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TENLAW: Tenancy Law and Housing Policy in Multi-level Europe

National Report for

SCOTLAND

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National Report for Scotland Table of Contents

1 Housing situation	4
1.1 General features	4
1.2 Historical evolution of the national housing situation and policy	5
1.3 The current situation	11
1.4 Types of housing tenure in Scotland.....	24
1.5 Other general aspects	37
2 Economic urban and social factors	39
2.1 Current situation of the housing market	39
2.2 Issues of price and affordability	43
2.3 Tenancy contracts and investment	46
2.4 Other economic factors.....	48
2.5 Effects of the current crisis	50
2.6 Urban aspects of the housing situation.....	52
2.7 Social aspects of the housing situation.....	56
3 Housing policies and related policies	58
3.1 Introduction.....	58
3.2 Governmental actors.....	60
3.3 Housing Policies.....	66
3.4 Urban policies.....	75
3.5 Energy policy	77
3.6 Subsidization	80
3.7 Taxation	87
4 Regulatory types of rental tenures	89
4.1 Tenancy relationships in Scotland	89
4.2 Regulatory types of tenures without a public task.....	90
4.3 Regulatory types of tenures with a public task.....	93
5 Origins and development of tenancy law	101
6 Tenancy regulation and its context	112
6.1 General introduction.....	112
6.2 The preparation and negotiation of tenancy contracts.....	121
6.3 Conclusion of tenancy contracts	135

6.4 Contents of tenancy contracts	150
6.5 Implementation of tenancy contracts	172
6.6 Termination of tenancy contracts	188
6.7 Enforcing tenancy contracts	205
6.8 Tenancy law and procedure 'in action'	208
7 Analysing the effects of EU law and policies on national tenancy policies and law	212
7.1 EU policies and legislation affecting national housing policies	212
7.2 EU policies and legislation affecting national tenancy laws	214
7.3 Table of transposition of EU legislation	221
8 Typical national cases (with short solutions)	226
8.1 Entering a lease	226
8.2 Lease and licence	228
8.3 Market rent	230
8.4 Joint tenants	231
8.5 Housing standards in the private rented sector	232
8.6 Deposit protection	234
8.7 Rent arrears in private sector tenancy	236
8.8 Termination of a social rented tenancy	238
8.9 Responsibility for repair, unfair terms	240
8.10 Energy efficiency, repair.	243
9 Tables	245
9.1 Literature –Books and Articles	245
9.2 Cases	246
9.3 Abbreviations	251

1 Housing situation

1.1 General features

The Tenlaw research project seeks to investigate tenancy law across Europe and make comparisons. This is the report on Scotland. It is slightly unusual in that Scotland is not a Member State of the EU but is (at present) a constituent part of the United Kingdom. A referendum will be held in 2014 on Scottish independence which would take place on the basis that Scotland applied to become a Member State. Part 1 of the Report is focused upon the Scottish housing situation and housing policies while in Part 2 attention shifts to Scottish residential tenancy law. This part begins with a description of general features of housing in Scotland it details economic, social and urban aspects before describing housing policy, taxation and subsidisation and concludes by detailing the regulatory types of rental tenures in Scotland. As well as providing a brief history of the development of housing in Scotland the paper sheds light on the impact of the recent economic troubles.

1.2 Historical evolution of the national housing situation and policy

Distinctiveness of Scots law

Scotland is not (as of the start of 2014) a Member State of the EU, but rather a constituent part of the United Kingdom.¹ Its inclusion as a reporting state to the Tenlaw project therefore calls for some preliminary explanation.

The Scottish legal system is a mixed legal system which draws upon common law and civil law influences.² Scots law has a long civil law tradition which originated in the use of uncodified procedural rules in dispute resolution, in line with the Romano-Dutch legal tradition. Civilian aspects of Scots law, influenced indirectly by Roman law, were strengthened in the eighteenth century through specific writings of specific academics (for example Lord Stair), known as Institutional Writings. In Scots law these were one of four recognised sources of law, in addition to legislation, legal precedent and custom. Scottish common law developed in tandem both with the civil law and also the English common law system. At a mechanical level Scots common law bears much in common with the English tradition, in that both systems operate through a scheme of legal precedent, so case law figures prominently in legal exposition. Scotland therefore has a very distinctive legal system at the time of the union with England. This is marked by a very distinctive terminology which continues to this day.

This was preserved after the union. One reason is that the initial form of union was a personal union of thrones which arose on the death of Queen Elizabeth I of England (in 1603) when the Scottish King James VI was called to London to reign as James I of England. The subsequent legal union was the reverse, a takeover by Hanoverian England of the Jacobite Scotland. However, one condition of the Act of Settlement 1701 was that Scots law should survive and be preserved, and this principle was enshrined in the Act of Union of 1707 by which the two Kingdoms of Scotland and England were merged into a single United Kingdom titled Great Britain, with a centralised legislative authority in the Westminster Parliament. The alienation of legislative power from Holyrood in Edinburgh continued for almost three hundred years, but this legislative union did not bring about a fusion of the Scottish and English legal systems and indeed guaranteed their separation.

There has always been a cross-fertilisation in the case law between England and Scotland, though for much of the nineteenth and twentieth centuries English case law was dominant simply because of the volume of appellate cases passing through the courts in London. On the other hand Scots law always infused the highest appeal cases in England because of the tradition that the panel of the House of Lords sitting as an appellate body should include a Scots judge, so reports of cases involving land law often have a comparative flavour. English cases were only of persuasive authority in Scotland and vice versa. All of this means that the evolution

¹ A referendum will take place during 2014 to determine whether Scotland should become an independent state within the EU.

² R.M. White, I.D. Willock and H.L. MacQueen, *The Scottish Legal System*, (Edinburgh: Bloomsbury Professional, 5th edn, 2013).

of the housing system in Scotland can only be understood against a broader context of the housing situation of the United Kingdom.

Highlands

Scotland is divided between the highlands and the lowlands, as illustrated below,³ which must be considered separately.

Figure 1: Scottish Highlands and Lowlands



The Highlands are very sparsely populated, with few towns separated by long distances and rather poor roads. Partly this is a reflection of the mountainous terrain, but partly it is man-made. The Highland community was dramatically affected by the social and economic changes occurring during the period known as the Clearances. During the agricultural revolution many landlords were led to the conclusion that the poor soils of the Highlands could return a greater profit if they were cleared of the traditional communities and replaced with vast sheep farms. This brought the interests of landlords into conflict with the interests of their tenants. Their rights depended upon the customs and traditions of the various Celtic tribes inhabiting the northern parts of Great Britain during an essentially pre-legal age, characterised by a range of unwritten customary rules concerning possession. Unfortunately these customary land practices involved informal tenures which were not recognised in Scots law. The landowners, predominantly English, were thus allowed to effect a series of clearances or mass evictions which resulted in whole Highland communities moving from their traditional settlements into farming estates or into small Crofting communities along the coast.

³ The image above has been released into the public domain.

Since 1990, great strides have been made in reversing some of the economic and social catastrophe created by the clearances, and this work has progressed rapidly since devolution. Feudal tenure has been reformed⁴ and the rights of local communities to buy out the predominantly foreign landowners have been implemented. Some areas of the highland region⁵ are characterised by crofting – small rural holdings where a croft is surrounded by a small area of land used for small holding and also using other land in common with other crofters, the crofter often surviving today by economic diversification. A special and highly specialised regime applies to crofters,⁶ and this lies beyond the scope of this work. It affects a relatively small group of crofters.

Urbanisation of the Lowlands

Housing in the Lowlands of Scotland, especially in the central belt containing both Edinburgh and Glasgow, shares much in common with the continent and is rather distinct from the pattern of development in England, Wales and Northern Ireland and also in the Republic of Ireland. Scotland is characterised by cities containing a preponderance of an older generation of tenement blocks and a newer generation of high-rise blocks on large residential estates, so that many Scots live in flats or apartments in Scottish housing, and there are as compared to English cities fewer rows of terraced houses.

This dominant feature of the history of Scottish housing was an urbanisation and industrialisation that was particularly rapid by European standards. In 1750 approximately a tenth of the Scottish population lived in an urban area, but within fifty years Scotland was among the five most urbanised societies in Western Europe (and hence of the world). By 1850 Scotland was only second to England and Wales in this respect. Change at this pace placed significant pressure on urban housing provision in Scottish cities, particularly in Glasgow. Glasgow's population at the start of the nineteenth century was just over 77,000 but over that century it increased tenfold to 785,000. As a result overcrowding and primitive housing conditions prevailed in Scottish cities.

Tenements

Tenements are a characteristic feature of Scottish cities. In response to the rapid urbanisation many landlords converted large inner city buildings into tenements and

⁴ Abolition of Feudal Tenure etc. (Scotland) Act 2000. This was the final step in a process that had been ongoing for several decades, e.g. when the power to discharge feuing conditions was given to the Lands Tribunal for Scotland (Conveyancing and Feudal Reform (Scotland) Act 1970) and the phasing out of feuduties (Land Tenure Reform (Scotland) Act 1974).

⁵ There were seven traditional crofting counties, recently extended in 2010.

⁶ Crofters (Scotland) Act 1993, as amended by the Crofting Reform etc. Act 2007; Crofting Reform (Scotland) Act 2010; McAllister, *Scottish Law of Leases*, ch. 16.

leased out one and two room flats or apartments to households. Housing conditions in tenements was particularly poor with overcrowding an everyday feature of life. These conditions were met by legislation promoted on public health grounds, the origin of modern housing powers. Afterwards the same style of development continued, with many purpose-built tenements, providing better standards of accommodation. Almost all tenements surviving today date from the late nineteenth century or later. A majority of Scottish households were still accommodated in tenements at the outbreak of the First World War, and it was only afterwards that the seeds of large scale public provision of housing were sown with the intention of replacing the poorer tenements. The Scottish legal system did little to alleviate such conditions and it was not until there was legislative intervention in the late nineteenth and early twentieth century did housing conditions begin to improve. During this period the vast majority of Scottish households were private renters accommodated in small flats or apartments in tenements.

Relatively dense building was assisted by the distinctive form of the feudal system adopted in Scotland. In England no new tenorial obligations could be created by private lords after 1290, and this eventually translated into a prohibition of positive obligations binding purchasers, an essential if people are to live in close proximity. There was no equivalent to this bar in Scotland. New grants were permitted with new feudal obligations. Landowners were therefore able to 'feu' sections of their land to 'vassals' in return for the 'feu duty' a fixed annual amount paid in perpetuity to the landowner ('feu superior'). The feu superior was enabled to place restrictions on the subsequent development of that land. This proved very convenient because the demand for housing stimulated by the industrial revolution increased the value of urban development land which in turn created an incentive for developers to maximise the return from their land by high levels of tenement construction. Common obligations were brought about contractually in relation to individual properties by the insertion of these common obligations in the title deeds. The default system was the archaic Law of the Tenement under the common law, which was quite inappropriate in modern times, but problems have been resolved by the passing of the Tenements (Scotland) Act 2004.⁷ Scots law began to adapt to this form of accommodation and over several decades customary rules concerning common property and neighbour obligations were developed which remain considerably more advanced than those in the United Kingdom. Abolition of the feudal system of landholding was one of the first pieces of legislation passed by the new Scottish Parliament⁸ but the possibility of creating common obligations was preserved. So the hybrid legal system in Scotland facilitated the development of a flexible scheme governing common obligations in shared housing units.⁹

Controls in the private rental sector under the Rent Acts (1919-1989)

The First World War which began one hundred years ago in many ways represents the beginning of modern society, and it can certainly be seen as the origin of modern

⁷ W. Gordon & S. Wortley, *Scottish Land Law Volume 1* (Edinburgh, Green, 2009), chapter 7.

⁸ Abolition of Feudal Tenure etc. (Scotland) Act 2000.

⁹ The English legal system relies on leasehold schemes for the effective imposition of positive obligations.

housing law throughout Britain and Ireland. The war effort led to further industrialisation which resulted in severe housing shortages in parts of the United Kingdom. Scarcity of accommodation enabled landlords to profiteer at a time when this seemed out of keeping with the sacrifices being made by the troops and their families. Tenants' protests about escalation of rents led the Westminster Parliament to introduce the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 which provided tenants with guaranteed security of tenure and control of the rent. This was re-enacted in 1919 after the end of hostilities and led to a whole series of Rent Acts which dominated the private residential sector throughout most of the twentieth century. The details of this legislation fluctuated over the years as political control changed hands at Westminster, but found its final form in the Rent (Scotland) Act 1984.¹⁰ In its final form the legislation provided for fair rents, which were intermediate in level between controlled rents and market rents, but in the areas of greatest market scarcity fair rents were well below market values and contributed to the reduction in value of property subject to Rent Act tenancies. Arguably, this caused the decline over the years of many properties into slum condition, as landlords were increasingly unable to get a sufficient return on their investment to fund repairs. The complexities of this legislation and attempts to avoid it dominated private sector renting between 1919 and 1989.¹¹ The Rent Acts also formulated many of the key concepts of housing law in the post 1989 legislation on assured tenancies.

Mass public sector provision

In response to the poor housing conditions the local authorities, during the interwar period, built 71% of dwellings.¹² During this period local authorities took over from the private rented sector as the largest provider of housing in Scotland and in the post-war period substantial urban development projects were carried out and households were increasingly relocated from inner city tenements to council operated terraced housing estates. The dominance of the public rented sector began give way with the institution of the right to buy scheme in the late 1970s. This gave tenants of local authorities and, later on, housing associations, the opportunity to purchase their home at a discounted rate, an opportunity widely taken up and leading to a reduction in the number of local authority rented households and a corresponding increase in the number of owner occupied households.

Modern housing law

Modern housing law in Scotland essentially begins with the Thatcher Government of the 1980s. Three main threads emerge since that date which are the subject of this report.

¹⁰ See Part 2, section 1 – Origin and development of tenancy law.

¹¹ Tenancies granted before 2 January 1989 continue to enjoy Rent Act security, but few survive today.

¹² High Level Summary of Statistics Trends (Edinburgh: Scottish Government, 2013) see chart on new housing in Scotland since 1920.

- (1) Market reforms in the private rented sector which led to the introduction of the assured tenancy under which the landlord could charge market rents, and particularly short assured tenancies under which the tenant does not enjoy extended security of tenure.¹³
- (2) Reforms of the social sector; public sector tenants were granted Scottish secure tenancies which entailed full residential security of tenure, succession rights and, secure tenants were given the Right to Buy their homes; provision largely shifted to the social sector (housing associations) and public sector stock was subject to mass transfers to housing associations; eventually a unified social sector was created in 2001 with all social tenants enjoying Scottish secure tenancies.¹⁴
- (3) Housing policy was devolved to the Scottish Executive as from 1999 and housing policy has figured very prominently in the activity of the Executive and the legislative output of the Parliament at Holyrood. The devolved period has been marked by divergence of Scottish housing law from that in force in England and Wales, and also by policy tensions between the Holyrood government and Whitehall.¹⁵

¹³ See section 5 below.

¹⁴ *Ibid.*

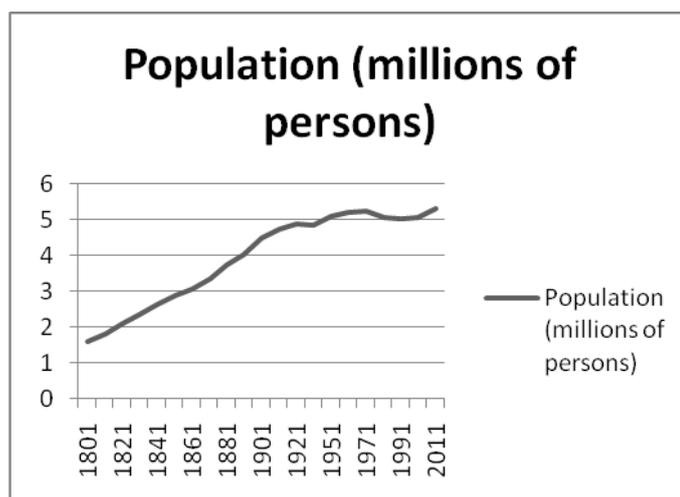
¹⁵ *Ibid.*

1.3 The current situation

Population

The Scottish population in 2011 is roughly 5.3 million.¹⁶ As the figure illustrates, the numbers living in Scotland underwent rapid growth during the nineteenth century, though the Scottish population remained relatively stable throughout during the twentieth century.

Figure 2: Population¹⁷



The distribution of the population across Scotland changed considerably during the nineteenth century at which point it became increasingly concentrated in a number of urban areas located in 'lowland' regions forming a strip across southern Scotland.¹⁸ During this period the population living in lowland areas increased threefold while at the same time population growth in northern 'Highland' regions was low. This shift was a direct result of the agricultural and industrial revolutions which were accompanied by periods of significant urbanisation across Europe, but the rapid pace of urbanisation in Scotland during the nineteenth century was unparalleled elsewhere on the continent. In 1750 approximately a tenth of the Scottish population lived in an urban area, but fifty years later the country was one of the five most urbanised societies in Western Europe and fifty years afterwards it was second only to England and Wales in terms of urbanisation. The speed of this process placed significant pressure on urban housing systems. Factors behind this shift were strong growth in manufacturing industry, emigration of Irish persons fleeing the famine of the 1840s and clearances in rural areas during the eighteenth and nineteenth centuries. Landowners found rearing sheep in the mountainous highlands to be more profitable than the rental income from Highland communities. The clearances decimated the Highland population and way of life as towards 'lowland' urban centres or to small Crofting communities on the coast. Scotland's urban centres,

¹⁶ 2011 Census: Population and Household Estimates for Scotland – Release 1C (Part One), p. 3

¹⁷ National Records of Scotland, *A century of census* Edinburgh, Scottish Government, 2012), p. 2.

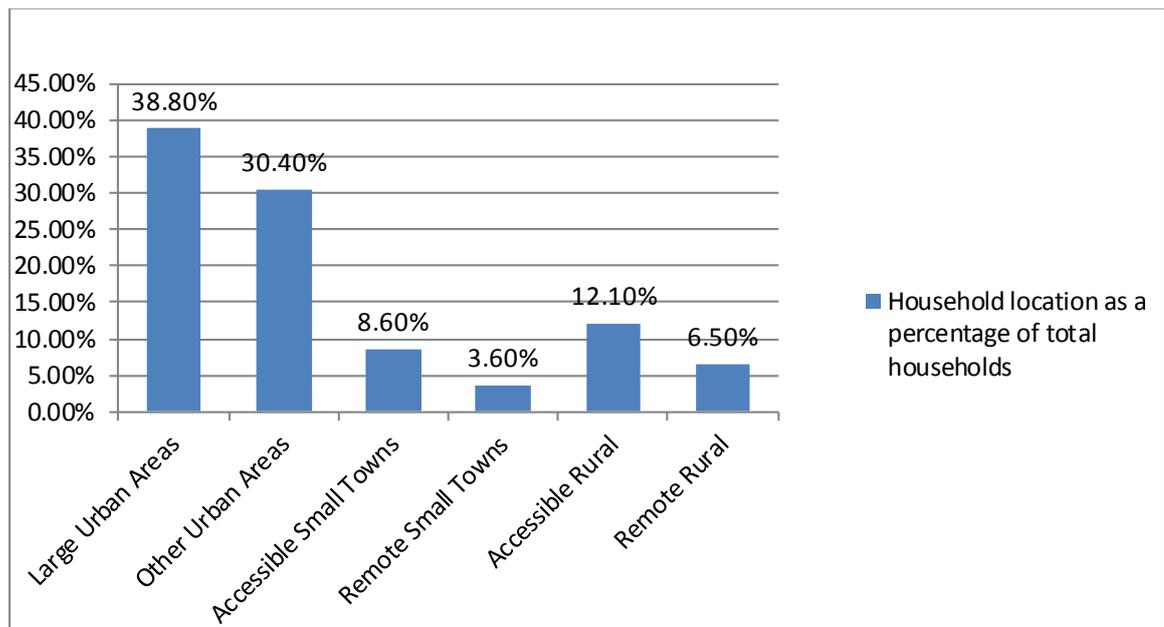
¹⁸ See Figure 1 above.

particularly Glasgow, attracted significant numbers of Irish emigrants which also contributed to strong population growth. Indeed, the pace of urbanisation in Glasgow was particularly dramatic with the city's population rising tenfold from 77,000 to 785,000 during the nineteenth century, since when it has fallen away to a little under 600,000 in 2011.

At present the vast majority of Scottish households are accommodated in urban areas while fewer than one fifth are located in rural areas, which are classified as either accessible or remote. This reflects the balance established during the nineteenth century.

The current division between different functional regions is shown below:

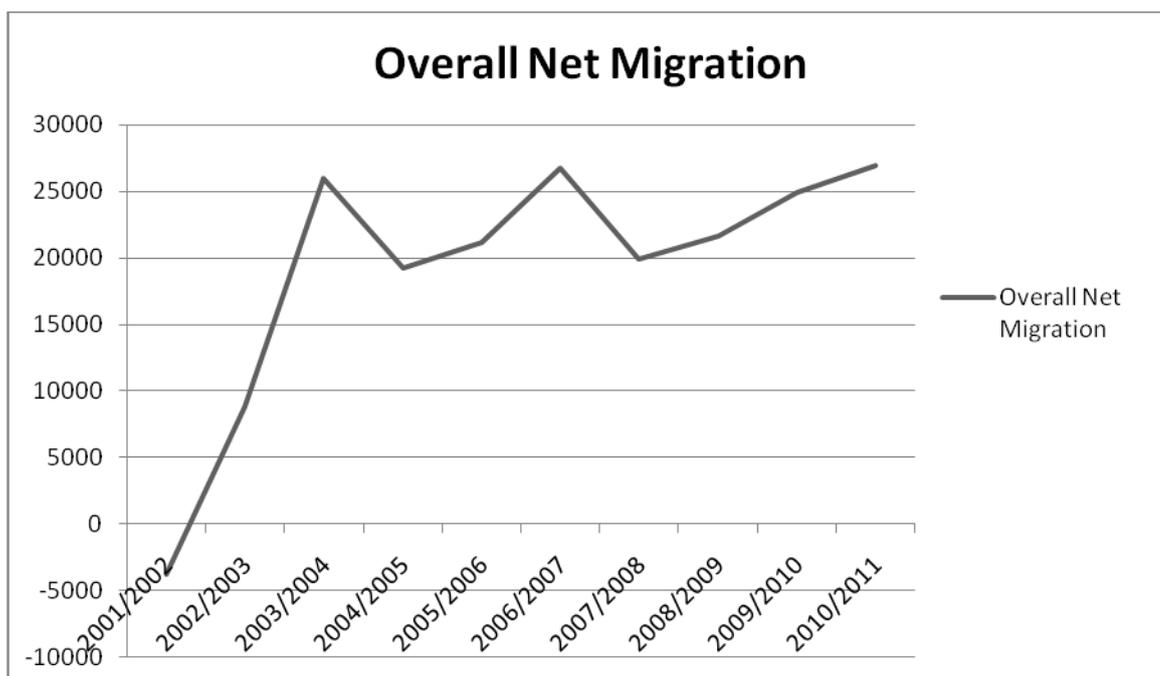
Figure 3: Urban Rural¹⁹



Scotland has experienced emigration for much of its history. There were brief periods where Scotland experienced substantial immigration most notably during the 1840s and 1850s when Scotland, and in particular Glasgow, received vast numbers of Irish emigrants. However, since the 1960s emigration has reduced considerably and during the 1980s and 1990s Scotland began to record immigration. During the 2000s this trend accelerated and since 2003/2004 Scotland has recorded overall net migration of over 20,000 annually.

¹⁹ National Records of Scotland, *Mid-2011 and Mid-2012 Small Area Population Estimates Scotland* (Edinburgh, General Records Office Scotland, 2013), p. 17.

Figure 4: Migration²⁰



Over the last decade inward migration to Scotland has averaged around 90,000 per year while outward migration has averaged about 70,000 per year. Almost all migration to Scotland was of persons from the British Isles with around 43,700 people migrating to Scotland from England, Wales and Northern Ireland in the year 2010/2011. Likewise, almost all migration from Scotland consisted of movement to other parts of the UK. Overall there is very strong net inward migration of persons from overseas. In 2010/2011 around 42,300 people came to Scotland from overseas while around 16,900 left Scotland to go overseas. The net migration figure of around 25,400 is the highest net migration gain from overseas in recent years.²¹

Housing stock

Scotland's **overall housing stock** grew consistently from 2001 to 2008 but from the onset of the economic recession growth in Scottish housing stock has been reduced.

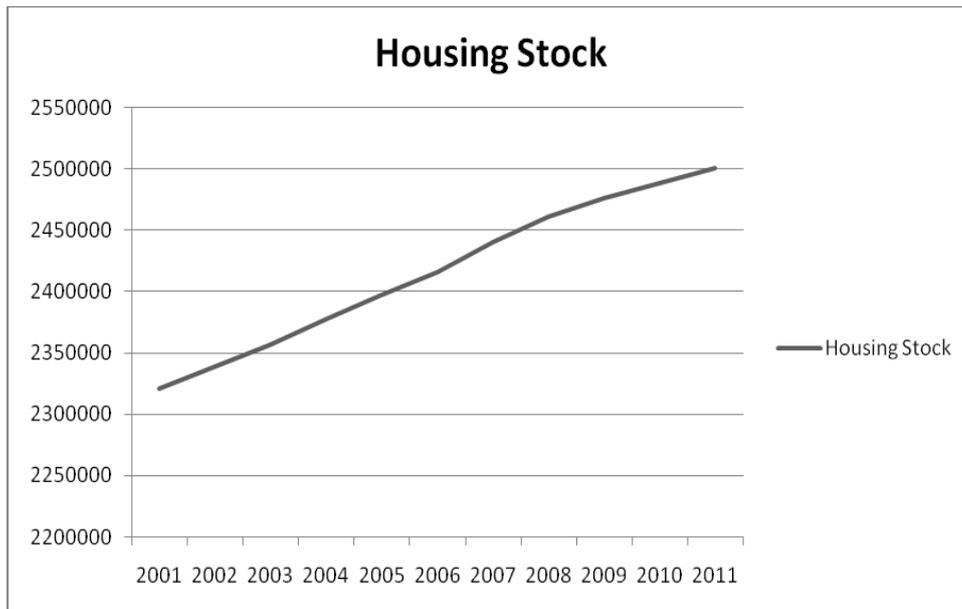
Over the ten year period ending in 2011 the overall housing stock grew by 7.8%, but growth slowed considerably so that between 2010 and 2011 the housing stock

²⁰ High Level Summary of Statistics: Population and Migration (Edinburgh, National Records of Scotland, 2013), p. 1.

²¹ This figures provided here are the result of a sample survey conducted at main airports and ports across the UK, and the sample size for Scotland is very small (around 220 migrant contacts in 2010-11). Internationally, migrants are defined as people who change their country of usual residence for 12 months or more. So short-term seasonal migrant workers, including many people from the Eastern European states which joined the EU in 2004, will not be counted in the migration estimates.

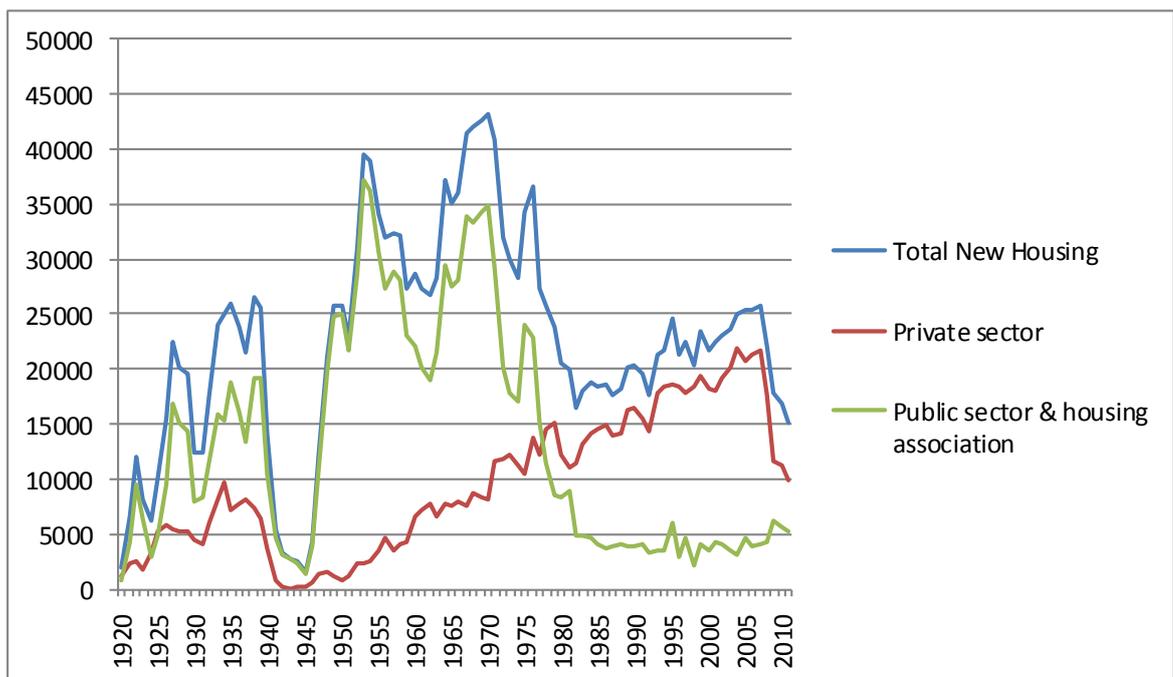
increased by only 0.5% overall. The number of household spaces then stood at 2.5 million dwellings.²²

Figure 5: Housing Stock



New housing

Figure 6: New housing in Scotland since 1920²³



²² High Level Summary of Statistics Trends (Edinburgh: Scottish Government, 2013), titled chart on estimated stock of dwellings by tenure: 1993 to 2011.

²³ *Ibid.* titled chart on new housing in Scotland since 1920. Also see Housing statistics for Scotland 2013: Key Trends Summary (Edinburgh: Scottish Government, 2012), p. 1. This graph does not classify according to tenure.

New housing was provided by private developers until the end of the First World War. After that the public sector was the dominant provider of new housing. During the interwar period the Council built 71% of dwellings and began to house persons experiencing housing need. This continued until the 1970s since when the private sector has consistently surpassed the public and social sector. Private dominance of the supply of new housing units continued until 2008 when one of the effects of the economic recession was a dramatic fall in the private sector supply of new housing units.²⁴

Occupancy of rooms per person

Rapid urbanisation during the nineteenth century led to overcrowding and primitive housing conditions prevailed across Scottish urban areas. According to Murie:

Overcrowding, housing density, amenities such as water supply and room sizes and the correlation between insanitary housing and both life expectancy and retarded physical development in children, were among the features of late nineteenth century Scottish housing.²⁵

Demand for housing could only be met by the division of large inner city buildings into tenements which became the dominant type of housing in Scotland with many households accommodated in single-roomed flats. This also stimulated the building of many purpose built tenement blocks with better conditions in the latter part of the nineteenth century. Overcrowding was an acute problem in Scotland in the nineteenth century. For instance in 1861 there were almost two people for every room in a household.²⁶ A Royal Commission reported in 1917 that Scottish cities, particularly Glasgow, continued to be characterised by the prevalence of tenements and deplorable housing conditions.²⁷

Over the following century housing conditions have improved considerably across Scotland as minimum legal housing standards were imposed to address overcrowding and quality. Purpose built housing estates, including terraced housing and semi-detached housing, were provided to house those in need of accommodation. During the twentieth century there has been considerable diversification in urban dwelling type across Scotland and this in turn has impacted upon several general housing standards including the number of rooms per house.

²⁴ *Ibid.*

²⁵ A. Murie, Scottish Housing: The Context, in *Housing and Public Policy in Post-Devolution Scotland*, ed. D. Sim (Totton, Chartered Institute of Housing, 2004), p. 25.

²⁶ p. 10.

²⁷ Report of the Royal Commission on 'The Housing of the Industrial Population of Scotland Rural and Urban' (Edinburgh, Scottish Government, 1917), p. 22. Also see *2011 Census: Key Results on Households and Families, and Method of Travel to Work or Study in Scotland - Release 2C* (Edinburgh: Scottish Government, 2013), p. 10.

In 2011, households in Scotland had an average of 5.0 rooms, this was a slight increase since 2001 when it was 4.8 rooms per household.²⁸ The number of rooms per household varied widely across Scotland, reflecting the differing types of housing prevalent in urban and rural areas, with 4.2 rooms per household in Glasgow city and 5.7 rooms per household in Eilean Siar. The Census 2011 also found general improvement in the number of rooms per person. With the average number of rooms per person rising from 2.1 rooms per person to 2.3 rooms per person in the period 2001 to 2011.²⁹

The Housing (Overcrowding) Act 2003 introduced the Bedroom Standard into Scottish law. This is based on the number of bedrooms in a dwelling and the people in a household who can share a bedroom.³⁰ This standard sets out that certain groups or individuals require a separate bedroom. These include, any couple, a person aged 21 years or more, two people of the same sex aged between 10 and 20, two children (whether of the same sex or not) under 10 years, two people of the same sex where one person is aged between 10 years and 20 years and the other is aged less than 10 years and any further person who cannot be paired appropriately. This definition is distinct from the rules introduced by the UK Government in April 2013 for the size of accommodation that Housing Benefit will cover for working age tenants renting in the social sector, known as the 'spare room subsidy'. The Scottish House Condition Survey has regard to the Bedroom Standard and therefore does not provide data related to Housing Benefit reforms. The Scottish House Condition Survey 2012 found that 3% of all households live in overcrowded accommodation. The Survey also found that 30% of households have 2 or more bedrooms in excess of the requirement of the bedroom standard, down from 32% in 2011. In the social sector, only 10% of households (229,000) have 2 or more bedrooms in excess of the requirement of the bedroom standard, down from 13% in 2011.³¹

It is ironic that policy has now come full circle. The UK government is seeking to clamp down on the welfare budget and in particular housing benefit payments. One approach is to assess the need for bedrooms of each claimant household and to reduce housing benefit if the accommodation exceeds the needs of the claimant. According to political persuasion this principle is known as the 'under occupancy charge' or the 'bedroom tax'. It is estimated that it may take ten years to meet the demand created for one-bedroomed properties.³²

Types of dwellings

While Scotland's housing situation continues to be characterised by the presence of high levels of flats or apartments (38%) and the low levels of detached housing units (21%) the housing make up has diversified considerably over the last hundred years.

²⁸ '2011 Census: Key Results on Households and Families, and Method of Travel to Work or Study in Scotland - Release 2C p. 10. The definition of rooms included kitchens, living rooms, utility rooms, bedrooms, studies and conservatories but excluded bathrooms, toilets, halls or landings and rooms that could only be used for storage such as cupboards. If two rooms had been converted into one, it was counted as one room.' (Edinburgh: Scottish Government, 2013), p. 10.

²⁹ *Ibid.*

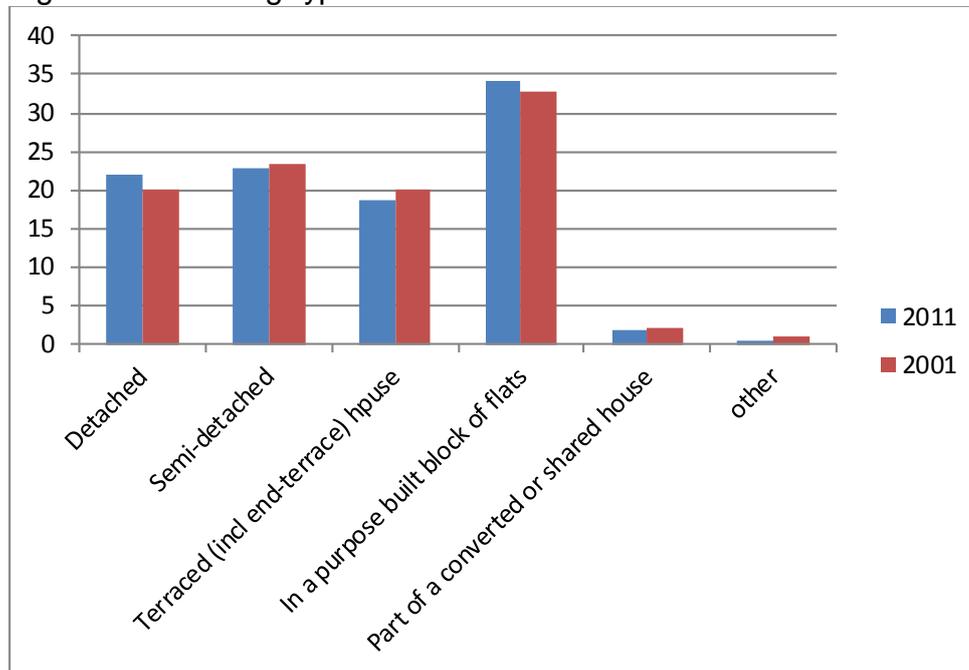
³⁰ Housing (Overcrowding) Act 2003, s. 2.

³¹ 'Scottish House Condition Survey' (Edinburgh: Scottish Government, 2013), p. 86.

³² See section 1.4 below.

During the nineteenth century the overwhelming majority of Scottish households were accommodated in tenements however over the following century the make-up of Scottish housing has changed substantially.³³

Figure 10: Dwelling type 2001-2011³⁴



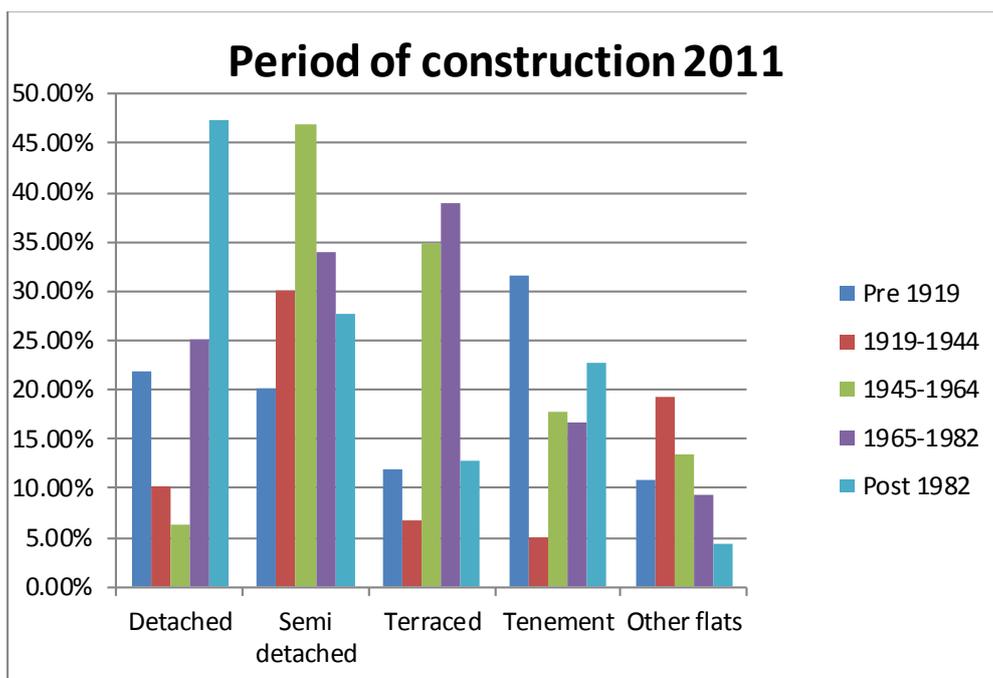
High rates of construction of new-build housing units during the latter half of the twentieth century has left Scotland in possession of a high proportion of post War housing stock. Approximately 20% of Scottish housing was built since 1982, while almost 69% of Scottish housing was constructed between 1945 and 1982. Of the remainder, 13% was constructed during the period 1919 – 1944 and 19% was constructed prior to 1919. Most dwellings built prior to 1919 are either tenements or detached houses. The inter-war years were notable for the increase in building of semi-detached houses. The vast majority of dwellings built during the period 1945 to 1982 which are currently occupied are semi-detached and terraced housing. This reflects the substantial redevelopment work which local councils undertook in re-locating households from run down inner city tenements to terraced and semi-detached housing estates. Since 1982 there has been an increase in construction of detached housing units.³⁵

³³ 2011 Census: Key Results on Households and Families, and Method of Travel to Work or Study in Scotland - Release 2C (Edinburgh: Scottish Government, 2013), p. 7.

³⁴ *Ibid.*

³⁵ See table below.

Figure 11: Dwellings in 2011 by period of construction and dwelling type³⁶



Housing Condition

This vital topic will be addressed under four sub-headings. First consideration will be given to the tolerable standard, the minimum standard below which property is not fit for human habitation. This will be followed, second, by a consideration of the Scottish Housing Quality Standard, the aspirational standard for social sector housing. Third, there will be a mention of the private sector repairing standard. Finally, reference will be made to the Scottish Home Condition Survey which gathers statistics about the extent to which the Scottish housing stock meets these quality standards.

The tolerable standard

The tolerable standard essentially amounts to a legal minimum quality threshold below which a Scottish dwelling must not fall and shows when it may be condemned as unfit for human habitation i.e. it is no longer reasonable to expect people to live in the property.³⁷ A house will meet the tolerable standard if it has:

- structural stability;
- substantial freedom from rising or penetrating damp;
- satisfactory natural and artificial lighting, ventilation and heating;

³⁶ 'Scottish House Condition Survey 2011 Key Findings' (Edinburgh: Scottish Government, 2011), p. 16.

³⁷ Housing (Scotland) Act 1987 s. 86; the Housing (Scotland) Act 2006 s. 11 amends the definition of tolerable standard to require satisfactory thermal insulation.

- satisfactory thermal insulation;
- adequate internal piped supply of wholesome water;
- an internal sink with running hot and cold water;
- a water (or waterless) closet available for the exclusive use of the occupants of the house and suitably located internally;
- a fixed bath or shower and a wash-hand basin, with hot and cold water and suitably located;
- effective drainage for foul and surface water;
- adequate and safe electrical wiring etc. (if indeed electricity is installed);
- satisfactory cooking facilities; and finally
- satisfactory access to all external doors and outbuildings.

The local authority has a duty to secure that all houses in their district which do not meet the tolerable standard are brought up to the tolerable standard within a reasonable time, taking account of the availability of alternative accommodation for the occupants; otherwise the house may be closed or demolished.³⁸

The Scottish House Condition Survey³⁹ collects statistics on houses falling short of the tolerable standard. It reveals a direct link between type of property and prevalence of falling below the standard, in particular 8% of pre-1919 dwellings failed the tolerable standard and these represent 49% of the dwellings that fail.⁴⁰ Failure also varies considerably by tenure as follows:

Figure 12: Dwellings below the tolerable standard, 2011⁴¹

Sector	% of stock in this sector found to be intolerable
owner occupier	3.5%
local authority/ public	1.5%
housing association/co-operative	6.0%
private rented	5.0%
Total	3.0%

³⁸ *Ibid.* s. 85.

³⁹ 'Scottish House Condition Survey' (Edinburgh: Scottish Government, 2011), see description.

⁴⁰ *Ibid.*, 127. Around 8% of pre-1919 dwellings fail the tolerable standard; these account for almost half (49%) of the dwellings that fail.

⁴¹ *Ibid.*, 125. In 2011, 72,000 homes were found to be below tolerable standard (BTS), amounting to 3% of the housing stock (Table 30).

Scottish Housing Quality Standard

A higher standard must be met before housing meets the Scottish Housing Quality Standard⁴² which was introduced in February 2004 as the Scottish Government's principal measure of housing quality in Scotland. It applies in the social sector as an aspiration (though a highly influential one) for the improvement of the stock of local authority and Registered Social Landlords. In order to meet the Scottish Housing Quality Standard, a dwelling should meet five housing criteria, though we can perhaps spare the reader the fifty five separate elements into which these criteria are broken down, some of them further subdivided. The five criteria are:

- meeting the Tolerable Standard:

the basic legal minimum standard, already discussed.

- freedom from serious disrepair:

a primary element fails if more than one fifth requires repair or replacement, and this involves outright failure of this criterion and thus outright failure of the overall Standard. Such elements are the wall structure, internal floor structures, foundations and roof structure. There are a large number of secondary elements,⁴³ which are failed if one fifth or more requires repair or replacement, and which adds up cumulatively when two secondary element fail to overall Standard failure.

- energy efficiency:

elements required in this section include cavity wall insulation, loft insulation, insulation of hot water tanks and pipes (as well as cold water tanks as an ancillary measure) and full and efficient central heating;⁴⁴ energy efficiency policy is considered below.⁴⁵

- modern facilities and services

facilities in various parts of the dwelling are specified. In the bathroom there must be a wash hand basin, bath and/or shower, WC, and hot & cold water supply. Failure occurs if one quarter of the sub-elements requires repair or replacement, and this involves outright failure. The critical issue is not the age of the fittings but their condition that matters, though bathroom fittings are likely to deteriorate with age. In the kitchen the key issues are safe working arrangements, adequate electrical sockets and adequate food storage space. Failure of any of these elements leads to outright failure, with no quarter rule.

⁴² 'Scottish Housing Quality Standard' (Edinburgh: Scottish Government, 2004).

⁴³ These are: principal roof covering, chimney stacks, flashings, rainwater goods (gutters and downpipes), external wall finish, common access decks/galleries/balustrades, common access stairs and landings, individual dwelling balconies and verandas, attached garages of individual dwellings, internal stairs of individual dwellings, damp proof course, windows and doors of individual dwellings, common windows and common roof lights and underground drainage.

⁴⁴ The energy efficiency rating sought is either National Home Energy Rating (NHER) 5 or Standard Assessment Procedure (SAP) 2001 of 50 (gas systems) or 60 (electric systems)

⁴⁵ See Part 2.a below.

- healthy, safe and secure.

the health aspect looks to issues such as lead free pipes, ventilation in the kitchen and bathroom and noise insulation, failure in any of which may lead to outright failure. There must also be safe smoke alarms, electrics, gas or oil appliances, lifts, lobbies etc., outside areas, refuse chutes and bin stores, as well as adequate communal lighting. Finally the dwelling must be secure with appropriate door locks, external door entry systems, and access doors.

The Standard represents a consolidated minimum housing quality standard below which a property should not fall and which should be met by 2015 by all local authority landlords and Registered Social Landlords, under the supervision of the Scottish Housing Regulator. Owner occupied households and private sector landlords are not required to meet the 2015 target.

Repairs standards for private sector housing

All private sector housing must meet the tolerable standard. This is the minimum housing quality threshold for housing in Scotland. A house which falls below the tolerable standard is not acceptable for living accommodation and will be condemned.⁴⁶ Local authorities are responsible for ensuring that any house in their area which falls below the tolerable standard is demolished or brought up to standard in a reasonable period.⁴⁷ In addition to the tolerable standard, housing in the private rented sector must also meet the 'repairing standard'. The Housing (Scotland) Act 2006 introduced the 'repairing standard' into private sector residential tenancies. This Act sets out the repairing obligations of the landlord and also provides for a higher repairing standard than the tolerable standard.⁴⁸

Scottish House Condition Survey

The Scottish House Condition Survey records authoritatively the physical condition of Scotland's homes, judged against the tolerable standard and the Scottish Housing Quality Standard, as well as the experiences of householders across all forms of tenure.⁴⁹ Two housing quality standards set by the Scottish Government are monitored through the Survey. The results from the Scottish Housing Condition Survey indicate that from 2003 to 2011 there has been a general improvement in housing quality across all housing tenures with the overall failure rate falling during this period from over 70% to just under 60%.⁵⁰

⁴⁶ The standard is set out in the Housing (Scotland) Act 1987, ss 85 - 87.

⁴⁷ The main powers of local authorities in this regard are set out in the Housing (Scotland) Act 2006, chapter 5 and the Building (Scotland) Act 2003, part 3.

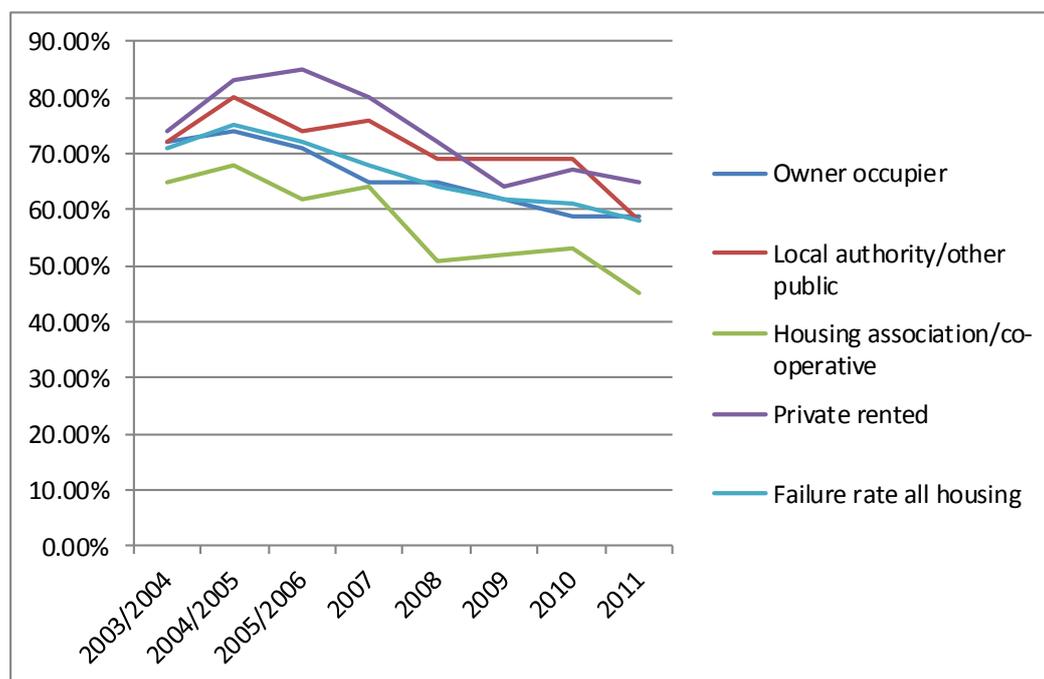
⁴⁸ This is dealt with in detail in Part 2.

⁴⁹ The Survey collects responses from a random sample of the population as a whole: 'Scottish House Condition Survey' (Edinburgh: Scottish Government, 2011), s. 157-158.

⁵⁰ This is dealt with in detail in Part 2.

Housing in the housing association/co-operative sector has the lowest failure rate with the owner occupier sector second best; the private rented sector has the highest failure rate, closely followed by the local authority/public sector.

Figure 13: Scottish Housing Quality Standard 2003-2011 (% failure by tenure)⁵¹



Failure rates have fallen generally across all tenures, and also across the rural/urban divide with dwellings in rural areas significantly more likely to fail the Scottish Housing Quality Standard than in urban areas.⁵² The rate of improvement varies considerably from tenure to tenure. Of owner occupied dwellings in 2011, 59% of houses failed, an improvement of six percentage points in three years. Local authority/public dwellings had a failure rate of 58%, but this was an improvement of eleven percentage points in three years. Of housing association or co-operative dwellings a relatively respectable 45% failed, an improvement of six percentage points in three years. Private rented property was worst, with a 60% failure rate, an improvement of six percentage points in three years.

Relatively few dwellings fail on the basis of inadequate facilities and services and the failure rate for this criterion has fallen consistently since 2004/2005 across all forms of tenure, to only 11% of dwellings in 2011.⁵³ Multiple failures of the criteria of the Quality Standard have also become less common, so that 13% now fail on two criteria.⁵⁴

⁵¹ *Ibid.*

⁵² *Ibid.*, 132.

⁵³ *Ibid.*, 132. The proportion of dwellings failing the modern facilities and services criterion of the SHQS has also fallen since 2004/05 in both the social and private sectors. Overall it fell from 23% in 2004/5 to 11% of dwellings in 2011. The change from 2007 (19%) to 2011 (11%) is statistically significant.

⁵⁴ *Ibid.*, 133. The proportion of dwellings with more than one criterion failure has fallen since 2004/05. In 2011, 40% of dwellings failed on only one of the five higher-level criteria and 13% on two criteria. As a result, the number of SHQS element failures (as opposed to failing properties) has reduced from about 2.6 million to 1.9 million.

Dampness is a special problem in the Scottish climate; dampness and condensation may range from a small damp patch or area of condensation on a single wall in one room to prevalence throughout a dwelling, so it may not be a serious housing quality issue.⁵⁵ The Scottish House Condition Survey found that just over 10% of dwellings had condensation in at least one room, whilst relatively few Scottish dwellings suffered from either rising or penetrating damp (around 1 in 30).⁵⁶

There is a direct link between the age of a dwelling and the incidence of both internal and external disrepair. Over 90% of buildings built between 1919 and 1964 have some degree of disrepair and 83% of buildings built between 1965 and 1982. This figure reduced to 57% of buildings erected since 1982.⁵⁷ Disrepair was experienced to critical elements in approximately 60% of owner-occupied households and 74% of local authority households. The Scottish Housing Condition Survey found disrepair to critical elements in 56% of housing associations/co-operative households and in 70% of private rented households.. This degree of disrepair was found in, 61% of urban households and in 65% of rural households.⁵⁸ The survey also found that 22% of owner-occupied households 33% of local authority/other public households, and 26% of housing associations/co-operative households were experiencing some extensive disrepair. The same was true of 37% of private rented households. Overall, 26% of urban households and 28% of rural households were experiencing this degree of disrepair.⁵⁹

⁵⁵ *Ibid.*, at 135, 136 and 137 where Rising damp is set out as the result of defective or missing damp proof coursing leading to water leaching into the building fabric and finally, penetrating damp is described as usually the result of a defect in the building fabric, such as damage to the walls or roof, water ingress due to damaged seals on doors or windows or damp as a result of leaking plumbing.

⁵⁶ *Ibid.*, 137.

⁵⁷ *Ibid.*, 139, and 189.

⁵⁸ *Ibid.*, 151.

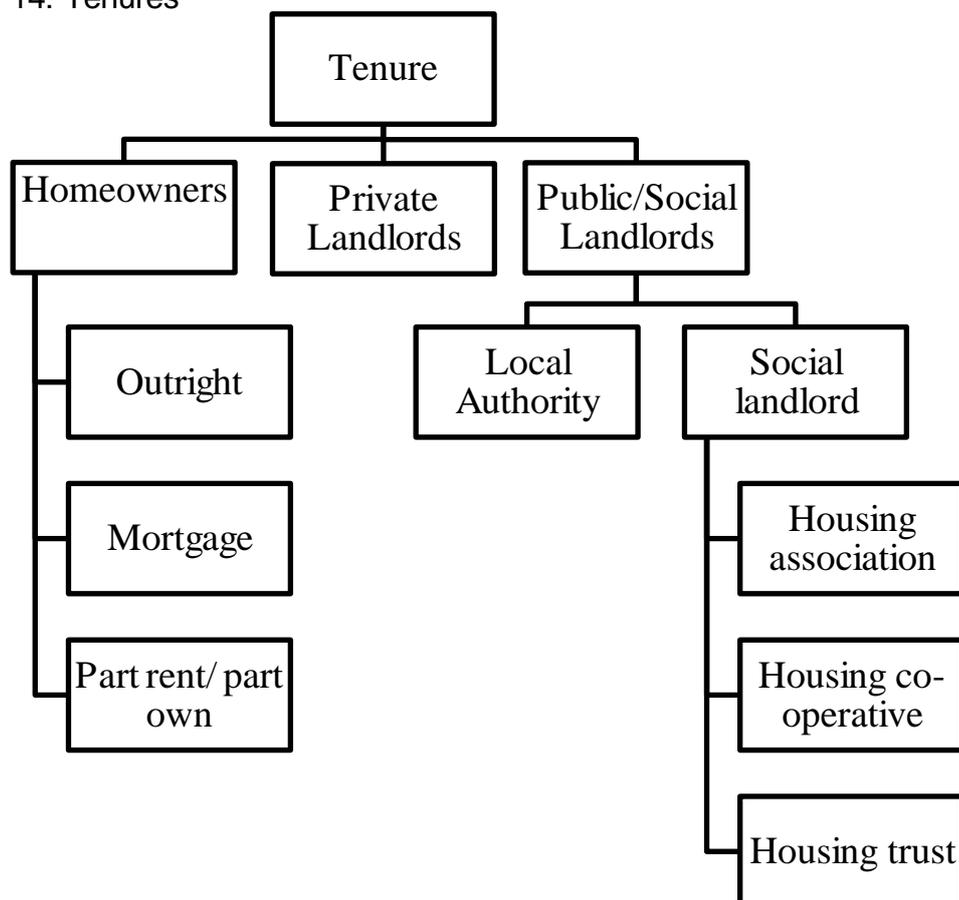
⁵⁹ *Ibid.*, 151.

1.4 Types of housing tenure in Scotland

Tenure mix

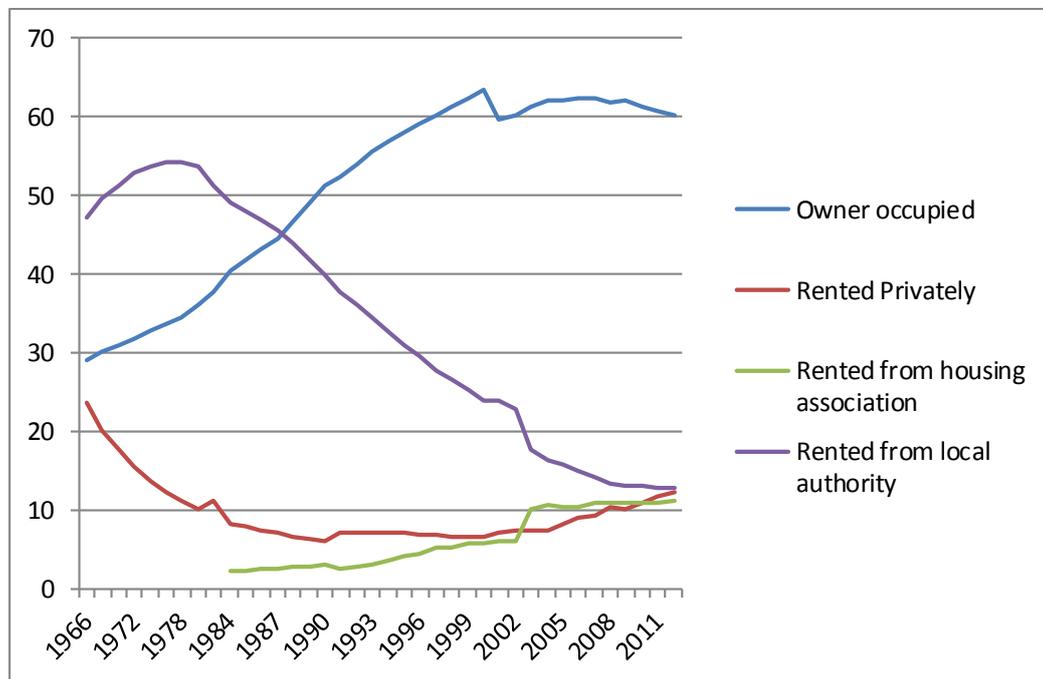
For the purposes of statistical analysis tenure structure in Scotland is classified into owned, social rented and private rented. Owned housing is divided into owned outright, owned with a mortgage or loan or paying part rent and part mortgage through a shared ownership scheme. Social rented housing includes rented from a Registered Social Landlord, Housing Association, Housing Co-operative and Charitable Trust while Rented from a Council refers to housing rented from a local authority in Scotland. Private rented describes renting from a private landlord or letting agency, employer of a household member, a relative or friend of a household member or other person.

Figure 14: Tenures



At various times throughout the last century the three main forms of tenure have attained dominance within the Scottish housing market, which has thus been characterised during this period by various interrelated tenure transitions. The trends are illustrated below.

Figure 15: Tenure shifts in Scotland 1966-2012⁶⁰



During the latter part of the twentieth century the owner occupier sector became the dominant tenure form in Scotland. Indeed, by 2011, the Scottish housing situation was increasingly distinguishable by high, although gradually declining, rates of owner occupation (64.8%) and historically low, and consistently declining, levels of local authority renting (14.6%). At the same time there has been strong growth in the size of the housing association sector (8.3%) as well as resurgence in the private rented sector (10.9%).⁶¹

⁶⁰ Housing statistics for Scotland 2013: Key Trends Summary (Edinburgh: Scottish Government, 2013)

p. 10.

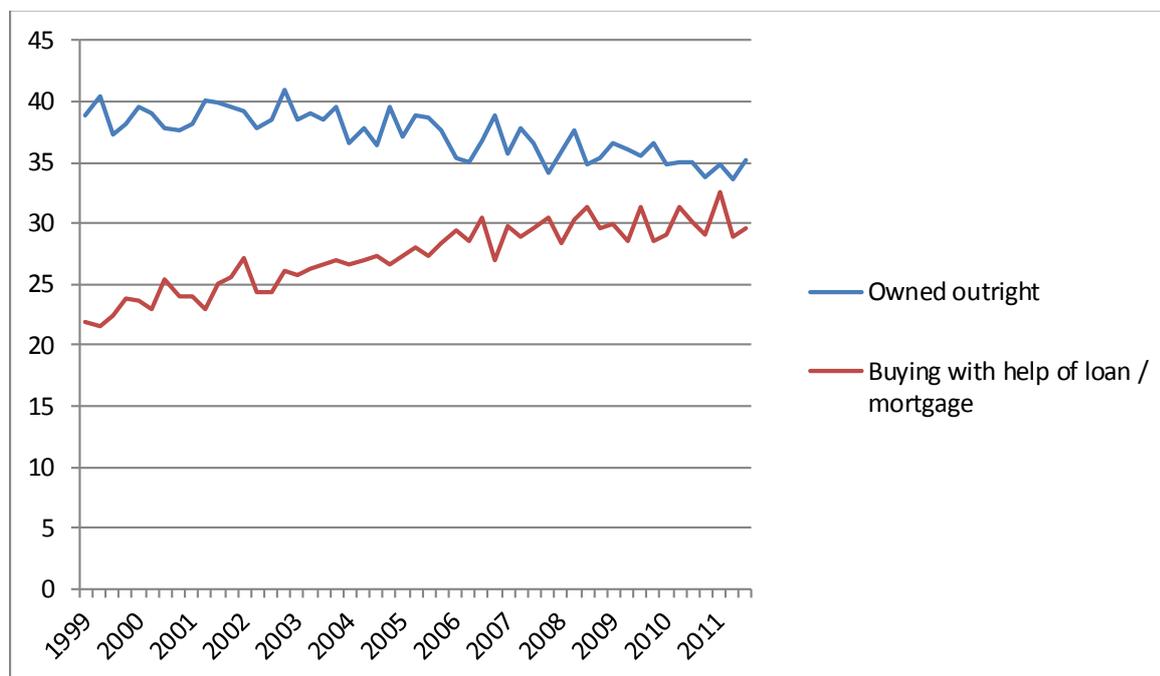
⁶¹ *Ibid.*

Owner occupation

From 1966 to 2011 the number of owner occupiers in Scotland has increased considerably, rising from 29.1% of Scottish households in 1966 to 63.4 per cent in 2011.⁶² However, the rate of increase has varied considerably during this period with particularly strong growth recorded after the introduction of the right to buy scheme in the 1980s and weaker growth, and even decline, recorded after the onset of the economic recession of the late 2000s. The owner occupier sector peaked in 2000 when 63.4% of Scottish households were accommodated in that sector a figure which had fallen back slightly to 60.7% in 2011. Historically, Scotland has always had consistently lower rates of home ownership than England and Wales and the level remains roughly three percentage points lower. Owner-occupation tends to be more prevalent in Scottish rural areas and small towns, with relatively low rates of homeownership in major cities – just less than half in Glasgow in 2001.⁶³

Between 2001 and 2011 the number of households in Scotland increased by 8% to reach almost 2.4 million. During this period the owner occupier sector has remained relatively stable, rising to a highpoint in 2007 before falling to 61% of total households in 2011. At the same time, there has been considerable shift from owning outright to owning with a mortgage.

Figure 16: Owner occupied as a proportion of total households (owned outright, buying with the help of a loan or mortgage)⁶⁴



The split was 38%:62% in 2001 but this had shifted by 2011 to 46%:54%. The recession of the late 2000s has placed pressure on many indebted owner occupiers,

⁶² *Ibid.*

⁶³ The proportion of social rented households was also much higher, with 39% of Glaswegian households accommodated in the social rented sector as opposed to 28% nationally. However, the proportion of Glaswegian households accommodated in the private rented sector was in line with the national rate of 9% of households.

⁶⁴ Scottish Household Survey Quarterly Data Trends (Edinburgh: Scottish Government, 2012), p. 1.

though there are a number of supports available to homeowners in Scotland who are experiencing mortgage difficulties. One example is the Support for Mortgage Interest scheme which helps with mortgage instalment payments for those already receiving Income Support, Employment and Support Allowance, Jobseeker's Allowance and Pension Credit. In 2011 there were 6,100 Scottish households in receipt of the Support for Mortgage Interest in Scotland and 2011 representing 7% of total recipients across Great Britain.⁶⁵

The Scottish Government provides additional supports for homeowners who have mortgage difficulties; the Mortgage Rights (Scotland) Act 2001 provides statutory protections for homeowners who are experiencing difficulty in meeting their mortgage obligation.⁶⁶ The debtor may apply to the court for a stay of repossession proceedings of their home in order to repay arrears or to allow them secure alternative accommodation.⁶⁷ There are also distinctive Scottish mortgage 'rescue' schemes, in particular the Home Owners' Support Fund which provides support to struggling home owners through the Mortgage to Rent and Mortgage to Shared Equity schemes. The Mortgage to Rent scheme provides a mechanism whereby a social landlord purchases the property and then rents it back to the former homeowner who remains in occupation as a tenant. In 2008 there were 400 applications per year for the Mortgage to Rent scheme, of which just under half met the eligibility criteria, at an overall cost of £9.4m. Most Mortgage to Rent properties are relatively low value, and many are ex-Right to Buy homes, including many flats and terraced houses built between 1950 and 1975.⁶⁸ As an alternative to the Mortgage to Rent scheme the Scottish Government also operates the Mortgage to Shared Equity scheme, under which the Scottish Government purchases a share of the of the property and with the proceeds the homeowner is able to reduce the level of secured debt while remaining in occupation. If the property is sold before the charge is lifted then the Scottish Government will take its share of the proceeds of the sale in satisfaction of the outstanding security.

Private Rented Sector

Forms of tenancy

The private rented sector in Scotland is best understood when divided into two distinct periods, the first defined by UK wide rent restriction measures operating in one form or another from 1915 to 1989 and the second operating from 1989 onwards which is defined by a return to market rents. These periods are separated by the legislative reforms of the late 1980s which deregulated the private rented sector by abolishing rent regulation and introducing limited security of tenure provisions and market rents.⁶⁹ However, in recent years increasing the level of regulation of the private rented sector in Scotland has been a key aim of the Scottish Executive which

⁶⁵ Department for Work and Pensions for Great Britain.

⁶⁶ Further protections are provided under the Home Owner and Debtor Protection (Scotland) Act 2010.

⁶⁷ Mortgage Rights (Scotland) Act 2001. This part of the Mortgage Rights (Scotland) Act 2001 has been repealed by the Home Owner and Debtor Protection (Scotland) Act 2010.

⁶⁸ 'Evaluation of the National Mortgage to Rent Scheme' (Edinburgh: Scottish Government Social Research, Scottish Government, 2008), pp. 2-3

⁶⁹ Housing (Scotland) Act 1988.

has, since devolution, introduced a range of regulatory reforms, including the institution of a regulatory body, the Private Rented Housing Panel, which is responsible for ensuring rent levels reflect market forces and ensuring that landlords fulfil their repairing obligations. Throughout these two time periods the size of the private rented sector has fluctuated considerably. At the turn of the twentieth century the vast majority of Scottish households were accommodated in the private rented sector, but the following century was marked by a substantial decrease in such tenancies to the extent that by the 1990s the sector was the second smallest tenure in Scottish housing. Since then there has been a small but consistent increase in the size of the private rented sector, which grew from 7% of Scottish households in 2001 to just below 12% in 2011.⁷⁰

The historical dominance of private sector tenure meant that for many years' developments within the private rented market dictated Scottish housing policy which was largely concerned with raising housing standards and overcoming overcrowding. At the turn of the twentieth century households accommodated in the private rented sector were largely channelled into two broad rental markets with one catering for skilled workers and the other for unskilled workers: skilled workers generally held under a yearly tenancy, while unskilled workers often held under a monthly tenancy. Skilled workers generally enjoyed a higher standard of housing but both groups were subject to the landlord's right of hypothec which allowed the landlord to seize a tenant's furniture, furnishings etc. at any time in satisfaction of rent arrears.⁷¹

As already noted, rent control legislation was introduced in 1915 and on a more permanent basis in 1919.⁷² Throughout the period until 1989 there were controls or regulation of residential tenancies to varying degrees, the so-called Rent Acts, characterised by full residential security. The strong protection of tenants and rent limits arguably promoted the decline of the private rented sector as landlords were increasingly dissuaded from entry into the sector by the prevailing artificially low rent rates and disproportionately strong security of tenure protections available to the tenants. Limits to landlords' financial returns from lettings restricted their ability, and often their incentive, to carry out repair and maintenance works and so housing standards began to decline in the private rented sector. Eventually the legislation was all consolidated as the Rent (Scotland) Act 1984, which continues to apply to those few surviving Rent Act tenancies originally granted before 2 January 1989.

In response to these conditions the Thatcher Government passed the Housing (Scotland) Act 1988 which largely deregulated the private rented sector by allowing landlords granting new tenancies to charge market rents and limiting security of tenure for tenants. The 1988 Act introduced the Assured Tenancy with market rents and full security and the Short Assured Tenancy with market rents but very limited security;⁷³ this new regime applies to new tenancies entered into on or after 2

⁷⁰ 'Housing statistics for Scotland 2013: Key Trends Summary' (Edinburgh, Scottish Government, 2013) p. 10.

⁷¹ The right of hypothec was abolished in relation to residential tenancies by of the Bankruptcy and Diligence (Scotland) Act 2007 s. 208, but had long since fallen into disuse by residential landlords because of the high expenses involved and the effect of other statutory protections of residential tenants.

⁷² Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, repealed and re-enacted by the Increase of Rent and Mortgage Interest (Restriction) Act 1919, see Part 2, section 1 – Origin and development of tenancy law.

⁷³ See Part 2, section 1 – Origin and development of tenancy law.

January 1989. Over the subsequent twenty five years the short assured tenancy has come to dominate the private rented sector.⁷⁴

Profile of the Private Rented Sector

From 1990 through to 2001, the private rented sector hovered around the 6-7% level; however, in recent years the private rented sector has grown considerably in response to affordability issues as well as reduced access to credit, which have channelled households towards the private rented sector. Between 1991 and 2011 the percentage of Scottish households living in the private rented sector rose from 7% to almost 12%. During this period housing law in the private rented sector has been substantially reformed with new regulatory standards for housing quality. Regulation of the sector has been completely overhauled in recent years through the introduction of the Private Rented Housing Panel which is responsible for e.g. the enforcement of repairs and resolving rent disputes etc.⁷⁵ Most recently, in 2012, the Scottish Government introduced an independent deposit protection scheme akin to the scheme operating in England and Wales.⁷⁶

A review of the private rented sector⁷⁷ conducted in 2009 found the sector to display wide diversity and to include sub-groups of lower income households, students, young professionals and migrant workers. Most demand for accommodation comes from households requiring transitional accommodation, but there were also households, primarily rural, for whom private renting provides a long term home. During the late 2000s most private rented households were either single adult households or small adult-only households. Private renters tend to be young, including 40-50% of students, 27% of those aged under-30, but only 5% of those over 75.⁷⁸ Around a third of households from minority ethnic communities live in the private rented sector.⁷⁹ A rural/urban divide exists with regard to size and function. Generally private renters are more prevalent in urban areas. In rural areas the private rented sector houses those unable to afford/access owner-occupied housing where there is little social rented accommodation, often providing long-term accommodation, generally unfurnished and often connected to employment. Around 85% of tenants were either 'very satisfied' or 'fairly satisfied' with their landlord, lettings agent and their home, but around one in twenty households were actively dissatisfied with their landlord and property and one in ten dissatisfied with the agent. Nevertheless on balance the private rented sector was functioning relatively well. The main reasons for dissatisfaction related to problems in securing repairs or disputes about the withholding of tenancy deposits.

In terms of financing, most dwellings rented out privately in Scotland are acquired by means of loans (so called Buy to Let – 61% of the total). Otherwise landlords acquire property by investing their own equity or occasionally by inheritance etc.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ 'Review of the Private Rented Sector: Key Findings and Policy Implications' (Edinburgh, Scottish Government, 2009), para. 2.1.

⁷⁸ *Ibid.*, para. 3.3.

⁷⁹ *Ibid.*, para. 3.26.

Over 90% of landlords are private individuals, couples or families and overall this group owns three quarters of all registered properties, with approximately 40% of landlords owning just one property while operating on a part time basis and living in close proximity to their property portfolios.⁸⁰ Over the past twenty years the number of rented properties owned per landlord has fallen substantially. Landlords were finding it relatively straightforward to let properties. Deregulation of the private sector in the late 1980s was found to have led to a significant increase in the number of individual, rather than institutional, landlords which had the result of reducing the average size of property portfolios.⁸¹ The vast majority of current landlords first started letting in Scotland after rent deregulation in 1989. Generally, the attraction of investing in the private rental market lies in the potential for capital appreciation and/or, the revenues arising from rent returns. Prior to the economic recession the potential for capital appreciation in Scotland was high and as such this was often the main attraction for private rented sector landlords.⁸² With respect to revenues arising from rent returns the 2009 Scottish Government review of the private rented sector found that only half of the sampled landlords thought that their rents were sufficient to cover their costs and give a reasonable return while one quarter were not looking for a return and one quarter said that rents were insufficient to cover costs. Given the debt funded nature of the sector, the review concluded that private landlords could be exposed to falling house prices and restricted access to credit.⁸³

Housing Supports and Reform

Private sector tenants who are experiencing difficulty in paying their rent may apply for Local Housing Allowance or Housing Benefit, a means tested social welfare benefit also available to social renters. The amount of support takes account of the income levels of the applicant, any savings and investments of the applicant, the number of children who live with the applicant, other people that live with the applicant and any special circumstances. The Local Housing Allowance scheme was introduced in 2008 for new claimants living in the private rented sector. In addition to housing benefit the local authority have the authority to provide further financial assistance, i.e. Discretionary Housing Payment, for housing issues to qualifying applicants.⁸⁴

The graph below provides an overview of the recent trend in Housing Benefit claims in Scotland. In 2012 almost half a million Scottish households were in receipt of housing benefit, which represents one fifth of total Scottish households. Around four fifths of claims came from social renters and one fifth came from private renters. Average awards in Scotland are lower than in other parts of Great Britain, reflecting lower average rents. A decline in housing benefit claims between 2001 and 2007 reversed shortly after 2007, an increase driven primarily by strong growth in the

⁸⁰ *Ibid.*, para. 2.

⁸¹ In 1992-93, landlords with a one dwelling portfolio owned a quarter of the sector. This has now risen to 39 %. The median size of portfolios is only two dwellings and only 6 % of the total stock has landlords with twenty or more dwellings in their total portfolio.

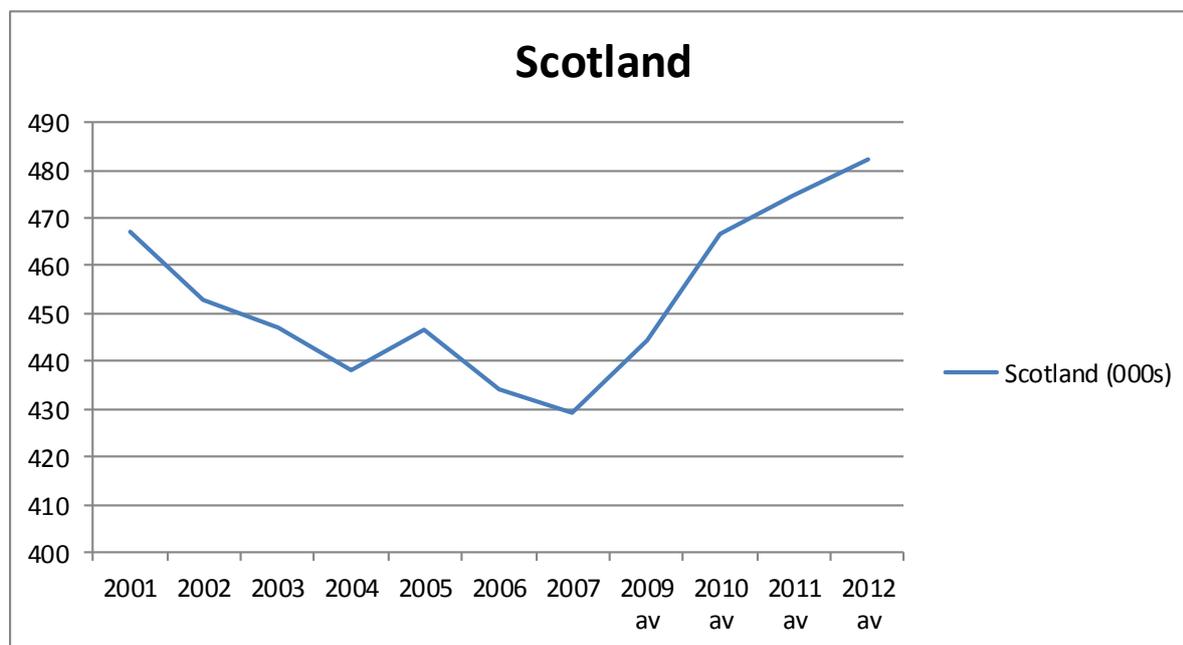
⁸² 'Review of the Private Rented Sector: Key Findings and Policy Implications' (Edinburgh, Scottish Government, 2009), para. 2.6

⁸³ *Ibid.*, para. 7.18

⁸⁴ Discretionary Financial Assistance Regulations 2001.

number of claims from private tenants,⁸⁵ as elsewhere in Great Britain, particularly in London.

Figure 17: Housing Benefit claimants in Scotland, 2001-2012⁸⁶



This trend has led Westminster to seek to control expenditure on housing benefit, as part of a wider welfare reform which is currently taking place across the United Kingdom in the context of the large budget deficit. The Coalition Government plans to introduce, fully from 2017, a Universal Credit welfare mechanism which will incorporate housing benefit along with most other social welfare benefits. One of the most controversial aspects of these reforms in Scotland is the ‘under occupancy charge’ (to use Coalition terminology) or the ‘bedroom tax’ (to cite the opposition by Labour and the Scottish Nationalist Party – the party currently in power at Holyrood). Part of the reforms proposed are to limit Housing Benefit for working age tenants so that it only covers the size of property they are judged to need, based on a standard regional rate.⁸⁷ Where homes are under occupied then the housing benefit claim will be reduced proportionately. The reforms are intended to direct households into smaller, ‘suitably sized’, accommodation. The Scottish Government has provided money for discretionary payments to mitigate the effects and both Labour and the

⁸⁵ 'Housing Benefit and Council Tax Benefit information by local authority' (Edinburgh: Scottish Government, 2013). Indeed, from January 2010 to January 2013 the number of housing benefit claims from private tenants increased by 20%, while during the same period claims from social renters have increased by only 1%.

⁸⁶ This graph has been put together from data taken from the Housing Benefit and Council Tax Benefit information by local authority (Edinburgh: Scottish Government, 2013).

⁸⁷ It has been estimated, from the Family Resources Survey, that Scotland-wide there are approximately 86,000 households in the social rented sector, in receipt of Housing Benefit, where the accommodation is under-occupied (HC Deb 4 October 2010b).

Scottish Nationalist Party has pledged to abolish the policy.⁸⁸ The matter is discussed in more depth in the context of over- and under- crowding.⁸⁹

⁸⁸ 'The Benefit Cap - Assessment of Impact in Scotland' (Edinburgh: Scottish Government, 2013); 'Impact of Planned Benefit Changes on Under-Occupied Disabled Households in Scotland' (Edinburgh: Scottish Government, 2013).

⁸⁹ See Part 2.a below.

Intermediate Renting

Intermediate renting is an emerging form of tenure which operates in Scotland as a form of affordable housing.⁹⁰ In practice, a tenant gets a short assured tenancy at below market rates (however rates are higher than prevailing rents in the social housing sector) over a medium timeframe of five to ten years. Generally, the landlord is a local authority, or Council, however under the scheme housing associations may offer housing for intermediate rent. In the first phase of this National Housing Trust scheme rent levels are set at roughly 84% of the March 2011 Local Housing Allowance rate and rent rates cannot rise to above 100% of the Local Housing Allowance. The local authority has authority to determine its own policies with regard to employing intermediate renting within its wider housing function. The scheme generally operates to assist households who are unable to afford private renting or homeownership and are unlikely to be given priority on a social housing waiting list. At present the role of intermediate renting is confined by the limited number of properties available for this purpose. However, the most recent housing policy statements of the Scottish Government indicate increasing importance for this tenure in the near future. This National Housing Trust scheme is a novel approach to provision of affordable housing. Previous models have been centred upon traditional grant-based models of investment whereas with the National Housing Trust scheme the Government's financial contribution is limited to a guarantee at an estimated cost of approximately £2,500 per unit. The perceived cost efficiency of the scheme has led the Scottish Government to proceed with a second phase of the scheme.⁹¹

Social Housing

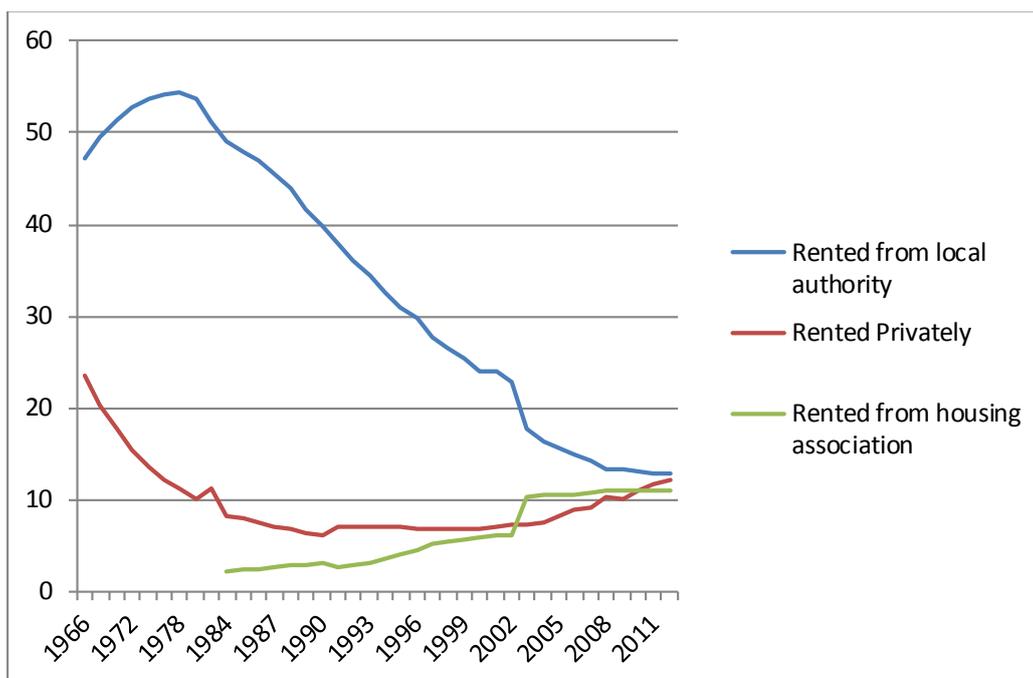
Provision of housing with a public task in Scotland began with property built and let out by local authorities. The tenancies created were largely unregulated until the 1980s when the Scottish secure tenancy was introduced. Meanwhile the social sector was evolving as housing associations emerged in the 1970s and became increasingly influential as providers of housing. They were regulated as Registered Social Landlords. At first they granted private sector tenancies, but in 2001 a single social sector was formed of public landlords and Registered Social Landlords, all granting Scottish secure tenancies.⁹² In 2010 the Scottish Housing Regulator was responsible for regulating 217 Registered Social Landlords and twenty six local authority landlords across Scotland. Secure tenants enjoy the Right to Buy at a discounted price, though this scheme is being restricted and will be removed completely.

⁹⁰ 'Intermediate Renting' (Edinburgh: Scottish Government, 2012). Implementation of this policy will apparently require legislative changes to permit a local authority to grant short assured tenancies.

⁹¹ 'Homes Fit for the 21st Century: The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020' (Edinburgh: Scottish Government, 2011), pp. 14-15.

⁹² Housing (Scotland) Act 2001, see Part 2.1 below.

Figure 18: Tenure development in Scottish housing 1966-2012⁹³



Local authority landlords

By international standards, Scotland has been known for relatively high rates of local authority renters. However, this sector has declined consistently from the 1980s as the introduction of the Right to Buy scheme in the late 1980s combined with the increasing prioritisation of the housing association sector during the 2000s to considerably reduce the number of properties held by local authorities. In 1991 almost 40% of Scottish households were renting from local authorities but by 2011 this had fallen to just under 13% of Scottish households.⁹⁴

Public provision of housing on a large scale really dates from the end of the First World War. A Royal Commission which reported in 1917 found that ‘for the housing of the working classes the State must accept direct responsibility’.⁹⁵ Local authorities were provided with financial support from the Government in order to build housing for those experiencing housing need. Building took place in the interwar period on such a scale that councils built 71% of new-build dwellings in Scotland. Tenants were increasingly channelled away from inner city tenements and towards housing estates which were constructed and managed by the local authority.⁹⁶ This housing policy shift caused the local authority sector to grow rapidly,

⁹³ ‘Housing statistics for Scotland 2013: Key Trends Summary’ (Edinburgh, Scottish Government, 2013) p. 10.

⁹⁴ *Ibid.*

⁹⁵ ‘Report of the Royal Commission on ‘The Housing of the Industrial Population of Scotland Rural and Urban’ (Edinburgh, Scottish Government, 1917), para. 1938.

⁹⁶ Many of the public construction works carried out during the 1930-1960 period were concentrated on demolition and clearance of tenements and the construction of terraced housing estates outside of the city centre.

replacing the private rented sector as the dominant tenure in Scotland.⁹⁷ The scale of building increased even further after the Second World War, local authority redevelopment schemes being jointed by the Scottish new towns, developed by public corporations answerable directly to central government. However, money for new build is increasingly channelled to housing associations and in addition there have been large scale stock transfers, so local authorities are less dominant than they once were.

Housing associations and other Registered Social Landlords

Housing associations were overhauled in the 1970s and since then the voluntary and co-operative housing sector developed into a significant provider of accommodation in Scotland. Rising costs of subsidising and supporting housing associations coupled with persistent under investment in council housing led the Government to reformat the housing associations into an independent rented sector. Housing associations and co-operatives were required to register with the Scottish Housing Regulator as Registered Social Landlords. Approximately four fifths of Registered Social Landlords own fewer than 2,000 homes each. Altogether the sector includes approximately 270,000 homes as well as 5,000 bed spaces.⁹⁸ Registered Social Landlords are empowered to raise funds for development through private finance, e.g. through private letting as opposed to public investment, thus relieving the Government of significant expense. Immediately prior to 1989, housing association tenants had secure tenancies (i.e. same as council tenants), though with the right to have a fair rent fixed and then as from 1989 assured tenancies. However, in 2001 a unified social sector was created consisting of public landlords and Registered Social Landlords, and all social sector tenants (existing and new grants) became Scottish secure tenancies.

The housing association sector grew considerably in size between 1993 and 2004, to cover 10.6% of households. The strong growth was due to housing policy decisions in the 1980s and subsequent housing stock transfers. Growth of the sector since then has been slower so that in 2011 housing associations accommodated 11% of Scottish households.⁹⁹

One of the first housing issues addressed by the Scottish Executive was the historic under investment in Council housing. The Scottish Executive engaged with this issue by arranging and accelerating transfers of ownership of Council housing to housing associations, co-operatives and community ownership landlords. Transfer allowed for increased investment and also broadened the scope of tenant participation as tenants had the opportunity of a new role on management committees and boards. The manner in which this has taken place, i.e. via the New Housing Partnership, has required tenant participation. Since the early 1980s the transfer of local authority housing has gathered momentum. In recent years whole stock transfers have become more common, for example with Glasgow tenants voting in 2002 to transfer

⁹⁷ In Scotland national records concerning tenure are generally only considered accurate from the 1960s onwards and as such it is not possible to determine exactly when this shift occurred however it was most probably during the interwar and early post-war period.

⁹⁸ 'Registered Social Landlords in Scotland: Summary Facts and Figures 2007/08' (Edinburgh, Scottish Housing Regulator, 2009), p. 4.

⁹⁹ Housing statistics for Scotland 2013: Key Trends Summary (Edinburgh, Scottish Government, 2013) p. 10.

roughly 90,000 houses to the Glasgow Housing Association. The result of this transfer activity caused the local authority sector to shrink and the role of the housing association sector to increase in importance, by 2012 the Scottish Federation of Housing Association estimated that Residential Social Landlords, including housing associations and co-operatives, administer 46% of Scotland's affordable rented housing stock.¹⁰⁰ Voluntary and co-operative sector has also played a growing role with regard to the construction of new housing units. From 1996 to 2012, there were 64,343 housing association new builds while during the same period there were 3,266 local authority new builds.¹⁰¹ Indeed since the onset of the economic recession of 2008 housing association new builds have accounted for 27.07% of the total supply of new housing in Scotland.

In 2008/2009 894 tenancies ended with eviction and 630 ended through abandonment following orders for recovery of possession. This equates in total to 0.6% of all tenancies in the sector, but compared with 2.8% for individual Residential Social Landlords. In almost all cases, these tenancies were terminated because rent was outstanding, but 6% of all terminations were due to antisocial behaviour.¹⁰² The average rent paid in this sector was £57.23 per week with over 60% of all tenants within this sector receiving Housing Benefit to assist with their payment of rent. In 2008/2009 the Regulator inspected 90 Residential Social Landlords and found that nearly 58% of inspected Residential Social Landlords were providing good or excellent services, and 30% provide fair services but eight landlords (together serving just under 5,000 tenants) were poor in terms of landlord services, governance or financial management.¹⁰³

Right to Buy

Tenants in the social sector with a Scottish secure tenancy may be entitled to the Right to Buy their home,¹⁰⁴ but this right has been withdrawn for tenants whose tenancies were granted on or after 1 March 2011 and may be withdrawn completely.

¹⁰⁰ 'Housing Adaptions: Options for Change and Improvement' (Edinburgh: A Response from the Scottish Federation of Housing Associations, Adaptations Working Group Consultation, 2012).

¹⁰¹ 'All new house building starts in Scotland: local authority time series tables' (Edinburgh: Scottish Government, 2013), see table.

¹⁰² 'Registered Social Landlords in Scotland - Summary Facts and Figures 2008/09' (Edinburgh: Scottish Housing Regulator, 2010), p. 3.

¹⁰³ *Ibid.*, p. 4.

¹⁰⁴ See Part 2.1 below.

1.5 Other general aspects

- **Are there lobby groups or umbrella groups active in any of the tenure types? If so, what are they called, how many members, etc.?**

The Scottish Association of Landlords represents the interests of all landlords and letting agents throughout Scotland. It provides information, training and advice to members nationally, and through a local branch network, and also lobbies on behalf of landlords to Holyrood and Westminster government departments. The Association of Residential Lettings Agents was formed in 1981 as the professional and regulatory body for letting agents and has approximately 6,000 individual members, with 3,500 member offices across the UK. The Association promotes standards in the residential letting sector of the property market. The National Landlords Association represents the interests of landlords in the private rental market at local, national and European level, providing information, assistance and support to landlords on all landlord related matters.

So far as tenants are concerned, the Private Rented Housing Panel provides a mechanism by which tenants can ensure that landlords meet their legal obligations with respect to the tenancy.¹⁰⁵ The Scottish Tenants Organisation traces its origins to the Glasgow Rent Strikes of 1915 when it was formed to represent the housing difficulties faced by tenants to policy makers as well as landlords. In recent years the organisation has campaigned against housing stock transfers. Shelter Scotland is a housing and homelessness charity which provides information, advice and support services to households experiencing housing difficulties ranging from poor quality housing to homelessness. It also carries out a lobbying and campaigning role on behalf of such households.

- **Number (and percentage) of vacant dwellings**

From 2001 to 2011 both the number of household spaces and vacant properties increased marginally to 2.5 million dwellings in Scotland of which 2.4 million were occupied and just 107,000 were vacant dwellings. There were 96,000 vacant private dwellings and second homes, which represented 3.9 per cent of the total housing stock.¹⁰⁶

- **Are there important black market or otherwise irregular phenomena and practices on the housing market (especially the rental market)?**

It is difficult to provide a definitive answer on the presence of informal economies in the Scottish rental market. This is because there has not been detailed academic consideration of the role of informal economies in the Scottish rental market. While this is most likely due to the absence of acute black market phenomena, it also derives from a persistent absence of meaningful statistics which would allow for a more detailed examination of real market activity. However there have been a number of reports which suggest that various informal economic activities take place in the Scottish rental market. Perhaps the most pressing instance of an “informal economy” is the letting of substandard accommodation and the practice of letting agents requiring unlawful pre-tenancy payments.

¹⁰⁵ See Part 2.b below.

¹⁰⁶ ‘Housing Statistics for Scotland - Key Information and Summary Tables’ (Edinburgh: Stationery Government, 2013), see chart for estimated stock of dwellings by tenure: 1993 to 2011.

Since deregulation of the private rented sector in the late 1980s, market rents have prevailed in Scotland and this has reduced any incentive to avoid the setting of artificially low rents. There are reports that letting agents have been asking for unlawful pre-tenancy payments of up to £180 to cover expenses which they should underwrite themselves,¹⁰⁷ which is certainly illegal.¹⁰⁸ With regard to the letting of housing which falls below the housing standard, it was noted above that many landlords let property which falls below the housing standard.¹⁰⁹

Summary table 1 Tenure structure in Scotland, (2011)

Home ownership	Renting		Other	Total
	Renting with a public task	Renting without a public task		
	23.8%	11.6%		
60.7%	35.4%		3.9%	100%

¹⁰⁷ <http://www.scotsman.com/business/finance/majority-of-letting-agents-are-ripping-off-tenants-1-1979222>

¹⁰⁸ Imposition of a prohibited premium can have both civil and criminal consequences: Rent (Scotland) Act 1984 Part VIII and the Housing (Scotland) Act 1988 s 27, but amended and considerably strengthened by of the Private Rented Housing (Scotland) Act 2011 s. 32 and the Rent (Scotland) Act 1984 (Premiums) Regulations 2012. See section 6.2 below..

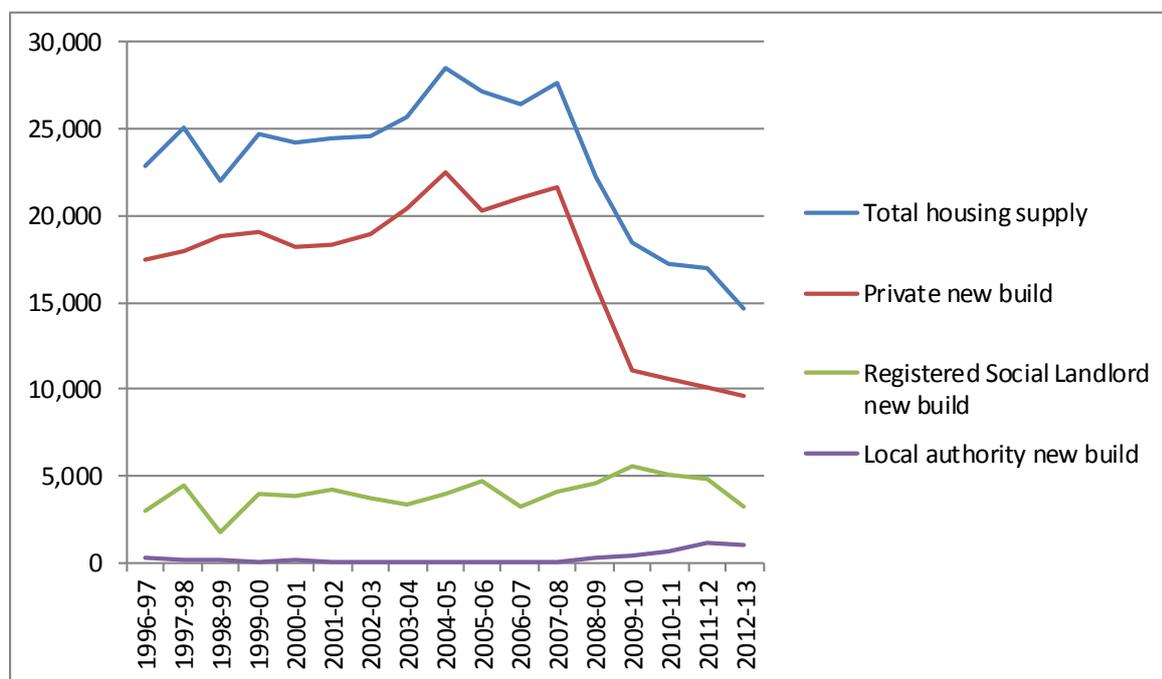
¹⁰⁹ See Part 2.d below.

2 Economic urban and social factors

2.1 Current situation of the housing market

- **What is the current situation of the housing market? Is the supply of housing sufficient/ insufficient and where is this the case (possibly in terms of areas of scarcity of dwellings in growth areas versus shrinkage areas)?**

New housing supply in Scotland 1996-2012¹¹⁰



From 1996 to 2013 private new build has contributed the majority of new housing in Scotland. During this period registered social landlords have contributed the lion's share of new build social housing in Scotland, while local authorities have a highly reduced role in new housing supply. The supply of new houses decreased significantly with the onset of the economic recession and this is largely due to private new build activity falling by about a half in the period 2008 to 2010. Although housing supply has since stabilised to an extent the supply of new housing decreased by 14% between 2011-12 and 2012-13 and this was largely due to a decrease in housing association completions (which fell by 32% on the previous year) and private house building (where completions fell by 5%). Furthermore, local authority completions also fell slightly from the previous year from 1,114 to just under a thousand.¹¹¹

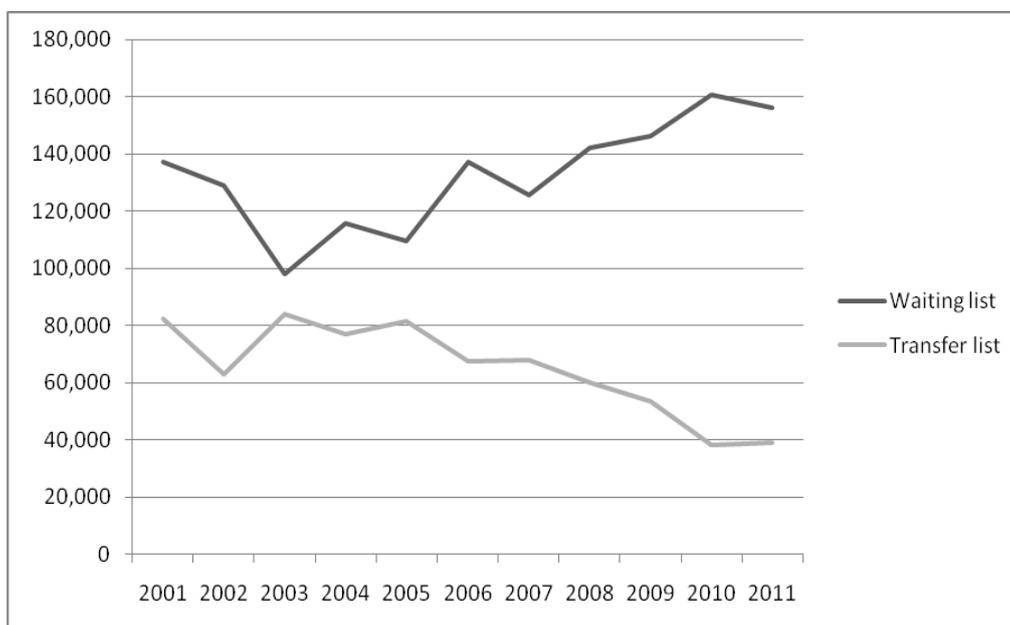
A good indicator of the supply of housing is the length of council housing lists. A housing list is a list of applicants for housing which is either kept by social landlords

¹¹⁰ *Ibid.* titled chart on new housing in Scotland since 1920. Also see 'Housing statistics for Scotland 2013: Key Trends Summary' (Edinburgh, Scottish Government, 2013), p. 1.

¹¹¹ 'Housing statistics for Scotland 2013: Key Trends Summary' (Edinburgh, Scottish Government, 2013), p. 1.

individually, jointly, or by a third party so that they can allocate their housing.¹¹² This allows for common housing registers and housing lists, which may also be known as housing registers. The numbers on the housing waiting list have reduced consistently during the early to mid-2000s before rising sharply after the onset of the economic recession.

Figure 19: Housing waiting list 2001-2011 (transfers and waiting list numbers)



In 2012 85,472 new applicants were added to housing lists. This is the lowest number of new applicants since 2001. In 2011 there were 194,992 households on local authority housing lists across Scotland with 156,200 people on waiting lists and 38,800 on transfer lists.¹¹³ The trends in homelessness applications are considered below.¹¹⁴

¹¹² Housing (Scotland) Act 1987 s. 19(2).

¹¹³ 'Housing Statistics for Scotland - Management of Local Authority Housing' (Edinburgh: Scottish Government, 2012).

¹¹⁴ See section 6 below.

○ **What have been the effects of the current crisis since 2007?**

House prices in Scotland recorded strong growth during the 2000s before peaking in June 2008. The recession, following the credit crunch, caused property prices in Scotland to fall significantly. The Department of Communities and Local Government recorded that in March 2009 property prices were 12% below peak. Since then however, property prices have recovered such that as of November 2010, prices have returned to 6% below peak, while prices across the UK are currently 5% below peak. House prices in September 2012 averaged £183,000 whereas on Registers of Scotland data the average house price was £162,000.¹¹⁵ Scottish first-time buyers (FTBs) paid on average £123,000, while owners trading up paid £210,000. New home prices in Scotland averaged £213,000 as compared to £178,000 for pre-owned buildings.

○ **How is the demand for housing expected to develop? What is the expectation about the growth and decline in number of households in the future in a scenario of average economic development? Is there a year forecasted where growth in number of households will stabilize or will start declining?**

The number of households in Scotland has increased every year for 10 years and from 2001 to 2011 the number of households has increased from 2.19 million to 2.37 million.¹¹⁶ A 2012 Government review set out that the number of households is increasing due to smaller average household size with more people living alone and in smaller households. People are also delaying family formation, with increased cohabitation, delayed parenting, lone parenthood and living alone. The general trends in household structure change are set to continue but at a faster rate.¹¹⁷ Overall the number of households is projected to increase to 2.8 million by 2033, an average of 19,250 additional households per year. It is also projected that households will get smaller with the average size projected to decrease from 2.18 people in 2008 to 1.93 in 2033. Furthermore, one adult households are expected to become increasingly common, increasing from 36% in 2008 to 45% in 2033. Finally it is expected that ageing population will also result in changes to household structure.¹¹⁸ After taking into account the factors set out above the report estimated that in excess of 20,000 homes each year are required to be built in Scotland just to accommodate household growth.¹¹⁹

¹¹⁵ 'Scottish Housing Market Review' (Edinburgh, Scottish Government, 2012), pp. 1. The former is mix adjusted whereas the latter takes the raw unadjusted data. The mix adjusted figure for the UK was £233,000.

¹¹⁶ 'Census 2011', (Edinburgh, National Records of Scotland, 2014), see table QS116SC - Household type. Also see 'High Level Summary of Statistics: Population and Migration' (Edinburgh, National Records of Scotland, 2014), p.1.

¹¹⁷ 'Evidence Review of the Private Rented Sector in Scotland' (Edinburgh: Communities Analytical Services, Scottish Government, 2012), p. 6. Also see P. Pattison, D. Diacon and J. Vine (2010) Tenure trends in the UK housing system: will the private rented sector continue to grow? (London, Building and Social Housing Foundation, 2010), pp 12-18.

¹¹⁸ *Ibid.*, pp 6 & 7.

¹¹⁹ *Ibid.* p. 7.

- **What is the number/percentage of families/households depending on rental housing (vs. owner-occupancy and other forms of tenure)? What is the number/percentage of immigrants among them?**

During the latter part of the twentieth century the owner occupier sector became the dominant tenure form in Scotland. Indeed, by 2011, the Scottish housing situation was increasingly distinguishable by high, although gradually declining, rates of owner occupation (64.8%) and historically low, and consistently declining, levels of local authority renting (14.6%). At the same time there has been strong growth in the size of the housing association sector (8.3%) as well as resurgence in the private rented sector (10.9%).¹²⁰ A 2009 Government review found that the private rented sector plays 'a major role in housing young and economically active migrants'. The review found that 'a migrant worker's first home in Scotland is highly likely to be in the PRS, because of the affordability and mortgage eligibility constraint'.¹²¹ However, the report also identified that migrant households were facing greater barriers and were disproportionately more likely to have paid an administration fee to secure their accommodation than tenants generally.¹²² The 2008 Tenant Survey found that a quarter of respondents were born outside of the UK. The bulk of these tenants were living in the urban areas and a significant proportion were students (40%).¹²³ Tenants born outside the UK are likely to be younger than their UK born counterparts with about two thirds of tenants born outside the UK aged 22-34 while just a third of tenants born in the UK were in this age bracket.

So far as immigrants are concerned, control of immigration is a responsibility of the UK government exercised via the UK Border Agency.

In Scotland any EU national has the right to be admitted to any social rented housing list, they also have the right to housing and homelessness assistance. However, if they lose employment they may not be entitled to housing benefit. Since landlords cannot take income into account when allocating housing, this should not be a barrier to accessing social housing. Asylum seekers are entitled to be admitted to a social landlord's housing list but they have no right to be given a full or short Scottish secure tenancy. Once an asylum seeker is given leave to stay in the UK then they have all the rights of a UK citizen and can be allocated social housing.¹²⁴ Under the Immigration and Asylum Act 1999 a Local Authority must ensure that accommodation provided under the accommodation provisions is not granted to a person subject to immigration control.¹²⁵ However, Registered Social Landlords are not subject to this exclusion and as a result are not required to consider nationality or immigration status and can allocate homes to any person.

¹²⁰ 'Housing statistics for Scotland 2013: Key Trends Summary' (Edinburgh, Scottish Government, 2013) p. 10.

¹²¹ 'Review of the Private Rented Sector Volume 1' (Edinburgh, Scottish Government Social Research, 2009, para. 3.29.

¹²² *Ibid.* para. 3.30.

¹²³ V. Strachan & T. Donohoe 'Views and experiences of tenants in the private rented sector in Scotland – Volume 2' (Edinburgh: Scottish Government, 2009), para 2.18.

¹²⁴ 'Social Housing Allocations: A Practice Guide' (Edinburgh: Scottish Government, 2010).

¹²⁵ Immigration and Asylum Act 1999 s 118.

2.2 Issues of price and affordability

- **What is the typical cost of rents and its relation to average disposable income (rent-income ratio per household)?**

Information about this issue can be obtained from the Scottish Household Survey giving information collected in 2009.¹²⁶ It found that the average rent paid by a private renter in Scotland in 2008 was £403 per month. A Scottish Government review of the private rented sector identified the sector as the least affordable rented tenure in Scotland with two fifths of tenants of the private rented sector spending more than one-quarter of their income on rent.¹²⁷ Even for bedsits the average monthly rent was roughly £330 and this rose to around £440 per calendar month for properties with five or more bedrooms. This compares with a mean weekly income for private rented sector tenants estimated to be just over £320. This figure was considerably lower than for households buying with a loan or mortgage (c. £550), but higher than those in the social rented sector (c. £240).¹²⁸

With respect to affordability the Review of the Private Rented Sector (2009) identified the private rented sector as the least affordable rented tenure - with almost two fifths of tenants paying more than a quarter of their income in rent with around a third of tenants surveyed finding it either fairly or very difficult to afford their rent.¹²⁹ Certain groups of tenant were particularly likely to find it difficult to afford their rent, including:

younger tenants;
lone parents,
people in part-time employment; and
those partially reliant on housing benefit.

A small minority of tenants in 2009 were experiencing significant affordability issues, often coupled with poor housing standards. Around a quarter of tenants were paying more than 25% of their income on rent, who not unnaturally found it at least fairly difficult to meet rent payments, and a quarter of tenants were struggling to meet fuel costs.¹³⁰

In the past four years rents have increased significantly. Citylet is one of the largest property marketing services in Scotland and provides a quarterly review of the private rental market in Scotland.¹³¹ This provides more recent data on the private rental market. In the first quarter of 2013, Citylet recorded that the average Scottish

¹²⁶ 'Review of the Private Rented Sector Volume 1' (Edinburgh, Scottish Government Social Research, 2009).

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, para. 7.12.

¹²⁹ *Ibid.*, para. 7.24.

¹³⁰ *Ibid.*

¹³¹ 'Maximising Yields and Happier Tenants: Working smarter in Scotland's Rental Sector' (Edinburgh, Citilets, 2013), p. 3. (data is mix adjusted).

rent nationwide was £675 but that average monthly rents varied considerably from city to city, for example:

Aberdeen	-	£961;
Edinburgh	-	£817;
Dundee	-	£572; and
Glasgow	-	£613.

Citylet have recorded that the average cost of renting in Scotland has increased by 2.3%. They argue that part of this increase is attributable to the Scottish Government's abolition of tenant fees in 2012,¹³² though a similar increase in rent levels occurred in England and Wales which this abolition did not affect. Since the onset of the economic recession of the late 2000s the supply of new build homes has reduced considerably while the credit practice of mortgage lenders towards Buy to Let borrowers has become more restrictive; this constriction of supply is the reason attributed by Citylet for the increase in rental levels. The increase year on year between 2011 and 2012 was just 1.0%; but in the fourth quarter of 2012 they found an annualised rate of increase of 5.1% in Edinburgh, 6.3% in Aberdeen and 2.2% in Glasgow, this last figure being just below the national average of 2.3%. Another indicator of strong demand is the evidence in the Citylet report that the average time to let for all properties across Scotland was just 39 days.¹³³ The Scottish rental market is characterised by a prevalence of individual landlords with small property portfolios and a general absence of institutional investors. The structural profile of the private rented sector in Scotland is ill suited to meeting large increases in demand¹³⁴ and as such it is likely that as demand increase rent rates will continue to rise.

In recent years there has been marked growth in the size of the private rented sector. During this period there have been legislative changes as well as changes in the fortune of the Scottish housing market and economy respectively. Changes in the supply of property in conjunction with increased demand have influenced the growth in the private rented sector. The Scottish Government committed to a Review of the Private Rented Sector. The results of the review were published in 2009 and present a broad overview of the private rented sector with the wider Scottish housing situation. The review found that in 2009 the cost of private rent was around 73% of the cost of paying a mortgage. Indeed:

Between 1997 and 2007 Scottish house prices increased by more than 150% (in nominal terms). The local reference rent (LRR) increased from £59 per week in 1997 to £90 per week in 2007 - a nominal increase of 53%. Over the same period Scottish full-time earnings rose by around 47%.¹³⁵

¹³² The Scottish Government has legislated to ensure that letting agents and landlords will only be able to charge tenants the rent and a deposit and will be unable claim additional charges for reference checks, credit checks, inventory fees etc.: see section 6.1 below.

¹³³ Time to let refers to the time taken to let the dwelling.

¹³⁴ 'Review of the Private Rented Sector: Key Findings and Policy Implications' (Edinburgh: Scottish Government, 2009), page 7.

¹³⁵ 'Review of the Private Rented Sector: Key Findings and Policy Implications' (Edinburgh: Scottish Government, 2009), para. 7.5.

The review recorded that the median weekly income level of private rented sector tenants is £300, higher than that of households in the social sector, but below that of those buying with a loan or mortgage. The range of household income differs significantly across the tenures with social renters tending to have more similar income levels while owner occupiers have more diverse incomes, and the private rented sector falling somewhere between the two.¹³⁶

▪ **To what extent is home ownership attractive as an alternative to rental housing**

At the height of the property boom in 2007 the Scottish Government commissioned a study on the housing aspirations of Scottish households.¹³⁷ The study found that just 10% of respondents would ideally prefer to rent their home. The majority said they would prefer to own. Almost all owner-occupiers, four in five private renters and three in five social renters said they would prefer to own their home.¹³⁸

▪ **What were the effects of the crisis since 2007?**

The recession caused house prices to drop significantly¹³⁹ but housing did not become more affordable because the criteria for mortgage lending were tightened very considerably. The recession has therefore increased demand for rented property, both in the private and the social sectors. One response to the public funding crisis by the UK Government has been to tighten the rules for the availability of housing benefit, a policy which has had a major impact on Scottish households.¹⁴⁰

¹³⁶ *Ibid.* p. 49.

¹³⁷ S. Clegg, A. Coulter, G. Edwards & V. Strachan, 'Housing Aspirations' (Edinburgh: Scottish Government, 2007).

¹³⁸ *Ibid.*, para 4.3.

¹³⁹ See section 1.4 above.

¹⁴⁰ See section 6.1 below.

2.3 Tenancy contracts and investment

- **The return (or Return on Investment (RoI)) for rental dwellings for landlords-investors and effects of the crisis since 2007**

Residential investment seeks both capital appreciation and, rental yields. With the strong house price inflation recorded during the late 1990s and early 2000s, rental dwellings proved to be a highly attractive investment with house prices rising by 82% between 2002 to 2008.¹⁴¹ However with the onset of the economic crisis the potential for capital appreciation was severely curtailed as the property price and construction booms ended with stark falls in property prices eroding some of the value gained in the last 10 years.¹⁴² House prices peaked in 2008 before falling by around 12% by March 2009. Since then house prices have recovered to a limited extent and in September 2013 Scottish house prices remained 7% off peak.¹⁴³ the potential of raising revenue from rent returns was limited relative to the potential for house price appreciation during the 2000s.¹⁴⁴ However, as set out above, the potential for raising revenue from rent returns has improved in recent years.¹⁴⁵

- **To what extent are tenancy contracts relevant to professional and institutional investors?**

The evidence is that institutional investment in the Scottish rental market is low.¹⁴⁶

- **In particular: may a bundle of tenancy contracts be included in Real Estate Investment Trusts (REITS) or similar instruments?**

A real estate investment trust is a company that owns and manages income-producing property assets, allowing individual investors to earn a share of the income produced through commercial real estate ownership without the problems of holding a portfolio of land directly. It is perfectly feasible to include the rental output of a bundle of tenancy contracts as an asset within a real estate investment trust. There is a complex UK tax regime giving tax advantages.¹⁴⁷ A property rental business must contain at least three single rental properties with no one property representing more than 40% of the total value of the property rental business. At least 90 per cent of its rental profits must be distributed by way of dividend. That

¹⁴¹ K. Berry & J. Dewar, 'Impact of the Credit Crunch on the Scottish Economy and the Scottish Housing Market' (Edinburgh, Scottish Government, 2008), p. 10.

¹⁴² Access to credit has been constrained while the supply of new houses has halved since the onset of the recession. See above section 1.4 above.

¹⁴³ 'Scottish Housing Market Review November 2013' (Edinburgh, Scottish Government, 2013), p. 1. The average mix adjusted house price in Scotland was £181,000 in September 2013.

¹⁴⁴ 'Evidence Review of the Private Rented Sector in Scotland' (Edinburgh, Scottish Government, 2012), p. 5. From 1995 to 2010 the median private rented sector rent doubled, rising from £50 per week to £104 per week.

¹⁴⁵ See section 1.4.

¹⁴⁶ See following answer.

¹⁴⁷ Finance Act 2006 Part 4 as amended by the Finance Act 2007 and supplemented by numerous regulations.

said, it appears that Real Estate Investment Trusts would have a very small hold on the Scottish rental market since institutional investment in residential property in general is very low.¹⁴⁸

- **Is the securitization system related to tenancies in your country? Are commercial (or other) landlords allowed to securitize their rental incomes? If yes: Is this usual and frequent?**

This is theoretically possible, but thought to be extremely rare.

¹⁴⁸ 'Evidence Review of the Private Rented Sector in Scotland' (Edinburgh, Scottish Government, 2012), p. 12.

2.4 Other economic factors

- **What kind of insurances play a role in respect to the dwelling (e.g. insurance of the building, the furniture by the landlord; third party liability insurance of the tenant)?**

Generally landlords are responsible for insuring the property and this will usually extend to fixtures and fittings and other contents belonging to the landlord however the landlord will not generally provide contents insurance for the tenant's property. Instead the tenant is at liberty to acquire a tenant's contents insurance policy independently.¹⁴⁹ In the private rented sector the tenant may acquire home contents insurance privately while in the social rented sector local authorities and registered social landlords offer their tenants access to low cost home contents insurance schemes, and this is something which the Scottish Executive has promoted.¹⁵⁰ However, many tenants do not take out home contents insurance. Indeed the extent to which households take out home contents insurance varies significantly according to tenure. In 2007 some 96% of owner occupiers had home contents insurance while just half of social rented tenants and private rented tenants took out home contents insurance.¹⁵¹

- **What is the role of estate agents? Are their performance and fees regarded as fair and efficient?**

There are approximately 500 letting agents in Scotland and together they account for about 50% of all annual lettings.¹⁵² Regulation of letting agents is largely centred on voluntary codes of practice and rules of conduct. The main regulatory body is the Association of Residential Letting Agents. Letting agents regulated by the ARLA have their funds protected by a bonded scheme. All letting agents under this scheme are subject to a code of practice which requires, amongst other things, that at least one staff member have a suitable letting agent qualification. There are a number of other bodies which operate a voluntary code of conduct, these include the Royal Institute of Chartered Surveyors, the Property Ombudsman, the National Approved Letting Scheme, the UK Association of Letting Agents, and the government backed National Landlords Association. Letting agents can also apply to Landlord Accreditation Scotland which is a voluntary scheme by which landlords and letting agents can assure tenants that the tenancy arrangements they have adhere to the standards outlined in the Scottish Core Standards for Accredited Landlords. All private landlords operating in Scotland must register themselves, and each of the

¹⁴⁹ 'A Place to Stay, a Place to Call Home - A Strategy for the Private Rented Sector in Scotland' (Edinburgh, Scottish Government, 2013), p. 11.

¹⁵⁰ P. Vestri, 'Exploring the Take-up of Home Contents Insurance' (Edinburgh: Scottish Executive Social Research, 2007), p.1.

¹⁵¹ 'Scottish Household Survey 2007' (Edinburgh: Scottish Government, 2008), p 62. This was the last Survey to provide data on insurance take up according to tenure.

¹⁵² 'Final Business Regulatory Impact Assessment: Private Rented Housing (Scotland) Act 2011: Section 32 (Premiums)' (Edinburgh, Scottish Government, 2012), p. 1.

properties they are renting, with the relevant local authority under the landlord registration scheme. Under this scheme landlords, and any agent appointed to manage the property, must pass a fit and proper person test. Since 2006 there have been over 200,000 applications for registration.

The role which letting agents play in the private rented sector has been brought into sharp focus in recent years. In particular, a 2012 Shelter report set out that '[c]urrently in Scotland, letting agents are not well regulated, and even the industrial bodies such as ARLA and the Property Ombudsman have called for legislation to regulate all letting agents to raise standards, and consequently the reputation of the sector.'¹⁵³ A central issue has been whether the levying of various fees and charges by letting agents complied with the statutory prohibition on charges, called premiums, on private lettings.¹⁵⁴ The lack of clarity led to the introduction of section 32 of the Private Rented Housing (Scotland) Act 2011. This amended the definition of premium in section 90 of the Rent Act 1984 to set out that it includes any service or administration fee or charge.¹⁵⁵ Citylet have suggested that this change has resulted in a 2.3% increase in the average cost of renting in Scotland.¹⁵⁶ The charging of illegal premiums has contributed to the Scottish Government decision to reconsider regulation of letting agents.¹⁵⁷

¹⁵³ 'Consultation response - A strategy for the private rented sector' (Edinburgh: Shelter, 2012), p. 20.

¹⁵⁴ Rent (Scotland) Act 1984, s. 82 made it an offence to require any premium as a condition of the grant or continuance of a protected tenancy. The provisions in section 82, 83 and 86 to 90 of the 1984 Act are applied to assured tenancies with modifications, by section 27 of the Housing (Scotland) Act 1988. A 'premium' is defined by section 90 of the 1984 Act as including any fine or other like sum and 'any other pecuniary consideration' in addition to rent.

¹⁵⁵ S. 32 also inserts a new section 89A into the 1984 Act, giving Ministers powers to outline in secondary legislation charges that will be allowed in connection with the grant, renewal or continuance of a protected tenancy.

¹⁵⁶ 'Maximising Yields and Happier Tenants: Working smarter in Scotland's Rental Sector' (Edinburgh, Citilets, 2013), p. 3.

¹⁵⁷ 'A Place to Stay, a Place to Call Home - A Strategy for the Private Rented Sector in Scotland' (Edinburgh, Scottish Government, 2013), p. 18.

2.5 Effects of the current crisis

▪ **Has mortgage credit been restricted? What are the effects for renting?**

For 2012 as a whole, there were 46,900 loans in Scotland for home purchase, a 7% decline from the previous year, and less than half the level recorded in 2006 (104,900).¹⁵⁸ Since the advent of the financial crisis interest rates have been cut to the extent that the Council of Mortgage Lenders data show that in Scotland interest payments as a percentage of income fell from 16.1% in 2007 to 8.3% in Q3 2013.¹⁵⁹ While this has improved affordability, deposit requirements – especially for first time buyers, have become much stricter with the average deposit being approximately equivalent to 69% of average annual income for first time buyers.¹⁶⁰ The Council of Mortgage Lenders suggest that the temporary increase in the stamp-duty threshold for first time buyers from £125k to £250k, which ended on 24 March 2011, had an impact on the Scottish market: in the first quarter of 2012 38% of Scottish first time buyers bought homes for between £125k and £250k, the highest proportion since records for this indicator began in 2005, while first time buyers accounted for 42% of house purchase loans, the highest proportion in Scotland since 2001.¹⁶¹ The Scottish Housing Market Review has also revealed that home movers in Scotland have benefitted from improved affordability since the onset of the economic recession with interest payments falling from 16.1% of income in 2007 to 8.3% in Q3 2013. As this group generally have higher levels of savings than first time buyers, they have been less affected by the deposit barrier – the average loan to value ratio of Scottish home movers has fallen from 76% in 2006 to 73% in Q3 2013.¹⁶² With regard to impact on the rented sector a 2012 Government review of the private rented sector has set out that constraints on mortgage availability and the level of deposits required from first time buyers have contributed to growth in the size of the private rented sector.¹⁶³ Indeed, the Review concludes that such factors will continue to contribute to growth in the private rented sector over the coming years.¹⁶⁴

▪ **Indicate the current figures on repossession (seizures of houses in case of mortgage credit default of the buyer)? Have repossessions affected the rental market?**

The Council of Mortgage Lenders data for first-charge mortgage lenders shows that for the UK the total number of loans with arrears equivalent to 2.5% or more of the mortgage balance at end of the second quarter of 2012 was 158,700, lower than the total of 161,400 at the end of the fourth quarter of 2011. The largest improvements were in the middle arrears bands, with both the 5-7.5% arrears band and the 7.5- 10% band at their lowest since 2008. The only band to show an annual increase was for arrears of 10% and over.

¹⁵⁸ 'Scottish Housing Market Review November 2013' (Edinburgh: Scottish Government, 2013), p. 3

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, p. 3.

¹⁶² 'Scottish Housing Market Review' (Edinburgh, Scottish Government, various years).

¹⁶³ 'Evidence Review of the Private Rented Sector in Scotland' (Edinburgh: Scottish Government, 2012), para. 2.1.

¹⁶⁴ *Ibid.*, section 7.

The Council of Mortgage Lenders recorded 8,200 repossessions UK-wide in the third quarter of 2012, which was the lowest since 2007. This represents a decline of 4% as compared with the second quarter of 2012 and it is line with a seasonal pattern experienced over the last three years. The Council of Mortgage Lenders central forecast for repossessions in 2012 was 45,000. In the first quarter of 2012, the number of repossessions totalled 18,100, following a lower trajectory than forecast. But the continuing pressures on household finance, welfare benefits, mortgage rates and economic growth may disrupt the current trend:

▪ **Has new housing or housing related legislation been introduced in response to the crisis?**

The Home Owner and Debtor Protection (Scotland) Act 2010 reformed the law relating to repossessions in Scotland. The Act will operate to protect those at risk of repossession by requiring that prior to going to court the lender must comply with certain Pre-action Requirements including engaging with the borrower and maintaining records of actions in this regard.

2.6 Urban aspects of the housing situation

- **What is the distribution of housing types in the city scale (e.g.: are rented houses mainly in the city centres and owner occupied in the suburbs?) vs. the region scale (e.g.: more rented houses in the big cities, less in the villages?)**

From the 2000s onwards affordability issues and restricted access to credit have channelled households away from the owner occupier sector and towards the private rented sector. Tenure varies between urban and rural areas with levels of owner-occupation higher in rural areas and accessible small towns, the former due to the relatively small social rented sector in rural areas, while the latter reflects in part urban workers moving out of high pressure housing markets to more affordable areas.¹⁶⁵ Private renting in Scotland is currently experiencing a renaissance of sorts. From 2001 to 2012 the private rented sector in Scotland has almost doubled in size, growing from 6% to under 12% during this period. A large part of this growth derives from increases in the size of the private rented sector in large urban areas. For instance during the period 2001 to 2012 the private rented sector in the city of Edinburgh increased from 13% of all households to over 20%,¹⁶⁶ while in Glasgow city the private rented sector more than doubled during this period, rising from 8% to 19%.¹⁶⁷ Indeed, Glasgow city centre has experienced one of the highest increases in private renting during this period, with the proportion of private renters rising from 18% to 38%,¹⁶⁸ with many of these accommodated in purpose built blocks of flats or tenements. Indeed, Scottish cities continue to be characterised by high numbers of purpose built blocks of flats or tenements.¹⁶⁹ This type of accommodation accounts for about half of all accommodation types in the cities of Aberdeen and Dundee, three fifths of all accommodation types in the city of Edinburgh and over two thirds of all accommodation types in Glasgow city.¹⁷⁰

- **Are the different types of housing regarded as contributing to specific, mostly critical, 'socio-urban' phenomena, in particular ghettoization and gentrification**

During the twentieth century Scottish regeneration policy increasingly moved from demolition and construction works to improvement and renewal works. During the post War period differing regeneration policies were pursued in the private and public housing sectors. However, from the 1970s onwards there has been considerable interaction between the two sectors as integrated regeneration models have been developed from the community based housing association model. In the early

¹⁶⁵ 'Estimates of Households and Dwellings in Scotland, 2012' (Edinburgh: National Records of Scotland, 2013), p. 7.

¹⁶⁶ 'Housing Strategy for a growing city' (Edinburgh: City of Edinburgh Council, 2012), p. 7.

¹⁶⁷ 'Note on Tenure Change in Glasgow City' (Glasgow: Glasgow City Council, 2012), p. 1.

¹⁶⁸ *Ibid.*, p. 2.

¹⁶⁹ In 2012 Glasgow had 16.99 dwellings per hectare, the highest number of dwellings per hectare in Scotland. see 'Estimates of Households and Dwellings in Scotland, 2012' (Edinburgh: National Records of Scotland, 2013), p. 51.

¹⁷⁰ 'Census 2011', (Edinburgh: National Records of Scotland, 2011), see accommodation type by council area.

twentieth century Government efforts to ameliorate the poor housing conditions of Scottish cities accelerated as local authorities began to assume direct responsibility for the housing of the working classes. Increasingly during this period this translated into the relocation of working class households from inner city tenements to publicly constructed and managed terraced housing estates outside the city centre. This process was exemplified by the urban renewal projects which took place in Glasgow during the interwar and post war.¹⁷¹ The inner city areas which were affected were largely redeveloped for commercial purposes. However regeneration projects have been criticised for contributing to gentrification in some areas.¹⁷² The Housing Association Grant, which was introduced in 1974, allowed the housing association sector to grow rapidly and by the early twenty first century the housing association sector has become the main driver of regeneration in Scotland. In 2003 Glasgow Council transferred its housing stock to Glasgow Housing Association which has proceeded with a major clearance and demolition plan aimed at regenerating inner city areas.¹⁷³ Creating and maintaining sustainable communities remains a key part of Scottish housing policy.¹⁷⁴ A key aspect of this policy is the promotion of mixed tenure however neighbourhoods with high levels of deprivation and with a large proportion of low-income residents have been identified as a significant concern.¹⁷⁵ The Scottish Index of Multiple Deprivation (SIMD) is the Scottish Government's measure for identifying areas in Scotland which are suffering from deprivation. The SIMD measures deprivation across seven domains including employment, income, health, education, skills, and training, geographic access to services, crime and housing. For the purposes of the SIMD Scotland is divided into similarly sized areas with each containing 350 households. The SIMD ranks each area from 1, most deprived, to 6,505, least deprived. In this way the SIMD identifies areas of multiple deprivation and allow for targeted policies and resources at places with the most need.¹⁷⁶ The SIMD carried out in 2004 found that nearly half of all datazones in the most deprived 10% across Scotland were in Glasgow City. However, by 2012 this

¹⁷¹ Glasgow council built new council housing estates on the fringe of the city, but in addition the “new towns” proper, built by new town corporations answerable directly to central government, also housed city overspill in quite separate “new” towns, well away from the city boundaries, though usually built around and adopting the name of an existing country village. Glasgow overspill was housed in new towns at East Kilbride, Cumbernauld and Irvine. The new town corporations were, however, eventually wound up and these towns are now run by their own local authorities.

¹⁷² S. Glynn, ‘Regeneration’ in *Interesting Times: a story of privatisation and gentrification in a peripheral Scottish city*, in *Mixed Communities: Gentrification by stealth?*, ed. G. Bridge (Bristol: Policy Press 2011).

¹⁷³ The Scottish Government has set out a regeneration strategy which is targeted towards supporting disadvantaged communities while promoting sustainability and well-being. The policy does not amount to a dramatic or radical approach to social disadvantage. Rather the policy approach is geared towards achieving more efficient outcomes with existing resources through a community led partnership approach to regeneration. The policy document identifies certain areas where: “there are high numbers of people in disadvantaged areas who are unable to work through ill-health or disability, alongside those who are either underemployed or employed in poor quality employment which does not offer prospects of progression.” In light of this the Scottish Government’s approach is to focus efforts on improving the capacity of individuals to move into better quality work and on measures to boost the supply of jobs and growth in particular geographical areas. ‘Achieving a Sustainable Future: Regeneration Strategy’ (Edinburgh: Scottish Government, 2011), p. 1.

¹⁷⁴ ‘Scottish Sustainable Communities Initiative’ (Edinburgh: Scottish Government, 2011).

¹⁷⁵ A. Fenton, *The Contribution of Housing, Planning and Regeneration Policies to Mixed Communities in Scotland* (Edinburgh: Scottish Executive Social Research, 2010), p.1.

¹⁷⁶ ‘Scottish Index of Multiple Deprivation 2012’ (Edinburgh: Scottish Government, 2012), p. 2. The SIMD 2012 shows that multiple deprivation in Scotland has become less concentrated over time.

has dropped to 35.8%, with corresponding rises in other Local Authorities.¹⁷⁷ The SIMD carried out in 2012 found that over half of Scotland's 15% most deprived datazones are located in five regions: Glasgow (29.6%), North Lanarkshire (10.2%), Fife (5.9%), Dundee (5.6%), and Edinburgh (5.5%). Overall these five local authorities contain 37% of Scotland's population.¹⁷⁸

The 15% most deprived areas in Scotland are characterised by high concentrations of social housing, with over half (55%) of households in the social rented sector; compared to 17% in the rest of Scotland.¹⁷⁹ Furthermore, while all tenures are affected by neighbourhood problems, including anti social behaviour, crime, rubbish, dog fouling etc, people living in social rented housing are most likely to be affected by those problems.¹⁸⁰ The prevalence of neighbourhood problems in social rented sectors is also reflected by the statistics concerning the granting of anti-social behaviour orders (ASBOs) with the majority of ASBOs have been directed towards persons accommodated in the social rented sector.¹⁸¹ Government policy on anti social behaviour is set out in *Promoting positive outcomes: working together to prevent ASB in Scotland*.¹⁸² This document identifies multiple positive outcomes which could be achieved by tackling anti social behaviour, including making Scottish communities safer and stronger.¹⁸³ A post implementation report on anti social behaviour¹⁸⁴ set out a range of proposals aimed at tackling anti-social behaviour. These proposals constitute a multi tenure approach and include giving social landlords more tools to tackle ASB i.e. powers to require that applicants with a history of antisocial behaviour would only become eligible for housing after a minimum period of time, the power to grant a short Scottish secure tenancy where the applicant has history of anti-social behaviour and the power to convert a Scottish secure tenancy to a short Scottish secure tenancy where there is a history of anti-social behaviour.¹⁸⁵ Further measures include ending the right to buy for social rented housing, transferring jurisdiction for the private rented sector over to a new private rented sector tribunal, introducing a new regulatory framework for letting agents as well as allowing greater flexibility in the allocation and management of social housing.¹⁸⁶

○ **Do phenomena of squatting exist? What are their – legal and real world – consequences?**

Squatting is a criminal offence in Scotland punishable by a fine or imprisonment.¹⁸⁷ As such Scots law differs significantly from English law in the area of possession

¹⁷⁷ *Ibid.*, p.7.

¹⁷⁸ *Ibid.*, p. 16.

¹⁷⁹ 'Scottish Household Survey 2012' (Edinburgh: Scottish Government, 2013), p. 18. For local examples see 'The Impact of Local Antisocial Behaviour Strategies at the Neighbourhood Level' (Edinburgh: Scottish Government, 2007), pp 94.

¹⁸⁰ 28 and 32

¹⁸¹ 'Use of Anti-Social Behaviour Orders in Scotland' (Edinburgh: Scottish Government, 2007), p. 48.

¹⁸² (Edinburgh, Scottish Government, 2009).

¹⁸³ *Ibid.*, p. 2.

¹⁸⁴ 'Antisocial Behaviour: A Post- Implementation Report on Promoting Positive Outcomes (2009)' (Edinburgh: Scottish Government, 2012), p.1. Scotland is experiencing the lowest level of reported crime in 39 years. The number of reported antisocial behaviour related crimes has fallen by 38% since 2009/10, from 223,167 to 138,000 in 2012/13.

¹⁸⁵ *Ibid.*, p. 7.

¹⁸⁶ *Ibid.*, p. 8.

¹⁸⁷ Trespass (Scotland) Act 1865.

based claims over interests in land. Under the English system the title of an owner may be lost by limitation while this is not possible in Scots law. Other property interests, lesser than ownership such as servitudes, may be acquired by the operation of prescription. In Scots law an interest in land may be acquired through the legal process of prescription as set out in the Prescription and Limitation (Scotland) Act 1973. In order for a person to acquire an interest in land they must fulfil the three criteria set out in the first section of that Act. That is, the interest at issue must be possessed for 10 years, that possession must be open, peaceable and without judicial interruption and must be founded on and follow the recording or registration of an ex facie valid title to the land in question.¹⁸⁸

¹⁸⁸ T. Guthrie *Scottish Property Law* (Edinburgh: Bloomsbury, 2nd edn, 2005) chapter 3; D. J. Cusine 'Adverse Possession of Land in Scots and English Law', *International and Comparative Law Quarterly*, (1996), 45(3) pp. 667; F. M. McCarthy (2008) Positive prescription in the human rights era, *Scots Law Times* 15.

2.7 Social aspects of the housing situation

- **What is (are) the dominant public opinion(s) towards certain forms of rental types or tenure forms? (e.g. is renting considered as socially inferior or economically unsound in the sense of a “rental trap”?) In particular: Is only home ownership regarded as a safe protection after retirement?**

A 2007 study found that external perceptions of social housing were largely negative. The sector was viewed as housing of need rather than choice, for benefit claimants and low income families. Furthermore those with previous experience of living in social housing were found to hold the belief that the sector had declined over time, with social and structural changes resulting in greater concentrations of social deprivation in this tenure. In addition, social landlords were viewed as bureaucratic and unhelpful, while paying rent was seen to be a waste, particularly when mortgage rates could be similar or even lower.¹⁸⁹

The study found that perceptions of private renting from people currently living in other tenures were more mixed than in relation to social renting. In particular the study found that private rented was viewed as transitional housing targeted at young people and those undergoing significant changes in circumstances, such as relationship breakdown. Overall the study revealed that the private rented sector was viewed more favourably than the social rented sector. In particular, respondents were of the view that the location and type of housing provided within the private rented sector was seen as better quality than social housing. However, furnishings and internal quality were perceived as poorer quality mainly because the sector was associated with temporary and student accommodation.¹⁹⁰ The study revealed that the private rented sector had an 'unscrupulous element'. This was associated with the idea of landlords exploiting tenants by charging extortionate rents and ignoring peoples housing rights.

- **What is the typical attitude of tenants towards different forms of tenure (e.g. owners of privatized apartments in former Eastern Europe not feeling and behaving as full owners)**

At the height of the property boom in 2007 the Scottish Government commissioned a study on the housing aspirations of Scottish households.¹⁹¹ The study found that just 10% of respondents would ideally prefer to rent their home. The majority said they would prefer to own. Almost all owner-occupiers, four in five private renters and three in five social renters said they would prefer to own their home.¹⁹² The preference for ownership was largely driven by economic concerns with respondents in all tenure groups of the opinion that buying a home was more cost effective than renting. In addition, owner occupation was positively associated with investment opportunities

¹⁸⁹ S. Clegg, A. Coulter, G. Edwards & V. Strachan, '*Housing Aspirations*' (Edinburgh: Scottish Government, 2007), para 4.28.

¹⁹⁰ *Ibid.*, para 4.30.

¹⁹¹ S. Clegg, A. Coulter, G. Edwards & V. Strachan, '*Housing Aspirations*' (Edinburgh: Scottish Government, 2007).

¹⁹² *Ibid.*, para 4.3.

and associated status, independence and flexibility.¹⁹³ In addition, respondents noted a sense of worth connected to owning a property.¹⁹⁴

With regard to renting the study found positive aspects included not having to pay maintenance or insurance costs for the building, and tenants appreciated the security of not having to worry about upkeep of their properties. They also appreciated the stability implied by a secure tenancy. Negative aspects included social landlords being slow to undertake repairs, although housing associations were viewed more positively in this respect than local authorities. Poor quality housing was also a concern, particularly in local authority housing, which was seen as older and in worse condition than housing association properties.¹⁹⁵

The Scottish Government commissioned a second study on tenant aspirations in the wake of the credit crunch.¹⁹⁶ Although the study found that attitudes to ownership were slightly more negative while attitudes to renting were more positive this was not reflected in tenure aspirations. Instead, the study found that more people would like to be in owner occupation in their next move than was the case in 2007, and fewer would like to be renting in their next move.¹⁹⁷ The study also found that the about half of respondents feared they would have difficulty in securing the mortgage they would need to get the house they wanted.¹⁹⁸

Summary table 3

	Home ownership	Renting without a public task	Renting with a public task
Dominant public opinion	Highly Favourable	Favourable	Unfavourable,
Contribution to gentrification?	High	-	-
Contribution to ghettoization?	-	-	High

¹⁹³ *Ibid.*, para 4.6.

¹⁹⁴ *Ibid.*, para 4.13.

¹⁹⁵ *Ibid.*, para 4.24.

¹⁹⁶ 'Housing Aspirations, Needs and Demands in the light of the Credit Crunch' (Edinburgh: Scottish Government, 2010), p. 15.

¹⁹⁷ *Ibid.*, p. 15.

¹⁹⁸ *Ibid.*

3 Housing policies and related policies

3.1 Introduction

- **How is housing policy related to the structure and concept of the (national) welfare state, to other welfare policies and the tax system?**

Within political devolution the position of housing as a matter of policy is somewhat complex as on the face of things housing functions were undoubtedly broadly devolved in 1998 to the Scottish Executive with the result that law and decision making with regard to issues such as homelessness, regulation of the private rented sector and provision of social housing fall to the Scottish Parliament which has taken the opportunity to engage with such matters. However, housing has been and remains a complex area with issues relating to mortgage finance, social welfare benefits and various schemes of taxation inextricably intertwined with various other housing matters. Such areas as financial oversight, social security transfers and general taxation policy remain firmly within the remit of the Westminster Parliament.¹⁹⁹ Since the early 2010s, in response to escalating public debt, the UK government has committed to various spending cuts in a policy of fiscal discipline or austerity. Reductions in spending have trickled down to the various devolved assemblies and has had major knock on effects on the Scottish Executive as it places fiscal limitations on the practical scope of their policy efforts.

This has not deterred the Scottish Executive from devising housing policy targets. In fact it has moved rapidly to develop housing law and policy since devolution. In particular, the pledge, and subsequent legislation enshrining a right to housing has set Scotland apart internationally with regard to the issue of homelessness. Additionally, the introduction in 2001 of a unified social rented tenancy moved Scotland ahead of the UK in this area. The manner in which devolution has been structured has led to various tensions between the Scottish and Westminster governments, particularly so since the UK Government embarked on a policy of fiscal discipline. Some of these conflicts are manifest in official housing policy documents, for instance in 'Homes Fit for the Twenty First Century'²⁰⁰ the Scottish Government has set out its opposition to UK Government housing policy in areas concerning investment in new social housing, cuts in housing benefit and reform of stamp duty. While the way in which housing has been devolved has its limitations the Scottish Executive has been extremely active in the area of housing law and policy and it is apparent that the Scottish Executive considers housing to be a crucial policy area. Prior to devolution, housing policies often formed a bulwark amongst broader welfare and taxation policies. In particular, the Scottish housing situation was distinguished internationally by high rates of council or social rented housing while further housing policies including housing benefit, local housing allowance, mortgage interest reliefs etc. were key tools employed within the Scottish welfare state. With regard to taxation, housing has contributed significant amounts of revenue including taxes raised from sales within the housing market and through inheritance tax. Further taxation revenue has been raised from the private rented sector through income tax contributions of landlords. As the Scottish Executive currently in power

¹⁹⁹ The Scotland Act 2012 has set in motion the devolution of certain taxation powers from Westminster to the Scottish Parliament.

²⁰⁰ 'Homes Fit for the 21st Century: The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020' (Edinburgh: Scottish Government, 2011).

continues to embrace devolution, it is certain that housing policies will continue to play a central role in the broader welfare and taxation policy of Scotland.

Early post-devolution housing policy documents centred housing priorities on improving housing quality, the regeneration of communities and addressing social exclusion.²⁰¹ These Papers framed housing discourse and contributed directly towards the housing legislation which emanated from the Scottish Executive in the early 2000s. In particular, the Housing (Scotland) Act 2001 marked a significant reform and simplification of the regulation of the social sector by creating a single sector out of public authorities and Registered Social Landlords and creating a single regulator, a task subsequently entrusted to the Scottish Housing Regulator.

○ **What is the role of the constitutional framework of housing? (in particular: does a fundamental right to housing exist?)**

Scotland does not have a written constitution and as such it is not possible to state that an express fundamental right to housing exists in Scotland. However, that is not to say that the right to housing does not exist through legislation.

A right to housing exists within Scotland in terms of the allocation of social housing and the duty to house those threatened with or experiencing homelessness. In practice the right to housing introduced across the UK in 1977 has been extended under the auspices for the Scottish Executive in the post devolution era. In 2003 the Scottish Parliament passed the Homelessness Etc (Scotland) Act which committed the Scottish Government to removing the requirement that to be able to access settled accommodation, presenting households had to exhibit priority need. This came into force at the end of 2012²⁰² from which date all persons assessed as unintentionally homeless will be entitled to settled accommodation as a legal right. The United Kingdom has acceded to a number of international human rights measures with housing rights, notably Article 16 of the European Social Charter 1961, but this is not justiciable in the domestic courts.

By contrast the Human Rights Act 1998 incorporated the provisions of the European Convention on Human Rights into domestic law. Actions of all public bodies must be compatible with the European Convention. This does not expressly confer a right to housing, but housing rights can be defended indirectly via the protection of property expressed in Article 1 Protocol 1, the trial rights in Article 6, and the respect for a person's home required by Article 8. This has affected most litigation affecting housing rights.

²⁰¹ 'Investing in Modernization - 'an Agenda for Scottish Housing', a Green Paper on Housing, (Edinburgh: Scottish Government, 1999); and 'Proposals for the Housing Bill', the Scottish Executive's White Paper, (Edinburgh: Scottish Government, 2000) and 'Better Homes for Scotland's Communities' (Edinburgh: Scottish Government, 2000).

²⁰² Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012.

3.2 Governmental actors

- **Which levels of government are involved in housing policy (national, regional, local); what are they called; how many are there of each?**
- **Which level(s) of government is/are responsible for designing which housing policy (instruments)?**
- **Which level(s) of government is/are responsible for which housing laws and policies?**

A. The United Kingdom government

Centralisation of political authority in Westminster from the Treaty of Union 1707 to the Scotland Act 1998 covers the period when modern housing law evolved. It was usual to enact separate Acts in that field, one for England and Wales and one for Scotland, but very often they shared a common structure and philosophy, and were differentiated by distinct legal concepts and terminology. Responsibility for effecting Westminster policy has been devolved to Scottish authorities for over one hundred years. This has allowed for several housing law and policy developments peculiar to Scotland. In particular, the prevalence of tenements facilitated the legal development of systems of common repairs in tenements quite distinct from principles abiding in other United Kingdom housing systems, while in more recent times the dominance of social rented housing amongst tenure forms, a fact arising from the rapid urbanisation which took place in Scotland during the industrial revolution, has also distinguished Scottish housing policy from the rest of the UK.

The United Kingdom joined the European Economic Community in 1973, since when European legislation affects Scotland.²⁰³ So too does the European Convention on Human Rights (ECHR) to which the United Kingdom acceded in 1950; the provisions of the ECHR were incorporated directly into domestic law by the Human Rights Act 1998, an Act of the United Kingdom Parliament at Westminster. Human rights issues can be litigated in the normal courts and therefore affect such matters as housing allocations and repossessions. Local authorities and other public bodies must act in accordance with the provisions of the ECHR which in Scotland, as elsewhere, has had a significant impact on housing law in Scotland. It has caused an explosion in case law affecting housing.

B. The Scottish Ministers

Since the Act of Union 1707 there have been calls for greater independence for Scotland. This was eventually realised under the Blair Labour Government in the form of the Scotland Act 1998 which devolved various powers of Government to the newly established Scottish Executive and the Scottish Parliament restored to Holyrood in Edinburgh. Basic housing functions were devolved in 1998 to the Scottish Executive with the result that law and decision making with regard to issues such as homelessness, regulation of the private rented sector and provision of social

²⁰³ The impact of EU policies and law on Scottish housing policy and Scottish tenancy law is considered below, see section 7.3 below.

housing fall to the Scottish Ministers. The new Parliament engaged in a wide ranging reform of basic land tenure, particularly to address the problems of large English owned shooting estates in the Highlands and the exclusion of the Scots population from land ownership in many rural areas. Subsequently the Scottish Ministers and Parliament have grasped the opportunity to engage with housing policy, and there have been a whole series of Housing (Scotland) Acts reforming the law bequeathed to the Scottish Parliament and in many ways creating a housing law distinct from and well in advance of English law. However, housing has been and remains a complex, and nebulous policy area, since basic tenancy law interacts with, and is inextricably intertwined with, issues such as mortgage finance, social welfare benefits and taxation. Areas such as financial oversight, social security transfers and general taxation policy remain at present within the remit of the Westminster Parliament. The political campaign for greater independence for Scotland is on-going, and, even if full independence is rejected, further transfers of power from Westminster to Holyrood are both likely and appropriate.

This year (2014) there will be a referendum to decide whether Scotland should become an independent nation. In the 2007 general election in Scotland the Scottish National Party, won a majority of seats in the Scottish Executive on a platform to campaign for a completely independent Scotland. The Scottish National Party lobbied the Westminster Parliament for greater independence and as a result of the Edinburgh Agreement in October 2012 it was agreed to hold a referendum to determine the future constitutional relationship between Scotland and the United Kingdom. If the vote is for independence, the union will be dissolved and Scotland will apply to become a Member State of the EU. Opinion polls suggest that the vote is likely to be close.

The Scottish Executive has overall responsibility for designing national housing policy and passing housing legislation. In practice, housing policies are administered on a local basis by local authorities. Various bodies are responsible for supporting and overseeing implementation. These include the Office of the Ombudsman, the Scottish Housing Regulator and the Private Rented Housing Panel. 'Homes Fit for the Twenty First Century – The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020'²⁰⁴ builds upon a previous strategy document from 2007 in order to set out the Scottish Government's vision for housing for the coming decade.. At present housing policy in Scotland seeks to increase housing supply whilst ensuring affordability, providing choice, and improving the localities used for housing and the quality of housing accommodation in Scotland. With regard to tenure housing policy is broadly tenure neutral and is geared more towards increasing tenure choice than prioritizing one particular form of tenure. From the outset the document sets out the need to increase the supply of houses while also focusing on the pressing need to significantly enhance the quality and sustainability of the existing housing stock and the surrounding neighbourhoods. The document also sets out a range of commitments on homelessness, fuel poverty and climate change. With one eye on 2020 the policy document makes a commitment to achieve a housing system which provides an affordable home for all. In order to meet this target the Government came to the conclusion that a strong recovery in the construction sector and a substantial increase in the number of homes of all types is required. The Scottish Executive predict a need for more than 20,000 homes each

²⁰⁴ (Edinburgh: Scottish Government, 2011).

year to accommodate household growth across all tenure forms, including the emerging tenure form of intermediate rent.²⁰⁵

Since 2010, the UK government has responded to escalating public deficit by a commitment to various spending cuts in a policy of fiscal discipline or austerity. Reductions in spending have trickled down to the devolved assemblies and has had major knock on effects on the Scottish Executive as it places fiscal limitations on the practical scope of their policy efforts. However since devolution land law and housing law have been one of the most creative areas of the Scottish Executive. In particular, legislation reforming the rights of homeless persons has distinguished Scotland internationally²⁰⁶ while the Scottish Executive has also introduced a unified social rented tenancy.²⁰⁷ However, it is quite clear that the manner in which devolution has been structured has led to various tensions between the Scottish Executive and the Westminster Parliament particularly so since the UK Government of the early 2010s embarked on a policy of fiscal discipline. Some of these conflicts have been expressed in official housing policy documents, for instance in *Homes Fit for the Twenty First Century – The Scottish Government’s Strategy and Action Plan for Housing in the Next Decade: 2011 – 2020*,²⁰⁸ the Scottish Government has set out its opposition to UK Government housing policy in areas concerning investment in new social housing, cuts in housing benefit and reform of stamp duty.

C. Control of Registered Social Landlords - the Scottish Housing Regulator

The Scottish Housing Regulator, established on 1 April 2011 under the Housing (Scotland) Act 2010, is the independent regulator of Registered Social Landlords and local authority housing services in Scotland.²⁰⁹ The Regulator is directly accountable to the Scottish Executive but is an independent non-ministerial department.²¹⁰ Its remit is ‘safeguard and promote the interests of current and future tenants of social landlords, people who are or may become homeless, and people who use housing services provided by registered social landlords and local authorities’.²¹¹ The Scottish Ministers formulate and implement housing policy, including social housing.²¹² Ministers appoint the Regulator and supervise some functions: The Regulator maintains a register of all Registered Social Landlords in Scotland, and

²⁰⁵ Evidence Review of the Private Rented Sector in Scotland’ (Edinburgh: Communities Analytical Services, Scottish Government, 2012), p. 6.

²⁰⁶ See e.g. the abolition of the priority need test by the Homelessness (Abolition of Priority Need Test)(Scotland) Order 2012. The Scottish Executive have estimated that around 3,000 more people a year will have the right to settled accommodation.

²⁰⁷ Housing (Scotland) Act 2001.

²⁰⁸ ‘Homes Fit for the 21st Century: The Scottish Government’s Strategy and Action Plan for Housing in the Next Decade: 2011-2020’ (Edinburgh, Scottish Government, 2011).

²⁰⁹ ‘Framework Agreement between Scottish Ministers and the Scottish Housing Regulator’ (Edinburgh, Scottish Housing Regulator, 2012).

²¹⁰ The Regulator replaced a previous agency: ‘Scottish Housing Regulator – About’ (Edinburgh, Scottish Housing Regulator, 2012).

²¹¹ Housing (Scotland) Act 2010, s. 2.

²¹² ‘Framework Agreement between Scottish Ministers and the Scottish Housing Regulator’ (Edinburgh, Scottish Housing Regulator, 2012).

assesses and reports on the activities of social landlords in carrying out their housing services, their financial health and standards of governance.

D. Regulation of private rentals - The Private Rented Housing Panel²¹³

Since devolution regulation of the private rental market in Scotland has been substantially overhauled. These reforms have ranged from the introduction of new legal standards with regard to housing condition and quality, the introduction of a tenant deposit scheme, right through to the institution of a purpose built regulatory body, the Private Rented Housing Panel which was set up in 2007. The Panel is responsible for upholding the Repairing Standard, introduced in the Housing (Scotland) Act 2006, which is aimed at improving physical conditions in private rented housing. With regard to rent, the Panel is responsible for assessing rents in order to determine whether the rent rate is reasonably in line with prevailing market forces.²¹⁴ Application to the Panel is open to private tenants holding under a short assured tenancy, or an assured tenancy, or those Scottish secure tenancies originally in the private sector.²¹⁵ The Panel also determines fair rents for those few tenants still holding under Rent Act tenancies. Where a private tenant considers that the landlord is not adhering to the repairing standard then he can contact the Private Rented Housing Panel who, after carrying out enquiries, can compel the landlord to carry out the work. The role of the Private Rented Housing Panel also extends, since October 2012, to disputes with property factors, a person hired to manage a property or common living space in a tenement.²¹⁶ Minimum standards were set for property factors, who are required to register.

²¹³ See section 1.4 above.

²¹⁴ 'Private Rented Housing Panel – Press Release' (Edinburgh, Scottish Government, 2011).

²¹⁵ Housing association tenants whose tenancy began after 1989 but before September 2002.

²¹⁶ Property Factors (Scotland) Act 2011; 'Better Dispute Resolution in Housing: Consultation on Introduction of a New Housing Panel for Scotland' (Edinburgh, Scottish Government, 2012).

E. Social housing - the Scottish Public Services Ombudsman

For a public tenant (Local Authority or Registered Social Landlord) faced with a tenancy related issue such as carrying out repairs etc. the first port of call is the complaint mechanism of the local authority or registered social landlord, failing this the tenant can contact the Scottish Public Services Ombudsman.

The Scottish Public Services Ombudsman is the office of last resort for complaints concerning public services in Scotland. The Scottish Public Services Ombudsman deals with complaints concerning councils, the National Health Service, housing associations, most water and sewerage providers, the Scottish Government and its agencies and departments, colleges and universities, prisons, and most Scottish public bodies. The Scottish Public Services Ombudsman provides advice, early resolution, investigation and reporting. In 2012-13 the Scottish Public Services Ombudsman received 689 housing complaints and dealt with 669.²¹⁷

Housing Complaints	2012-2013
Repair and maintenance	225
Neighbour disputes and antisocial behaviour	103
Applications, allocations, transfers & exchanges	57
Policy/administration	56
Complaints handling	37
Local housing allowance and council tax benefit	34
Improvements and renovation	29
Other	49

In exceptional circumstances the tenant may apply to the Scottish Housing Regulator although generally this office's main function is to ensure that local authorities and registered social landlords adhere to the Scottish Government's Social Housing Charter.

F. Sheriff Courts

Most kinds of housing dispute between landlords and tenants in the private and social rented sectors end up in the Sheriff Courts. There were 14,160 eviction cases raised in the court in 2010/11. Most of these cases were raised by social landlords and related to rent arrears. Only around 1% were evictions sought on the grounds of antisocial behaviour. The private rented sector accounts for a much smaller number

²¹⁷ 'Annual Complaints Report 2012-2013' (Edinburgh, Scottish Public Services Ombudsman, 2013), p. 7.

of eviction cases (around 500 per year), which is not surprising given that most private sector tenants lack residential security.²¹⁸ It is proposed to transfer much of the work to the First-tier Tribunal.²¹⁹

²¹⁸ Most private tenants have short assured tenancies and in this tenancy security is generally limited to a six month period after which a monthly tenancy will arise. See section 4.1 below.

²¹⁹ 'Better Dispute Resolution in Housing: Consultation on Introduction of a New Housing Panel for Scotland' (Edinburgh, Scottish Government, 2012), page 13.

3.3 Housing Policies

- **What are the main functions and objectives of housing policies pursued at different levels of governance?**

The 2011 policy document ('Homes Fit for the 21st Century: The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020') sets four major housing-related targets including that:

all unintentionally homeless households will be entitled to settled accommodation by December 2012;

all social landlords must ensure that all their dwellings pass all elements of the Scottish Housing Quality Standard by April 2015;

nobody will be living in fuel poverty in Scotland so far as is reasonably practicable by November 2016; and

improved design and greater energy efficiency in housing will by December 2020 have contributed to Scotland's commitments to reduce energy consumption by 12% and greenhouse gas emissions by 42%.²²⁰

However, the document identifies a range of challenges facing the Scottish Executive in meeting these targets. Of particular concern is the sharp decline in housing construction as well as increasingly restrictive financing of the private housing market, in particular a structural decline in mortgage availability. The demographics of Scotland have been identified as of particular concern given the projected growth and ageing of the population of Scotland, and reduction in the average size of each household. In addition to projected increases in energy prices, the Government has identified the prospect of sustained cuts to the availability of public funding, imposed on Scotland by the UK Government. Housing: Fresh Thinking, New Ideas²²¹ marked the launch of a national housing discussion in 2010.

The manner in which devolution has been designed has led to a direct housing policy conflict between the present Scottish Executive and the Westminster Parliament which is evident in various Housing policy documents. In particular, the 2011 document sets out that

we oppose UK reforms to Housing Benefit and the tenancy system, which will undermine work incentives.

Furthermore the policy document states that

the scope for Government investment is limited by the budget made available to us by Westminster, so we must change the way we invest'.²²²

The document makes a commitment to support home ownership in a balanced and sustainable way, including the growth of innovative products such as shared equity and rent-to-buy. With regard to social housing the document indicates an increased role for non-public financing for building affordable homes in addition to making

²²⁰ (Edinburgh: Scottish Government, 2011).

²²¹ 'Housing: Fresh Thinking, New Ideas' (Edinburgh: Scottish Government, 2010).

²²² 'Homes Fit for the 21st Century: The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020' (Edinburgh: Scottish Government, 2011) p. 7.

better use of existing homes, limiting the right-to-buy, and increasing the use of empty or under-occupied homes. With regard to financing house building the document sets out a 'radically different and innovative approach' including allowing housing associations to channel receipts into new build through models in which the Scottish Government's right to reclaim Housing Association Grant is waived; encouraging multi-tenure housing developments with developments for private sale or rent cross-subsidising the social rented sector; exploring the potential for shared funding of developments, with contributions from land-owners/ developers, housing associations/ co-operatives and central or local Government; and widening the sources of funding for investment in affordable housing.

In response to the projected financial restrictions deriving from the Westminster Parliament the Scottish Executive has committed to diverse financing mechanism including expanding and developing the National Housing Trust model to deliver a major increase in the number of homes for intermediate rent; to continue to invest in shared equity schemes, especially the New Supply Shared Equity scheme with private sector developers; and supporting development through an Innovation and Investment Fund, inviting bids from councils, housing associations and private bodies. In 2011-12 the Scottish Executive committed to investing £50m through this Fund. Through use of these schemes the Scottish Executive has committed to delivering 18,000 new affordable homes over the next three years. New sources of funding have been identified within the housing association sector via the European Investment Bank and a Scottish Housing Bond and access to pension fund and other institutional investment. Further financing options identified include levying additional council tax from long-term empty homes, establishing an Infrastructure Investment Loan Fund and a National Housing Investment Bank, to mobilise all possible sources of funding for housing investment. The document commits to reforming stamp duty to encourage and incentivize new investment in the private rented sector.

Homelessness

Under the Housing (Scotland) Act 1987, a person should be treated as homeless even if they have accommodation, if it would not be reasonable for the person to continue to occupy it.²²³ Homelessness policy is administered primarily by local authorities' in accordance with the duties set out in Part II of the Housing (Scotland) Act 1987 as amended.²²⁴ Under the Housing (Scotland) Act 1987 local authorities are obliged to offer a minimum of temporary accommodation, advice and assistance to all homeless persons and those at risk of homelessness. In practice this included households which are homeless or threatened with homelessness, unintentionally homeless households and those in priority need i.e. a household with children, a pregnant woman, a household that includes vulnerable people (for example due to age, ill health or other reason) and a household made homeless due to an emergency (for example fire, flood)). As part of their wider housing function local authorities must produce homelessness strategies as appropriate to levels of homelessness in their area. In administering their function with regard to homelessness local authorities must adhere to a statutory Code of Guidance on Homelessness published by the Scottish Government. The Scottish Executive

²²³ Housing (Scotland) Act 1987 s. 24.

²²⁴ Housing (Scotland) Act 2001 and Homelessness etc (Scotland) Act 2003.

passed the Homelessness Etc (Scotland) Act 2003 which committed the Scottish Government to removing the requirement that to be able to access settled accommodation, presenting households had to exhibit priority need, but this is no longer the case since the end of 2012;²²⁵ persons assessed as unintentionally homeless are now entitled to settled accommodation as a legal right.

In order to inform and influence progress towards the achievement of the 2012 target, a joint Scottish Government/COSLA steering group for that purpose was established in October 2009. With regard to homelessness prevention, in June 2010 the Scottish Government/COSLA 2012 Joint Steering group recommended a new broad policy approach centred upon Housing Options 'Hubs' approach which involves extensive collaboration with all thirty two local authorities as well as broader social partners. Five regional Hubs were created across Scotland with each Hub having a 'lead' (or 'host') authority which was the main contact for the Hub and was responsible for hosting meetings and co-ordinating the activities of the Hub. The hubs were made up of local authorities as well as external organisations including registered social landlords and third sector agencies. Each hub is required to submit an action plan setting out a number of targets to be achieved within defined deadlines and funding targets. The policy approach is focused upon offering early intervention information support to homeless persons or persons at risk of homelessness. This approach involves a holistic approach to the housing options available to the individual including all possible tenure options including council housing, housing association housing and the private rented sector. The advice offered may also incorporate a range of non-housing issues including debt advice and advice concerning health issues. The Hubs' approach allows representatives from the five Hubs to meet and share best practice and practical experience.

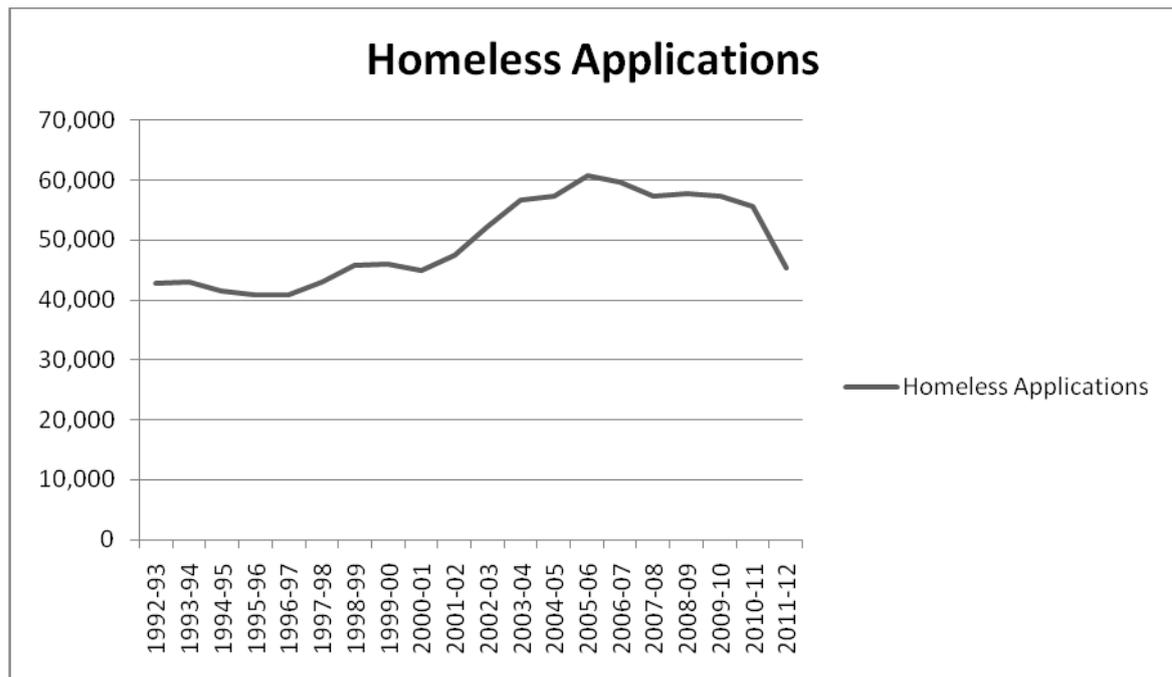
The Hubs approach has benefited local authorities by raising the profile of the housing options while also assisting local authorities to develop further housing options.²²⁶ The housing policies enacted by the Scottish Executive to engage with homelessness appear to be operating with some success. Shelter has estimated that in 2011-12, 45,322 households made homeless applications to their local council in Scotland with 35,515 households being accepted by their local authority as homeless or potentially homeless, and 32,243 of those households found to be as in priority need. Shelter has estimated that there has been a 19 per cent decrease on the number of households who made homeless applications in 2010-11.²²⁷

²²⁵ Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012.

²²⁶ 'Evaluation of the Local Authority Housing Hubs Approach' (Edinburgh: Social Research, 2012), p. 30.

²²⁷ 'National Housing Statistics' (Edinburgh: Shelter Scotland, 2012), p. 1.

Figure 20: Homeless applications in Scotland 1992-2012



The Scottish Government has recorded that from 1 July – 30 September 2012²²⁸ there were 10,269 applications for homelessness assistance. This represented a 13% reduction the same period in 2011. In the previous quarter, from 1 April – 30 June 2012,²²⁹ there were 10,395 applications for homelessness assistance. This represented a 13% reduction in the same period in 2011. The Scottish Government has set out that the fall in applications reflects the impact of homelessness policies including the housing impacts/homelessness prevention strategies adopted by most councils rather than changes in the underlying drivers of homelessness.²³⁰

Fuel Poverty

The Scottish Government has made a commitment that by November 2016, so far as is reasonably practicable, people will not have to experience fuel poverty in Scotland.²³¹ As part of this commitment the Government has designed the Energy Assistance Package to provide support to those who are likely to struggle in meeting their fuel and home energy bills. In practice, the EAP is administered by the Energy Saving Trust which offers advice and various supports to persons experiencing fuel poverty. In particular, the EAP provides a free home energy check to examine the energy efficiency of the applicant's home and make recommendations on how to improve energy efficiency. Additionally, there are benefit and tax credit checks available to qualifying applicants as well as access to lowest cost energy rates from the qualifying applicants. In 2009/10 a total of 82,213 households were assisted with most of the assistance relating to 16,348 of those. The overall budget for the EAP for

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ 'Homes Fit for the 21st Century: The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020' (Edinburgh, Scottish Government, 2011), p. 2.

the year 2009/10 was £15,000,000.²³² In addition to the EAP, the Scottish Government has designed the Universal Home Insulation Scheme which provides energy efficiency supports to qualifying Scottish households. The UNIS is directed towards reducing emission savings while helping to reduce fuel poverty. The scheme is administered by local authorities and Home Energy Scotland. The UNIS may provide free loft and cavity insulation to qualifying households.

Tenant Participation

Under the Housing (Scotland) Act 2001 the Scottish Government undertook a commitment to develop practical tenant participation. In particular, section 53 of the Housing (Scotland) Act 2001 places an obligation on social landlords, including local authorities and registered social landlords, to prepare a tenant participation strategy for promoting the participation of tenants under a Scottish secure tenancy or a short Scottish secure tenancy in the formulation by the landlord of proposals in relation to the management of housing accommodation and the provision of related services by it, so far as such proposals are likely to affect such tenants.

The Scottish Social Housing Charter

The Housing (Scotland) Act 2010 introduced the Scottish Social Housing Charter after a discussion paper²³³ gave rise to a series of extensive consultations with groups of tenants, landlords and others at road show events throughout Scotland. In particular, section 33 of the 2010 Act required that the Scottish Ministers consulted with the Scottish Housing Regulator, tenants in social housing and their representative bodies, social landlords, homeless people and other stakeholders about the Charter's contents. The Charter came into effect in April 2012 and replaced the performance standards set out in the guidance that the Scottish Ministers issued under section 79 of the Housing (Scotland) Act 2001 in November 2006. However, the charter does not replace any legal obligations that landlords have under previous legislation. The Charter was designed to improve the quality and value of the services that social landlords provide by clarifying tenant expectations of social housing and by focusing landlords on achieving particular outcomes and finally by establishing a basis for the Scottish Housing Regulator to assess and report on landlords activities. The Charter is a list of 16 results or outcomes that landlords should achieve. The Charter is not worded in mandatory terms, rather it operates to clarify what tenants and other service users can expect from their landlord. Landlord progress on achieving Charter results will be reported on annually by the new Scottish Housing Regulator. The charter will be used by the Scottish Housing Regulator (SHR) to assess landlord performance and SHR will publish its findings each year. This should help landlords and tenants to identify and share areas of good practice, so that services keep on improving. The Charter has seven sections including: equalities; the customer/landlord relationship; housing quality and maintenance; neighbourhood and community; access to housing and

²³² 'EAP Detailed Report, 2009/2012' (Edinburgh: Scottish Government, 2012), see table 4.4.

²³³ 'The Scottish Social Housing Charter Discussion Paper' (Edinburgh, the Scottish Government, 2011), p. 2.

support; getting good value from rents and service charges; and other customers. Furthermore, the Charter contains a total of 16 outcomes and standards that social landlords should aim to achieve. The outcomes and standards apply to all social landlords, except that number 12 applies only to local councils in relation to their homelessness duties; and number 16 applies only to councils and registered social landlords that manage sites for Gypsies/Travellers.²³⁴ Under the Housing (Scotland) Act 2010 the Scottish Housing Regulator is responsible for monitoring, assessing and reporting on how well social landlords, individually and collectively, achieve the Charter's outcomes.

Housing Benefit Reform

The Westminster Parliament has retained control over housing benefit. In recent years this has been a source of tension as the UK Government has proceeded to cut the rate of housing benefit in a move which is at odds with the housing policy of the Scottish Executive. The Welfare Reform Act 2012 provides for the introduction of a 'Universal Credit' to replace a range of existing means-tested benefits and tax credits for people of working age, starting from 2013. The Act implements the November 2010 White Paper, 'Universal Credit: welfare that works', which set out the Coalition Government's proposals for reforming welfare to improve work incentives, simplify the benefits system and tackle administrative complexity. The White Paper found that expenditure on Housing Benefit (HB) has risen (in cash terms) from £11,176 million in 1997-98 to £19,978 million in 2009-10 corresponding to an increase of almost 80% during this period for the whole of the UK. As a result the UK Government's June 2010 Budget made provision for cutting housing benefit. Further expenditure cuts to Housing Benefit were announced in October 2010. Additionally, the Welfare Reform Act 2012 restricts Housing Benefit entitlement for social housing tenants whose accommodation is larger than they need.

▪ In particular:

- **Does the national policy favour certain types of tenure (e.g. rented housing or home ownership (owner-occupation))?**

National housing policy is directed towards developing "a housing system which provides an affordable home for all."²³⁵ Current Government housing policy does not express a preference for a particular tenure rather current Scottish housing policy adopts a tenure neutral approach²³⁶ and housing policies are directed towards increasing the supply of housing across all tenures. Indeed, the policy takes account of the growing numbers of people whose housing needs are not met by the traditional tenures and certain housing policies are directed towards expanding mid range housing products, including shared equity and intermediate renting.²³⁷ In addition Government housing policy remains committed to encouraging multi-tenure

²³⁴ 'The Scottish Social Housing Charter' (Edinburgh, Scottish Government, 2012), p. 4.

²³⁵ 'Homes Fit for the 21st Century - The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020' (Edinburgh: Scottish Government, 2011), p. 2.

²³⁶ *Ibid.*, p. 33.

²³⁷ *Ibid.*, p. 7.

housing developments.²³⁸ In practice the Scottish Government pursues various tenure specific policies which tend to promote the different forms of tenure without excessively prioritising a single tenure. For instance the abolition of the right to buy will stem the increase in the homeownership rate while also stabilising the number of households living in the social rented sector. Further initiatives towards increasing the housing quality standards in the social rented sector are directed towards reducing the extent to which the social rented sector could be regarded as having generally poorer housing quality than the other tenures. In addition various policies are directed towards streamlining dispute resolution in the private rented sector and also raising housing quality standards in that sector. While there are still major supports available to homeownership the overall housing policy of the Scottish Government is not as generous in its support compared with the support directed to that tenure south of the border.

- **Are there measures against vacancies (e.g. fines or forced assignments of vacant houses)?**

In 2011 there were 107,000 dwellings not used as primary residences, of which 96,000 were vacant and the remainder were second homes; overall this represented 3.9% of the total housing stock.²³⁹

Recycling vacant properties as a means of expanding housing supply is a significant current housing policy in Scotland. Local authorities have discretion to reduce or retain the council tax discount on second homes and long-term empty properties to between 10% and 50%.²⁴⁰ The additional income is retained locally and routed through Registered Social Landlords (RSLs) for the provision of new-build affordable social housing to meet locally determined priorities. With certain categories of property a mandatory 50% discount applies.

In particular, vacant dwellings which subsequently undergo extensive repair after sale are exempt from council tax for 12 months; thereafter they pay 50 per cent council tax. Additionally, a mandatory 50% discount applies to dwellings vacant for less than 12 months. Such properties are exempt from council tax for the first 6 months and then pay 50% after that. In addition to lobbying the Westminster Parliament for amendment of the Council tax rate to incentivise recycling of vacant property the Scottish Executive has launched various schemes aimed at recycling former Housing Association Grant

²³⁸ *Ibid.*

²³⁹ Housing Statistics for Scotland 2012: Key Trends Summary 2011-12' (Edinburgh, Scottish Government, 2012).

²⁴⁰ Council Tax (Discount for Unoccupied Dwellings) (Scotland) Regulations 2005 I

- **Are there special housing policies targeted at certain groups of the population (e.g. elderly people, migrants, Sinti and Roma etc)?**

There are various special housing policies in Scotland. For instance there are special housing policies targeted at older people, those with disabilities and those with Supported tenancies.

In Scotland housing is provided to older people, , those with disabilities and those with Supported tenancies by local authorities and registered social landlords. The Supporting People programme is directed towards meeting the housing needs of these vulnerable groups by giving them the opportunity to continue to live in their own homes. Under this program housing needs are graded as either very sheltered, sheltered, medium dependency, adapted for wheelchair and ambulant disabled. Based on the persons need the programme will offer differing levels of support. For instance the programme will allow older people the independence of having their own flat with the security of having an alarm and a warden. At year ending March 2013, there were over 30,000 sheltered households and over 5,000 very sheltered households accommodated by public authorities and housing associations.²⁴¹ However, the scheme has not been successful with regard to meeting the housing needs of the majority of disabled persons. Indeed, one in five disabled people or people with long-term health problems who require an adapted house lives in a house that is “not at all” or “not very suitable” to their needs.²⁴² In order to address this the Scottish Government have reviewed building regulations to expand accessible housing.²⁴³ However, this is directed towards new build housing and does not have retroactive effect.

The Scottish Government does not have a dedicated housing policy directed towards Gypsies/Travellers, rather local authorities are required to consider these groups when preparing local housing strategies. Since 1998 a series of bi-annual counts of the Gypsies/Traveller population in Scotland has been conducted. In July 2009 there were a total of 684 Gypsies/Traveller households living on council or registered social landlord sites or private sites and unauthorised encampments in Scotland. In 2009 there were 229 households living in unauthorised encampments.²⁴⁴ However, a Government report has found that policies directed towards Gypsy/Travellers has not

²⁴¹ 'Housing for older people, those with disabilities and those with supported tenancies' (Edinburgh: Scottish Government, 2014), see summary chart.

²⁴² 'Homes Fit for the 21st Century - The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020' (Edinburgh: Scottish Government, 2011), p. 24.

²⁴³ *Ibid.*, p. 25.

²⁴⁴ 'Gypsies/Travellers in Scotland: The Twice Yearly Count - No. 16: July 2009' (Edinburgh: Scottish Government, 2010), p.32.

resulted in any meaningful change leaving this group to continue to experience discrimination²⁴⁵ while there are also substantial information gaps.²⁴⁶

²⁴⁵ 'Equal Opportunities Committee 3rd Report, 2012 (Session 4) Gypsy/Travellers and Care' (Edinburgh: Scottish Government, 2012), p.30. Also see 'Equal Opportunities Committee 1st Report, 2013 (Session 4) Where Gypsy/Travellers live' (Edinburgh: Scottish Government, 2013), p. 35.

²⁴⁶ 'Gypsies/Travellers in Scotland: Summary of the Evidence Base, Summer 2013' (Edinburgh: Scottish Government, 2013), p. 1.

3.4 Urban policies

- **Are there any measures/ incentives to prevent segregation, in particular**
 - **mixed tenure type estates**²⁴⁷
 - **“pepper potting”**²⁴⁸
 - **“tenure blind”**²⁴⁹
 - **public authorities “seizing” apartments to be rented to certain social groups**

Since the late 1980s there has been a mixed tenure housing policy in the United Kingdom. The drive towards mixed tenure was a reaction to the housing allocation policies of social housing which led to the concentration of the most vulnerable members of society in similar areas. Since devolution the Scottish Government has an active mixed tenure policy and in 2011 the Scottish Government published a new housing strategy, Homes Fit for the 21st Century which sets out its vision for 2020 and its strategic approach.²⁵⁰ As part of its commitment to mixed communities, the strategy aims at:

encouraging multi-tenure housing developments with developments for private sale or rent cross-subsidising the social rented sector.

While pursuing a mixed tenure policy the Scottish Government have declared the adoption of a tenure neutral approach which places emphasis on seeking sustainable choices for all households rather than encouraging a particular tenure.

The current planning framework is set out in ‘Scottish Planning Policy - Planning for Homes’ which states that:

Scottish Government policy encourages more diverse, attractive and mixed-use residential communities, in terms of tenure, demographic and income. ... As far as possible, the tenure of housing should be indiscernible from its design, quality or appearance.²⁵¹

Under the ‘Planning Policy on Affordable Housing’ local authorities can require developers to ensure that a proportion of new housing developments are 'affordable' and sets a benchmark figure of 25 per cent to apply in most cases.²⁵² Affordable is defined broadly to include housing build without subsidy such as entry level housing

²⁴⁷ Mixed tenure means that flats of different tenure types: rented, owner-occupied, social, etc. are mixed in one estate, it is the simplest way of avoiding homogenized communities, and to strengthen diversification of housing supply.

²⁴⁸ This mechanism is locating social housing flats among open market ones, so as not to gather lowest income families in one place. The concept is quite controversial, however in English affordable housing system was used for a long time to minimize the modern city ghettos problem.

²⁴⁹ This is a mechanism for providing social housing in a way that the financial status of the inhabitants is not readily identifiable from outside. It is used to avoid/minimize stigmatization and social exclusion which could be caused by living in a (openly identifiable) social stock.

²⁵⁰ The Scottish Sustainable Communities Initiative was launched in 2008. It focuses on both the environmental and social sustainability of new development

²⁵¹ (Edinburgh: Scottish Government, 2008).

²⁵² 'Planning Policy Advice Note 74: Affordable Housing' (Edinburgh: Scottish Government, 2005).

for sale, as long as it is affordable to groups identified in a local housing needs assessment. This mechanism therefore sets out a process both for the subsidy of affordable housing through the market, and also for ensuring that new developments include a mix of affordable and market housing, which may well include a tenure mix.

Scottish housing policy on mixed communities has been criticised by McIntyre and McKee who have argued that policies of mixed communities in Scotland have acted to promote home ownership to marginal groups for which home ownership may not be economically viable. They have also argued that providing generous supports for homeownership creates an aspirational tenure in the housing system and skews perception of other tenures.²⁵³

²⁵³ See Z. McIntyre, & K. McKee, 'Creating sustainable communities through tenure-mix: The responsabilisation of marginal homeowners in Scotland', *Geojournal* 77(2) (2012), p. 245.

3.5 Energy policy

The Scottish Government is committed to reducing energy consumption by 12% by 2020, as set out in the Energy Efficiency Action Plan.²⁵⁴ A considerable contribution can be gained from reducing energy use in housing. The Scottish Government has pursued a robust energy policy with the Climate Change (Scotland) Act 2009 setting a target for Scotland to reduce carbon emissions from 1990 levels across all sectors by 42 per cent by 2020 and 80 per cent by 2050. As greenhouse gas emissions from Scottish households account for around a quarter of Scotland's total emissions the Scottish Government has targeted increasing energy efficiency in housing as a means of meeting this target. The present Scottish Executive strategy for progressive enhancements of energy standards in Scottish building regulations is based on the Sullivan Report (2007).²⁵⁵ New standards came into force in October 2010, and new homes need to be more energy efficient and emit around 70% less carbon dioxide than those built to the standards that existed in 1990. For more detail on housing standards, see the section above.

Energy efficiency is a crucial component of the (social sector) Scottish House Quality Standard, the aim being particularly to improve the energy efficiency standard of social housing so that all homes meet the Quality Standard by 2015. The major reason for properties failing the Scottish Housing Quality Standard in the 2011 Survey was the energy efficiency criterion.²⁵⁶ Nevertheless, there is a broad trend of improvement across all tenure forms, with the social sector once again improving more rapidly, rising by 6 percentage points from 2009-2011. The Condition Survey conducted in 2011 revealed a considerable improvement on this front. Since 2008 every dwelling built, sold or re-let must now have an Energy Performance Certificate. As part of this system dwellings are given an energy efficiency rating on a scale from 'A' to 'G', with 'A' being the most energy efficient. However, no dwelling rated 'A' was found within the survey sample! In 2012 it found that 38% of dwellings in Scotland have an energy efficiency rating of 'D'. The worst category of homes is detached houses of which 8% have a rating of 'F' as opposed to 2% with other dwelling types. Energy efficiency is also linked to being connected to the gas grid (78% of homes with gas are rated D or better, as opposed to 61% without gas). In general dwellings in urban areas have better energy efficiency than those in rural areas.²⁵⁷

The vast majority of Scottish households have central heating with the majority of households relying on gas to heat their homes, indicating a strong reliance on fossil fuels. The split between natural gas and oil also reflects an urban/rural split with gas prevalent in urban areas, whereas rural households rely on a variety of fuels.²⁵⁸

²⁵⁴ 'Conserve and Save – The Energy Efficiency Action Plan for Scotland (Edinburgh: Scottish Government, 2010), p. 2.

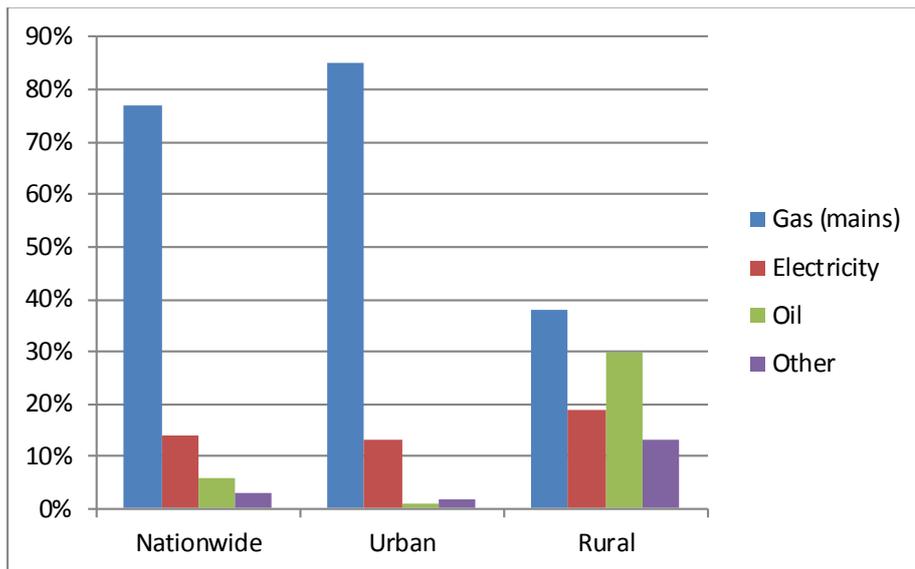
²⁵⁵ L. Sullivan, 'A Low Carbon Building Standards Strategy for Scotland' (Edinburgh: Scottish Government, 2007).

²⁵⁶ *Ibid.*, 131. The majority of dwellings that failed the SHQS failed the energy efficiency criterion.

²⁵⁷ 'Scottish House Condition Survey' (Edinburgh: Scottish Government, 2011), table 18.

²⁵⁸ *Ibid.*

Figure 21: Central Heating 2010



The Scottish Ministers are anxious to eliminate fuel poverty. Extreme fuel poverty is not being able to heat a home to an acceptable standard at a reasonable cost.²⁵⁹ Fuel poverty is, by way of contrast, where over 20% of household income is required to meet fuel costs.²⁶⁰ Roughly one in twelve households experience extreme fuel poverty, 8% of households or 185,000 households. By comparison fuel poverty was experienced by almost a third of all households in 2011. Levels of fuel poverty rose steadily from 2002 to reach a peak in 2009 after which it fell slightly.²⁶¹

²⁵⁹ 'The Scottish Fuel Poverty Statement' (Edinburgh: Scottish Government, 2002), p. 5. Also see 'Fuel Poverty Evidence Review – Defining, Measuring and Analysing Fuel Poverty in Scotland' (Edinburgh: Scottish Government, 2012), chapter 1.

²⁶⁰ 'Fuel Poverty Evidence Review – Defining, Measuring and Analysing Fuel Poverty in Scotland' (Edinburgh: Scottish Government, 2012), p. 8.

²⁶¹ *Ibid.* From 2002 levels (293,000 or 13%) fuel poverty increased to a peak in 2009 (770,000 or 33%). Rates then decreased for 2 years between 2009 and July 2011, to a level of 582,000 households (25%). Following the sharp fuel price increases in autumn 2011, fuel poverty increased to 684,000 (29%) in October 2011.

Summary table 4

	UK	Scotland - policy	Regulators - monitoring	Landlords - implementation
Policy aims				
Reduce housing costs in welfare budget	√			
Achieve the Scottish Housing Quality Standard		√	√	√
All unintentionally homeless households entitled to settled accommodation		√		
Improved design and greater energy efficiency	√	√	√	√
Elimination of fuel poverty		√		
Introduction of Scottish Housing Quality Standard,		√	√	√
Reducing vacancy rates		√	√	√
Administering allocations				√
Laws				
Energy efficiency	√	√		
Homelessness		√		
Policy instruments	√	√	√	√

3.6 Subsidization

Over the last hundred years the dominant tenure in Scotland shifted from private rented to local authority rented and to owner occupied, and throughout this period there has been widespread subsidization of the various tenure forms. There has been a concerted effort at developing a diverse housing subsidization policy in order to cater for households across a variety of tenures other than homeownership. There are a range of Government subsidies operating across all tenures in the Scottish housing market.

In the homeowner sector most subsidies are targeted towards increasing access to homeownership by allowing low income households or first time buyers more flexible entry points, beyond the traditional mortgage route, into the housing market. Other subsidies in this sector are directed towards increasing the supply of properties and supporting households which are struggling to meet their mortgage obligations. One of the main subsidies directed towards increasing the supply of houses is the Help to Buy (Scotland) scheme. This scheme is directed towards helping to stimulate Scotland's house-building industry and to help people to buy a new build home in Scotland from a house builder who has been approved to participate in the scheme. The scheme is only available on new build homes from participating house builders and on homes up to a maximum value of £400,000. The Scottish Government will help buyers to purchase the property and will take an equity stake of up to 20% of the value of the property which can be repaid at any time.

Several of the subsidies operate through the housing association sector for instance the Housing for New Supply Shared Equity is financed through the Housing Association Grant and is geared towards assisting people on low to moderate incomes who want to own their own homes but are unable to afford the purchase.²⁶² The scheme operates to allow the qualifying buyer to pay between 60 to 80 per cent of the price of the property with the remainder paid for by the Scottish Government. The shared ownership scheme is a similar scheme and is directed towards assisting people with below average income who aspire to become homeowners.²⁶³ The scheme allows the qualifying tenant to purchase a 25%, 50% or 75% share in a house or flat owned by a housing association. The purchasing tenant then pays an occupancy charge on the remainder to the housing association.²⁶⁴

The Partnership Support for Regeneration is a funding support mechanism for increasing the supply of new build housing in areas with limited private housing. In practice a grant is provided to qualifying private developers to build houses for sale. The Rural Home Ownership Grant is targeted at rural areas and provides financial support to individuals with below average incomes living in rural communities who wish to own their own home. This grant was to individuals and aimed to make it

²⁶² 'New Supply Shared Equity Scheme – Information for Buyers' (Edinburgh: Scottish Government, 2012).

²⁶³ 'The Evaluation of Low Cost Initiative for First Time Buyers' (Edinburgh: Scottish Government, 2011).

²⁶⁴ 'Shared Ownership – Information for Buyers' (Edinburgh: Scottish Government, 2012).

easier for local people in rural communities on low or modest incomes to own their own home and to meet their housing needs within their own community.²⁶⁵

The Empty Homes Loan Fund was directed towards encouraging owners of empty homes to bring these back into use as affordable housing. The Fund was open for bids until 3 October 2012 and it is projected that over the 10 year life of the fund, up to 438 houses could be refurbished.²⁶⁶

A further subsidy towards homeowners operates through the Home Owners' Support Fund, as detailed above, which comprises the Mortgage to Rent scheme and the Mortgage to Shared Equity scheme. Both schemes are directed towards assisting owners who are having difficulty in repaying a loan over their property. The mortgage to rent scheme operates to allow a qualifying applicant stay in their home by selling it to a registered social landlord thereby rendering the registered social landlord the landlord of the qualifying applicant. The mortgage to shared equity scheme is designed to allow the Scottish Government, on application from a qualifying applicant, to take a financial stake in the property which operates to reduce the amount due to the lender.²⁶⁷

There are a number of subsidies which promote access to the rental market. The Grants for Mid-Market Rent scheme is directed towards supporting low and modest income groups in their efforts to access affordable rented accommodation. This housing option is popular with people on incomes that are not quite enough to afford owner occupation but can afford to pay more than an affordable rent. Projects aimed at higher income groups are not eligible for funding. The Grants for Mid-Market Rent scheme is available to non-charitable subsidiaries of registered social landlords which are financially viable and have the power to contract with the Grant provider. They must also have the necessary skills, experience and capacity to manage the development.²⁶⁸

Several subsidies are targeted towards rural private rented housing. The Rural Empty Properties Grant is designed to increase the supply of rented housing in rural areas. The scheme provides financial assistance to lower income groups for projects that improve or convert eligible empty properties for the provision of affordable rental units. In addition, the Rural Homes for Rent scheme provides financial support to RSLs to increase new build housing for affordable rent in rural areas where the housing market is characterised by high demand.²⁶⁹

Further subsidies are targeted towards supporting persons with particular needs such as the Special Needs Capital Grant for Rent which provides financial support for increasing the supply of housing for rent for persons with particular needs. Projects funded by this grant mechanism must contribute to a local community care

²⁶⁵ 'Affordable Housing Investment Programme 2010-11 Out-turn Report' (Edinburgh: Housing Supply Division, 2011).

²⁶⁶ 'Empty Homes Loan Fund Guidance' (Edinburgh: Scottish Government, 2012).

²⁶⁷ 'Are you in Danger of Losing Your Home?: Information Booklet' (Edinburgh: Scottish Government, 2011).

²⁶⁸ 'Grant for Mid-Market Rent – Administrative Procedures for Grant Providers and Grant Applicants' (Edinburgh: Scottish Government, 2010).

²⁶⁹ *Ibid.*

strategy and be supported by the relevant statutory bodies. The scheme is open to private and charitable organisations.²⁷⁰

Those experiencing difficulty in paying their rent are supported through housing benefit and local housing allowance. These supports are available to public and private renters and represent the largest subsidy in the private rented market.

The Scottish Executive has also used various subsidies to promote council house construction. The Council House Building Fund was designed to encourage local authorities to commence new build projects. By the end of 2010-2011 almost £80 million had been allocated to 22 councils to build 3,298 houses across Scotland.²⁷¹ The Housing for Rent scheme is operated by registered social landlords through the Housing Assistance Grant. Under this scheme funding is provided for new build houses for rent which are owned and managed by RSLs. The scheme is administered in accordance with the local authorities Local Housing Strategy and Strategic Housing Investment Plan. Under the terms of the Glasgow housing stock transfer the Scottish Government was contractually committed to provide certain funding for Glasgow Housing Association (GHA) and for three other Housing Associations. The funding is directed towards stock improvements, demolitions and new builds.²⁷²

There are also subsidies directed towards the intermediate sector. The National Housing Trust is a hybrid private/public finance model aimed at utilising private sector funding in conjunction with council borrowing in order to increase the supply of properties suitable for intermediate rent schemes. The National Housing Trust was devised by the Scottish Government and the Scottish Futures Trust and is a transitional finance model geared towards moving funding for affordable housing from a grant funding model to one based on working with councils and developers and using expected future receipts from house sales. In practice, the dwellings are constructed by private sector developers who build the homes to agreed specifications. Once complete, the homes are purchased by a relevant Limited Liability Partnership which is set up to oversee progress on each developer's site. The Limited Liability Partnership pays between 65% and 70% of the agreed price to the developer. The outstanding payment is made as a mixture of loan funding and equity investment. The funding for the initial payment comes from loans made from councils to the Limited Liability Partnerships. The first phase of the National Housing Trust is expected to deliver almost 700 new affordable homes. The homes will remain available for rent for between five and 10 years, after which time they will be available for sale.²⁷³

Mixed tenure subsidies are also part of the Scottish Executive subsidisation framework. For instance the Affordable Housing Investment Programme provides funding for both housing for rent and for low cost home ownership. Most of the funding was directed towards Registered Social Landlords, however the program

²⁷⁰ *Ibid.*

²⁷¹ 'Housing Statistics for Scotland 2012: Key Trends Summary 2011-12' (Edinburgh, Scottish Government, 2012).

²⁷² 'Affordable Housing Investment Programme 2010-11 Out-turn Report' (Edinburgh, Housing Supply Division, 2011).

²⁷³ 'Variants of the NHT Model for Housing Associations – Discussion Paper' (Edinburgh, National Housing Trust, 2011).

also provided funding to others including councils, individuals and private developers.²⁷⁴ The Housing Association Grant forms the largest constituent element of the programme and is available to social landlords registered with the Scottish Housing Regulator to acquire land or buildings and to build, convert or improve housing for rent or low cost home ownership.²⁷⁵

Summary Tables on Subsidization

Summary table 5

Subsidization of private rental landlord			
	Housing benefit/ local housing allowance	The Rural Empty Properties Grant	Special Needs Capital Grant for Rent
Subsidy before start of contract (e.g. savings scheme)		Financial assistance to lower income groups to convert eligible empty properties into affordable rental dwellings	Support for increasing the supply of housing for rent for persons with particular needs
Subsidy at start of contract (e.g. grant)	-	-	-
Subsidy during tenancy	Help with rent	-	-

Summary table 6

Subsidization of private rental tenant		
	Housing benefit/local housing allowance	Grants for Mid-Market Rent scheme
Subsidy before start of contract		
Subsidy at start of contract (e.g. subsidy to move)	-	Support for low/modest income groups in efforts to access affordable rented

²⁷⁴ 'Affordable Housing Investment Programme 2010-11: Out-turn Report' (Edinburgh, Scottish Housing Regulator, 2011).

²⁷⁵ 'Affordable Housing Investment Programme 2010-11: Out turn Report' (Edinburgh, Housing Supply Division, 2011).

		accommodation
Subsidy during tenancy	Short/medium term income support covering part of rent throughout the tenancy	Support access to affordable mid-market rents

Summary table 7

Subsidization of owner-occupier						
	Home Owners' Support Fund and Mortgage to Rent scheme and the Mortgage to Shared Equity scheme	Housing for New Supply Shared Equity	Help to buy scheme	Partnership Support for Regeneration Grant	Rural Home Ownership Grant	Emp Home Fund
	Both schemes assist owners who are having difficulty in repaying a loan over their property	Assists people on low to moderate incomes to own their own homes	Helps buyers to buy a new build home from a participating home builder without having to fund all of the purchase price		Financial support to those with below average incomes in rural communities	Encourages owners to buy back as a house
Subsidy before purchase of the house (e.g. savings scheme)			The Scottish Government will help buyers to purchase the property and will take an equity stake of up to 20% of the value of the property.	Increase supply of new build housing in areas with limited availability		
Subsidy at start of contract (e.g. grant)	-	20-40% subsidy towards price of the		Grant provided to developers to build houses for	Grant provided for home purchase	Loan available Oct

		property		sale		
Subsidy during occupancy	Help with mortgage payments	-		-	-	-

Summary table 8

Subsidization of social etc. sectors			
	Social Sector	Intermediate sector	Mixed tenure subsidies
Grant	Housing Assistance Grant	National Housing Trust	Affordable Housing Investment Programme
Recipient	RSLs	Private sector funding in conjunction with council borrowing	mainly RSLs, also councils, individuals and private developers
Funding for construction etc.	Funding for RSL housing	Increase the supply of properties for intermediate rent schemes	Funding for both housing for rent and for low cost home ownership
Subsidy before start of contract			
Subsidy at start of contract	Housing for Rent scheme		
Subsidy during tenancy	-	-	-

3.7 Taxation

Legislative responsibility for taxation has not so far been devolved to the Scottish Executive, but substantial new powers of taxation have been transferred to the Scottish Parliament with further transfer of taxation powers, for example income tax, to take place in the period ending 2016.²⁷⁶

Rental income

Rental income of individual landlords is chargeable to the income tax scheme. Income here means the net income from a property that is let so that various expenses incurred in letting the property may be deducted from the income derived from rent received.²⁷⁷ These expense deductions include management fees, repairs, insurance, ground rent, wear & tear allowance, professional fees, and loan interest. Landlords are required to declare this rental income on a self-assessment tax return. If the landlord is a company it will pay corporation tax instead.²⁷⁸ Landlords which are companies are required to pay tax on profits in the form of corporation tax.²⁷⁹ This form of taxation does not apply to owner occupiers; there is no income tax charge on a principal private dwelling or any secondary dwelling.

Some landlords may be registered for Value Added Tax which is charged when a VAT-registered business sells to either another business or to a non-business customer. Landlords are required to pay the full rate of VAT (20%) for all goods and services. Owner-occupiers are also required to pay the full rate of VAT (20%) on repairs, renovations, extensions and professional fees.

Capital value

Stamp Duty Land Tax is generally payable on the purchase or transfer of property or land in the UK where the amount paid is above a certain threshold.²⁸⁰ When a landlord acquires an individual property for letting, the tax will be paid at the appropriate rate depending on the purchase price. Tax would be paid at the same rate by an intending owner-occupier. Capital Gains Tax is a tax on the profit or gain made upon sale or disposal of an asset. For landlords the sale of a property which has been held for investment is liable for Capital Gains Tax at 18%. This tax applies only to the gain in value of the property (i.e. the rise in the property's price). There is an exemption when an owner-occupier sells their principal home, and a letting exemption will be available for any period that the principal home has been let in part.²⁸¹ If a landlord dies, inheritance tax will be paid on the value of his estate²⁸² at a rate of 40% of the excess over £325,000, though no tax is paid on property passing to a spouse. The value of rental properties would be included in the estate.

²⁷⁶ Scotland Act 2012 Part III.

²⁷⁷ Income is taxable whether derived from a lease or a licence or any other occupation arrangement.

²⁷⁸ Income Tax Act 2005 part 3, Chapter 5. *UK Tax Guide 2013-14* ch. 11.

²⁷⁹ Corporation Tax Act 2010.

²⁸⁰ Finance Act 2003 Part 4, as amended; *UK Tax Guide 2013-14* ch. IX

²⁸¹ Taxation of Chargeable Gains Act 1992; *UK Tax Guide 2013-14* ch. III.

²⁸² Inheritance Tax Act 1984; *UK Tax Guide 2013-14* ch. VII; the Inheritance Tax threshold at the end of 2013 is £325,000.

Council Tax

The council tax was introduced to replace the community charge or 'poll tax' with effect from 1 April 1993. In Scotland a similar tax applies.²⁸³ The tax is a property based tax.²⁸⁴ Liability to pay council tax will generally fall on individuals residing in the dwelling in question. As such the owner occupier will be liable to pay council tax on their dwelling while residential tenants may also be responsible for paying the council tax. However in practice this may depend on the terms of the tenancy arrangement. If the dwelling is empty, the tax is paid by the owner. In general the owner pays council tax on a house in multiple occupation. Council tax benefit is available to assist qualifying households pay their council tax. This support is available to both homeowners and tenants who have low incomes and are in receipt of welfare benefits.

Summary table 8

Taxation			
Taxpayer	Owner occupier	Landlord	Tenant
Taxation at point of acquisition	Stamp Duty Land Tax	Stamp Duty Land Tax	-
Taxation during occupancy	Council tax	Income Tax or Corporation Tax and possibly VAT	Council tax
Taxation on sale	Capital gains tax (if not principal residence)	Capital gains tax	-
Taxation on death	Inheritance Tax (but capital gain written off)	Inheritance Tax (any capital gain written off)	

²⁸³ Local Government Finance Act 1992, chapter 1.

²⁸⁴ In 2013-2014 the national average council tax was £1,149.

4 Regulatory types of rental tenures

4.1 Tenancy relationships in Scotland²⁸⁵

There are a variety of tenancy relationships which operate across the rented sector in Scotland with the law relating to landlord and tenant representing a blend of judicially developed principles and, more recently, statute and the scheme of regulation applicable depends on the type of tenancy at issue. In the late 1980s the private rental market in Scotland was deregulated with the result that the statutory system of rent regulation which had defined the sector up to that point was largely replaced with a market rent system governed by the principles of contract law and statute. The vast majority of tenancies are assured or short assured tenancy agreements governed by the Housing (Scotland) Act 1988 however there are a number of other tenancy relationships which continue to operate in Scotland, albeit in smaller numbers. Since the Housing (Scotland) Act 2001 all social rented sector tenancies, whether local authority or registered social landlords, are either Scottish secure tenancies or short Scottish secure tenancies.

²⁸⁵ See section 6.1 below.

4.2 Regulatory types of tenures without a public task

▪ Private landlords

- **Are there regulatory differences between professional/commercial and private landlords?**

Scottish residential tenancy law divides into private sector and social sector; landlords are private sector if they are not in the social sector (that is Registered Social Landlords).²⁸⁶ There is no distinction between individuals and commercial landlords.

- **Please describe the regulatory types in the rental sector in your country that do not have a public task. This category may be called private or market rental housing.**

▪ Tenancies granted on or after 2 January 1989

Short assured tenancies

The short assured tenancy was introduced by the Housing (Scotland) Act 1988 for grants first made on or after 2 January 1989.²⁸⁷ This form of tenancy currently accounts for 94% of the private rented sector in Scotland.²⁸⁸ It is a form of assured tenancy so it applies where:

a separate dwelling;²⁸⁹

is let;

as the tenant's principal home; and

there is no exclusion.

As a form of assured tenancy it is subject to market negotiation of rents. The characteristic of the short assured tenancy is that there is an initial contractual grant for a period of at least six months. Following that there is no security of tenure, so the landlord may merely end any contractual extension of the initial grant by notice and will then have an automatic entitlement to repossession. Short assured tenants generally leave under a notice to quit. Because the security is limited, tenants must be served with a warning notice (in Form AT5) before the tenancy is granted. Without the warning notice the tenancy will be a (fully) assured tenancy.²⁹⁰

(Fully) assured tenancies

²⁸⁶ For completeness one should add that lettings by the Crown are outside both regimes.

²⁸⁷ Ss. 32-33; McAllister, *Scottish Law of Leases*, para. 17.63 ff.

²⁸⁸ Review of the Private Rented Sector (Edinburgh: Scottish Government, 2009) para. 4.56.

²⁸⁹ Some accommodation must be exclusive, but there may also be some shared accommodation, see section 6.1 below.

²⁹⁰ See section 6.1 below.

There is no precise language to describe assured tenants which are not short assured tenancies, but it is convenient to talk of full assurance. Again this takes effect under the Housing (Scotland) Act 1988²⁹¹ which introduced the assured tenancy for grants on or after 2 January 1989. Again as a form of assured tenancy it applies where:²⁹² a separate dwelling; is let; as the tenant's principal home; and there is no exclusion.²⁹³ In around 6% of cases the landlord grants full assurance, by omitting to serve a short tenancy warning notice. In this case the tenancy may have an initial fixed period or it may be periodic from the start. The initial rent will be negotiated in accordance with the open market rate. The tenancy confers security of tenure. A landlord can only initiate eviction procedures based on one or more express statutory grounds.²⁹⁴ It is important to point out that grounds 1 to 7 are 'mandatory' grounds while the remaining grounds are 'discretionary'. The distinction boils down to the fact that where a mandatory ground is successfully established the Sheriff is compelled to give an order for possession while with the discretionary grounds he can employ his judgement to take mitigating circumstances into account in deciding whether or not to give an order for possession. If the tenant behaves himself he will usually be entitled to stay indefinitely. The landlord may seek to increase the rent but there is a machinery to ensure that it is not raised above market levels.²⁹⁵

Other occupation arrangements

There are a wide range of tenancies that are not assured:

Tenancies in other sectors:

Business tenancies;

Agricultural leases;

Residential tenancies granted by social landlords.

Sharing arrangements/licences:

Premises are not let;

Accommodation is not a self-contained dwelling;²⁹⁶

Resident landlord;

Service accommodation;

Tied accommodation of employees.²⁹⁷

²⁹¹ Ss. 32-33; McAllister, *Scottish Law of Leases*, para. 17.63 ff.

²⁹² Housing (Scotland) Act 1988, ss 12-14.

²⁹³ These conditions matter much more for fully assured tenancies; where they are absent, see section 6.1 below.

²⁹⁴ Housing (Scotland) Act 1988, s. 16(2); sch. 5; see section 6.6 below.

²⁹⁵ See section 6.4 below.

²⁹⁶ Though some accommodation may be shared, see section 6.1 below.

Not principal home:

Company lets;

Second homes;

Holiday lets and out of season holiday lets²⁹⁸;

Other:

Student lets and out of term lets;

Mandatory grounds (these are assured tenancies but lacking full residential security):

Property required for occupation by the landlord;

Mortgage default;

Ecclesiastical property.

Many of these will operate as contractual arrangements, either contractual tenancies or licence agreements. If the arrangement does create a tenancy there will be minimum periods for notices to quit²⁹⁹ but little other regulation.

In addition to the six tenancy relationships set out above there are also common law tenancies not covered by the legislation set out above and tenancies connected with employment.

- **Are there different inter-temporal tenancy law regimes in general and systems of rent regulation in particular?**
 - **Tenancies first granted before 2 January 1989**

Tenancies initially granted before 2 January 1989 may continue to operate under the Rent (Scotland) Act 1984. The main consequences are full residential security and fair rents. The tenancy is called a protected tenancy during a contractual phase or a regulated tenancy when it relies on statutory protection. Few Rent Act tenants remain in Scotland. The Rent Acts are mainly important because of the case law determining the key concepts of tenancy law such as when a dwelling is 'separate'.

Because Rent Act tenants had full residential security, there were a number of exclusions, widely litigated, such as licences, accommodation with the provision of

²⁹⁷ P. Robson, *Housing Law in Scotland* (Dundee: Dundee University Press, 2011), ch. 3.

²⁹⁸ Out of season lets of holiday accommodation are in a separate category from holiday lets, as are out of term lets of student accommodation. They are not exclusions, but belong in your last category. i.e. they are assured tenancies without full residential security, as they can be terminated with the advent of the new holiday season or term.

²⁹⁹ Rent (Scotland) Act 1984 s. 112 (four weeks); Sheriff Courts (Scotland) Act 1907 (period of notice varies according to the duration of the tenancy).

services (a Part VII Contract),³⁰⁰ company lets and so on, indeed most of the types of tenancy outside the assured tenancy regime, though with variations of detail.

4.3 Regulatory types of tenures with a public task

- **Please describe the regulatory types of rental and intermediary tenures with public task (typically non-profit or social housing allocated to need)**

Social landlords

A statutory regime was introduced in 1980 governing tenancies granted by public sector landlords, called secure tenancies, and this was consolidated in the Housing (Scotland) Act 1987.³⁰¹ A major reform of the social rented sector took place in the early 2000s as a single social sector, the Scottish Secure Tenancy, was formed by the addition of Registered Social Landlords, which are mainly housing associations.³⁰² Tenancies granted by Registered Social Landlords since the legislation came into force in 2002 have been Scottish secure tenancies.

Scottish secure tenancies

Since 30 September 2002 any tenancy granted by a social landlord (even one granted before that date) has generally been a Scottish secure tenancy.³⁰³ The basic requirements are similar to those in the private sector, that is

a house (technical term also including flats);

let;

as a separate dwelling,³⁰⁴

to an individual;

as his principal home; and

no exclusion applies.

The Scottish secure tenancy confers full residential security on the tenant. So long as the tenant behaves himself he should have accommodation indefinitely, and if he is asked to move (for example to enable the landlord to carry out work to the property) he should be offered suitable alternative accommodation. When the tenant dies, a Scottish Secure Tenancy may be inherited twice. The tenancy agreement should follow a model and tenants have information rights and some rights to be consulted. Social landlords are expected to charge rents that are reasonable. Where the landlord opts to increase rent and the tenant disagrees then the tenant

³⁰⁰ P. Robson, *Housing Law in Scotland* (Dundee: Dundee University Press, 2011), ch. 3.

³⁰¹ Ss.44.

³⁰² The social sector does not cover lettings by the Crown.

³⁰³ Housing (Scotland) Act 2001 s. 11; McAllister, *Scottish Law of Leases*, ch. 18.

³⁰⁴ The accommodation must be self-contained and no secure tenancy arises if any important living accommodation is shared.

has the right to apply to the private rented housing panel, to see whether the proposed increase is fair.³⁰⁵

In the past the status of Scottish secure tenant was important because it was the passport to having the Right to Buy,³⁰⁶ but the right to buy is not available to tenants who were first granted their tenancy on or after 1 March 2011.

- **Specify for tenures with a public task:**
 - **selection procedure and criteria of eligibility for tenants**
 - **typical contractual arrangements, and regulatory interventions into rental contracts**
 - **opportunities of subsidization (if clarification is needed based on the text before)**
 - **from the perspective of prospective tenants: how do I proceed in order to get “housing with a public task”?**

All of these matters are considered in part two of this Report.

The Short Scottish Secure tenancy

In addition to the Scottish Secure Tenancy the 2001 Act introduced the Short Scottish Secure tenancy,³⁰⁷ which is only applicable where it would not be appropriate for a full Scottish secure tenancy to be offered. In such situations social landlords will be able, but not obliged, to offer a short Scottish Secure Tenancy instead. The Short Scottish Secure Tenancy was designed as part of a broader policy effort directed at anti-social behaviour and is primarily to be used when dealing with persons with a history of anti-social behaviour as a Short Scottish Secure Tenancy allows for easier recovery of possession than a Scottish Assured Tenancy. It can also be used in situations where temporary accommodation is appropriate, notably where temporary accommodation is provided to homeless people. The tenant is given a contractual term of at least six months, but no security beyond that contractual period or any tacit relocation.³⁰⁸ Under a Short Scottish Secure Tenancy there is no right to buy, no possibility of succession and strictly limited security of tenure.

Social sector tenancies which are not secure

Certain arrangements by social sector landlords fall outside the secure tenancy regime and therefore operate contractually. These include:³⁰⁹

non-residential property;

³⁰⁵ All these matters are considered in section 5 below.

³⁰⁶ See section 6.1 below.

³⁰⁷ Housing (Scotland) Act 2001 s. 34 ff; McAllister *Scottish Law of Leases*, para. 18.102 ff.

³⁰⁸ It is possible for a short tenancy to convert to a fully secure tenancy and vice versa. Tacit relocation can operate, as in a common law tenancy, though in both cases it can be prevented by the timeous service of a notice to quit.

³⁰⁹ Housing (Scotland) Act 2001 sch. 1; there were additional exceptions from the Right to Buy.

accommodation which is not self-contained eg a bed in a hostel;
property no long occupied by the tenant as his principal home;
service accommodation and that used by the police and fire service; and
student lets;

Right to Buy in Scotland

Tenants in the social rented sector have the right to purchase their dwelling at a discounted price, under a scheme dating from the Thatcher Government of the 1980s.³¹⁰ At present this Right to Buy is being restricted³¹¹ and may soon be phased out completely.³¹² The specialised right for crofters lies beyond the scope of this report.³¹³

(1) Recent tenants

The Right to Buy is withdrawn from any tenant whose tenancy was first granted on or after 1 March 2011.³¹⁴ It is therefore irrelevant for anyone now taking on a social sector tenancy.

(2) Tenants qualified to buy

In principle the Right to Buy attaches to any Scottish secure tenant whose tenancy was first granted before March 2011.³¹⁵ However, as we shall see, the detail of the right depends upon whether the tenancy was first granted before 30 September 2002³¹⁶ or on or after that date, and whether the tenant holds from a local authority or a Registered Social landlord; longer standing local authority tenants are treated most favourably.

The Right to Buy is subject to a residential qualification period of five years³¹⁷ and throughout this continuous period³¹⁸ the house should have been their primary

³¹⁰ Housing (Scotland) Act 1987 s. 61 ff; P. Watchman 'Sales of Council Houses', *Journal of Law and Social Sciences* 1991, 36, p. 230; McAllister, *Scottish Law of Leases*, ch. 20.

³¹¹ Housing (Scotland) Act 2010 s 141 removes the right to buy in relation to new tenancies.

³¹² The Scottish Government intends to end the Right to Buy after three years from enactment of the Bill currently before the Scottish Parliament: See 'Empowering Scotland: The Government's Programme for Scotland 2013-2014' (Edinburgh: Scottish Government, 2013), p. 84

³¹³ Crofters may have both an individual right to buy their croft under the Crofters (Scotland) Act 1993 ss 12-19, and a collective right via a crofting community body under the Land Reform (Scotland) Act 2003, Part 3. For an unsuccessful human rights challenge to the scheme see *Pairston Crofters v. Scottish Ministers* [2012] CSIH 96.

³¹⁴ Housing (Scotland) Act 1987 s. 61ZA, inserted by Housing (Scotland) Act 2010 s. 141.

³¹⁵ Housing (Scotland) Act 1987 s. 61.

³¹⁶ This is the date from which the new legislation takes effect.

³¹⁷ The initial qualification period of two years under Housing (Scotland) Act 1987 s. 61(2) was increased to five years by Housing (Scotland) Act 2001 s. 42.

³¹⁸ *Lock v. Edinburgh City Council* 2001 SLT (L Tr.) 19; there are complex provisions covering for example a case where a tenant moves out to enable work to be done to his home and is reaccommodated elsewhere.

dwelling.³¹⁹ This should be a continuous period, but there is some discretion to ignore breaks beyond the control of the tenant. A qualified tenant may choose to purchase jointly with another occupier; such an arrangement can be beneficial if the tenant does not meet lending criteria, but a child of the tenant living in the home has a good income.³²⁰

A tenant may lose his Right to Buy by ceasing to occupy it as his principal residence or by committing breaches of the tenancy agreement.³²¹

(3) Restrictions and exclusions

There are a number of exclusions from the Right to Buy of which only a sketch can be attempted. There were a variety of properties which were excluded:

accommodation for the elderly or vulnerable, especially where specially adapted eg for the elderly;³²²

property occupied under a contract of employment,³²³ including teachers' houses,³²⁴ and police accommodation;³²⁵

homes in pressured areas;³²⁶

a home in the curtilage of a non-residential building;³²⁷

property held rent free or under a licence.³²⁸

There are further restrictions on purchases from Registered Social Landlords designed to protect the stock of social housing. Tenants of housing associations acquired the right to buy, after a ten year postponement in March 2012,³²⁹ but the Right to Buy is often excluded where the landlord is a housing association, for example if the landlord is not receiving public grant, or has a portfolio of less than 100 dwellings or has obtained permission for a further postponement;³³⁰ housing co-operatives and charities are also exempt. A tenant who moves to a new supply

³¹⁹ *Johnston v. Dundee City Council* 2006 Hous LR 68 L Tr. An assignation by husband to wife may mean that neither qualifies: *Williamson v. Fife Special Housing Association* 2006 Hous LR 60, L Tr.

³²⁰ Housing (Scotland) Act 1987 s. 61(5).

³²¹ Housing (Scotland) Act 2001 inserting Housing (Scotland) Act 1987 s. 61D; after notice rent arrears or other misconduct grounds.

³²² Housing (Scotland) Act 1987 ss. 61, 69; *Davidson v. Dundee City Council* 2002 Hous LR 104; *Forsyth v. South Ayrshire Council* 2002 Hous LR 101.

³²³ Housing (Scotland) Act 1987 sch. 2 para. 1 *Smith v. Dundee City Council* 2001 Hous LR 78, L Tr.; *McAuslane v. Highlands Council* 2004 Hous LR 30; *Taylor v. Renfrewshire Council* 2010 SLT L Tr. 2.

³²⁴ Housing (Scotland) Act 1987 s. 70.

³²⁵ Housing (Scotland) Act 2001 s. 144; *Robb v. Tayside Joint Police Board* 2009 SLT (L Tr.) 23.

³²⁶ Housing (Scotland) Act 1987 s. 61B, inserted by Housing (Scotland) Act 2001 s. 142.

³²⁷ *Doman v. Edinburgh City Council* 2006 S.L.T. (L. Tr.) 37; *Fee v. East Renfrewshire Council* 2006 Hous LR 99.

³²⁸ *Cochrane v. Grampian Joint Police Board* 2000 SLT (L Tr.) 19.

³²⁹ Housing (Scotland) Act 1987 s. 61A inserted by Housing (Scotland) Act 2001 s. 44. There were also a lucky few who were first granted their tenancies before 2 January 1989 who have the same rights as the most favoured council tenants. See: *Fotheringham v. Hillcrest Housing Association* 2010 SLT (L Tr.) 13.

³³⁰ Housing (Scotland) Act 1987 s. 61 subs. (A)3 (as inserted by Housing (Scotland) Act 2010, s. 44).

social house will lose the right, but must be warned of this consequence of his move.³³¹

(4) Price and discount

The price paid for exercising the Right to Buy is the market value less the discount. Levels of discount depend upon whether the initial grant was before or after September 2002

'Modified Right to Buy', for grants on or after 30 September 2002 and before 1 March 2011,³³² and also for tenants of Registered Social Landlords who acquired Scottish secure tenancies on 30 September 2002:³³³ Houses and flats are treated the same, with a discount of 20% which can be increased according to the length of the tenant's occupation (an increase of 1% per year after the first five years' occupation); there is a maximum discount of £15,000 and a cost floor provision to ensure that a landlord does make an actual loss on a sale.³³⁴

'Preserved Right to Buy', for council tenancies (but not those held from Registered Social Landlords³³⁵) granted before 30 September 2002. The rules varied between houses and flats.³³⁶

Houses: discount between 32% - 60% depending on length of occupation;

Flats: discount between 44% -70% depending on length of occupation.

Additionally, local authorities were obliged to provide finance to tenants wishing to purchase under the scheme but unable to arrange the finance privately.³³⁷

Discount has to be repaid if the property is resold³³⁸ within three years on a sliding scale:³³⁹ total repayment in the first year, two thirds in the second and a third in the third year.

(5) Procedure

The Thatcher government expected opposition to the Right to Buy from Labour controlled councils and accordingly the Housing (Scotland) Act 1987 has a mandatory procedure and powers for ministers to override recalcitrant local

³³¹ Housing (Scotland) Act 1987 s. 61F, inserted by Housing (Scotland) Act 2010 s. 143; the form of notice is specified by SSI 2010/469.

³³² Housing (Scotland) Act 1987 s. 62 as amended by Housing (Scotland) Act 2001 s. 49.

³³³ Housing (Scotland) Act 2001 (Scottish Secure Tenancy) Order SSI 2002/318.

³³⁴ Housing (Scotland) Act 1988 s. 65; *Rizza v. Glasgow Housing Association* 2008 SLT (L Tr.) 13.

³³⁵ Except for the lucky few granted housing association tenancies before 2 January 1989.

³³⁶ Housing (Scotland) Act 1987, s. 62.

³³⁷ Housing (Scotland) Act 1987 s. 216, *Scottish Ministers v. K.* [2013] CSOH 129, shows that in the event of false statements in the mortgage application, recovery can occur under the Proceeds of Crime Act 2002 s. 266.

³³⁸ This does not include a transfer on death or to family members, nor to a compulsory purchase.

³³⁹ Housing (Scotland) Act 1987 s. 72.

authorities.³⁴⁰ The tenant must take the initiative by putting in an application to buy.³⁴¹ Within two months the landlord must either accept or refuse the application; if it accepts it must an offer to sell within those two months stating the market value, the discount and the price.³⁴² Issue of this offer completes the contract to sell, so until that moment the tenant may lose his Right to Buy by dying³⁴³ or receiving a notice to quit for misconduct.

(6) Numbers exercising right

The right to buy scheme introduced in 1980 proved highly popular with tenants in the public rented sector throughout the 1980s. In recent years however, particularly from the mid-2000s onwards there has been a dramatic decrease in the number of sales taking place to sitting tenants.

Figure 23: Right to buy sales to sitting tenants 1979-2011



This change can in part be attributed to changes in the Scottish housing market and wider economy in addition to housing policy reform in this area which recently has increasingly been directed towards reducing the number of sales under the scheme. However, there remain a vast number of households which retain a right to buy.³⁴⁴ The Housing (Scotland) Act 2010 required the Scottish Government to collect data on the number of tenants with a right to buy.³⁴⁵ In 2011-2012 almost three hundred

³⁴⁰ Housing (Scotland) Act 1987 ss 77-81.

³⁴¹ Housing (Scotland) Act 1987 s. 63; Right of Purchase (Application Form) (Scotland) Order 2011; Application Form APP 2.

³⁴² Housing (Scotland) Act 1987 s. 63; may be conditional: Housing (Scotland) Act 1987 ss63-65.

³⁴³ *McKay v. Dundee District Council* 1996 SLT (L Tr.) 9; *Ross v. Dundee City Council* 2000 SLT (Land Ct) 2.

³⁴⁴ Information must be collected and published: Housing (Scotland) Act 2010 ss. 145-147.

³⁴⁵ The Future of Right to Buy in Scotland - A consultation, the Scottish Government, Edinburgh, 2012.

thousand tenancies retained a right to buy entitlement with roughly half of these retaining a preserved right to buy and the remainder retaining a modernized right to buy, although only 27% of these were recorded as having passed the five year qualifying period.³⁴⁶

The legacy of the Right to Buy is extremely controversial because prime property was sold off without adequate provision for its replacement, the tendency for unsaleable property to be left creating sink estates, and the inequity of favouring some social sector tenants when there is such a shortage of accommodation. The Scottish Government wishes to roll back the right to buy.³⁴⁷

The discounts of up to 70% under the 'preserved' (pre-2002) right-to-buy scheme are unjustifiable. They leave social landlords out of pocket, leading to pressures on rents for remaining tenants and an eroded asset base. Under current legislation, some 230,000 tenants still have the preserved right. A study by the University of York³⁴⁸ has shown that these discounts are excessive in comparison with the lesser discount under the 'modernised' Right to Buy. We will consult on ways to remove the excessive features of the preserved right-to-buy.³⁴⁹

In fact they are now proposing the removal of all Rights to Buy.

³⁴⁶ Furthermore, 12% of tenants during 2011-2012 were prevented from exercising their right to buy.

³⁴⁷ *Homes Fit for the 21st Century: The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020* (Edinburgh, Scottish Government, 2011).

³⁴⁸ *UK Housing Review, 2006/2007* (London: Centre of Housing Policy, 2007).

³⁴⁹ *Ibid.*

Table 9: Summary of tenure types

Rental housing without a public task	
Landlords	<ul style="list-style-type: none"> • private sector • mainly small investors
Tenants	<ul style="list-style-type: none"> • highly diverse backgrounds • 12% of households rent privately • slow but consistent growth
Short assured tenancies	<ul style="list-style-type: none"> • 94% of private sector • minimum 6 month term • no long term security • warning notice required
Fully assured tenancies	<ul style="list-style-type: none"> • 6% of private sector • fixed term or periodic • long term security and succession rights • market rents • mechanism to keep rent increases to market levels
Exclusions	<ul style="list-style-type: none"> • contractual tenancies • licences
Previous regime	<ul style="list-style-type: none"> • lettings before 2 January 1989 • Rent Act tenancies • full security ad succession • fair rents • now rare • similar exclusions from full security
Rental housing for which a public task has been defined	
Landlords	<ul style="list-style-type: none"> • local authorities (13% of total households) • Registered Social Landlords (housing associations) (11% of total households)
Tenants	<ul style="list-style-type: none"> • chosen by allocation procedure • some previously homeless
Scottish secure tenancy	<ul style="list-style-type: none"> • vast majority of social sector tenants • grants before or after September 2002 • security and succession rights • reasonable rents • formerly a Right to Buy
Short Scottish Secure tenancy	<ul style="list-style-type: none"> • short fixed term • lacks security, Right to Buy etc. • often result of anti-social behaviour • or where temporary letting appropriate
Exclusions	<ul style="list-style-type: none"> • several esp. tied accommodation of employees

5 Origins and development of tenancy law

What are the origins of national tenancy law and where was and is it laid down (civil code, special statute, case law)?

Scots law governing the landlord and tenant relationship leans in structure more towards the English common law than to the civilian systems of the continent of Europe. The law is not codified, but consists of a patchwork of numerous statutes amplified by case law decisions.

In terms of an origin it is hard to look beyond the Leases Act, passed in 1449 in the aftermath of the ravages of the Black Death, which ordained that:

for the safety and favour of the poor people that labour the ground that they, and all others that have taken or shall take lands in time to come from landlords and have terms of years thereof, that suppose the landlords sell or alienate the lands, that the tacksmen shall remain with their tacks on to the end of their terms in whose hands so ever the lands come to for such rent as they took them for before.³⁵⁰

This paved the way for the transformation of the lease in Scots law from a contractual arrangement which created personal rights into an arrangement creating proprietary rights enforceable against successors in title. This was neither immediate nor perfectly implemented, but it has endured over the centuries, and is particularly noteworthy for occurring precisely fifty years before the corresponding case law decision by which leasehold terms in England became specifically recoverable against successors in title.³⁵¹

Underlying the modern statutory housing law is the Scots common law, made up of an amalgam of cases and legislation, with sideways glances at both the English common law and civilian Europe. Its distinctiveness was explicitly preserved at the Union in 1707.

Legislation has become increasingly dominant from the middle of the nineteenth century onwards, fuelled initially by concerns for housing conditions and public health. Scottish legislation was enacted at Westminster, and often in a form similar to that covering England and Wales, though it was usual for separate Acts to be enacted for Scotland in the field of housing. Special mention should, however, be made of the legislation governing tenements. The nineteenth and twentieth centuries brought tumultuous economic and social change to Scotland as Great Britain underwent agricultural and industrial revolution. Industrialisation, which took place rapidly in Scotland, led to one of the highest rates of urbanisation in Western Europe. This placed significant pressure on urban housing systems in Scottish cities, particularly Glasgow. In 1801 Glasgow's population was just over 77,000 while by 1901 the population had increased tenfold to 785,000. In order to meet the extreme increase in demand for housing large inner city buildings were subdivided into flats or tenements, and large numbers of tenements constructed, and as a result overcrowding and primitive housing conditions prevailed in Scottish cities. Little was done to alleviate these conditions until legislative intervention occurred in the late nineteenth and early twentieth century, driven by public health concerns, and only

³⁵⁰ Leases Act 1449 (in translation). Today the term 'tack' would mean a lease and 'tacksmen' would mean a tenant.

³⁵¹ *Games v. Smyth* Fitzherbert *Natura Brevium* 220 (1499).

then did housing conditions begin to improve. During this period the vast majority of Scottish households were private renters accommodated in small flats or apartments in tenements. Scots law began to adapt to this form of accommodation and over several decades customary rules concerning accommodation used in common and neighbour obligations were developed which remain considerably more advanced than those elsewhere in the United Kingdom.³⁵²

Security of tenure and rent controls for residential tenants, as concepts, date from the First World War, and became more permanent features of the legal landscape after the end of that War when the government sought to provide 'Homes Fit for Heroes'.³⁵³ The precise details of the legislation fluctuated considerably over the years, but ended up most recently in the Rent (Scotland) Act 1984, although this legislation is no longer relevant for tenancies granted since the start of 1989. Protection for residential tenants evolved at a time when Westminster retained legislative competence over Scotland, so the basic structure was common to England, Scotland and Wales, and this dictated the shape of future housing legislation, particularly its sectoral character; different regimes cover public and social residential tenancies, private sector residential tenancies,³⁵⁴ business leases and agricultural tenancies.³⁵⁵ Since the legislation of residential tenancies addresses directly such fundamental social problems, it has been heavily litigated, and a mass of case-law expounds the legislative principles with cross fertilisation between English and Scottish case law since many of the pre-devolution statutes are similar in character.

Modern housing law dates from legislation enacted at the end of the Thatcher government in 1987-88. This is premised on the operation of free market principles for assured tenancies operating in the private residential sector (housing without a public task), and on legal regulation of the activities of social landlords (housing with a public task) coupled with the Right to Buy for tenants in the public and social sector at a discounted price. Subsequent years have seen a progressive shift of housing provision from public landlords to housing associations (registered social landlords) and the creation of a single social sector (called in Scotland social housing and in this report housing with a public task).

Devolution under the Scotland Act 1998 has restored legislative power in the field of housing to the Scottish Parliament which sits once more in Edinburgh. The Scottish Parliament and the Executive have been very active in addressing issues of land tenure and housing policy, and in many ways Scottish legislation has drawn ahead of that governing housing issues in England, partly because more time is available at Holyrood to legislate for matters of social concern.

Who was the political driving force? Was it based on a particular legal philosophy (e.g. socialism)? Is there a particular philosophy behind the rules (e.g. protection of the tenant's home as in Scandinavia vs. just a place to live as in most other countries).

³⁵² The most recent legislation is the Tenements (Scotland) Act 2004.

³⁵³ Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, as repealed and re-enacted in the Increase of Rent and Mortgage Interest (Restriction) Act 1920.

³⁵⁴ Beyond the scope of this study is the Long Leases (Scotland) Act 2012; McAllister, *Scottish Law of Leases*, ch. 8.

³⁵⁵ Also beyond the scope of the study is crofting, governed by the Crofters (Scotland) Act 1993; McAllister, *Scottish Law of Leases*, ch. 16.

Broadly speaking four periods can be identified in relation to the politics driving Scottish housing law reform.

The common law in Scotland, as in England, derives from a liberal, free market, tradition, its essentials settled in the eighteenth and nineteenth centuries, at a time when intellectual life in Edinburgh was dominated by liberal thinkers such as Adam Smith, so it is no surprise to find that the Scots common law governing landlord and tenant was largely formulated within this tradition. In practice the common law was weighted in favour of the landlord, since landlords could afford to litigate, and free market negotiation inevitably leant towards landlords who operated in a market context of a scarcity of accommodation and the inherently weaker bargaining position of tenants.

Legislation has become increasingly interventionist since the middle of the nineteenth century. In its conception it was originally utilitarian and paternalistic, concerned to improve public health and the lot of poorer tenants. However, during the twentieth century, starting during and immediately after the First World War,³⁵⁶ there was a more overt move towards tenant protection, that is an attempt to redress the inherent imbalance in landlord and tenant relationships. It would not be correct to describe this as socialist in conception, certainly not in the sense that socialism existed in Russia after 1917 or in eastern Europe after 1945, since its proponents included both those on the left politically, and those seeking to counter the attractiveness of left wing politics. Evolution of a concern for social interests in tenancy law is broadly coincident with the widening of the franchise to create a truly democratic basis for government for the first time. For much of the twentieth century, tenant security was politically contentious, in the sense that the schemes of tenant protection were often changed when a new government was elected, though it must be remembered that the changes of power occurred at Westminster; Labour was always more firmly entrenched in Scotland than were the Conservatives. Scotland was distinguished from the remainder of the UK by a very high proportion of public sector housing. Concern to protect a tenant's home led to sectoral legislation, as in England, with a residential/commercial divide that appears to be much more marked than in many European countries. A major theme of modern British scholarship in land law is what, to cite the title of Lorna Fox-O'Mahoney's book, consists of *Conceptualising Home*, a tendency which manifests itself in landlord and tenant law by a distinctive regime for residential tenancies.

A clean break with traditional housing law occurred in the late 1980s with a move towards the open market negotiation of rents in the residential sector. Regulation of rents was removed by the Thatcher government for new tenancies by the Housing (Scotland) Act 1987³⁵⁷ and the guiding principle of the assured tenancies legislation in the private residential sector is now market negotiation of rents. This was accompanied by a reduction of private sector security of tenure intended to encourage investment by private landlords. (However, in practice there is considerable public control because a rent level is set for the purposes of the calculation of housing benefit.) Abolition of rent controls in the late 1980s was driven by a political belief of the Thatcher government that market allocation of housing and prices is more efficient than is state control of rents. These Thatcher reforms have emphasised the sectoral division dating from the early 20th century between the private residential sector and public/social housing. In response to the poor housing

³⁵⁶ As mentioned above.

³⁵⁷ The Housing (Scotland) Act 1988 introduced assured tenancies in the private sector.

conditions, local authorities had taken over from private landlords as the dominant providers of housing in Scotland and in the post-war period substantial urban development projects were carried out and households were increasingly relocated from inner city tenements to council operated terraced housing estates. At this time comprehensive pieces of legislation were passed setting out the housing role of the local authority as well as the rights and duties of the parties to a public tenancy. In this way there came about a legal division between social housing and private rented housing, as housing in the private rented sector remained governed by the common law as well as specialist statutes. These were consolidated in 1980 and 1987 and afterwards in 2001. The Thatcher government introduced another truly radical initiative, the right to buy for tenants of public sector dwellings. This had a profound political influence in the short term, but left a contentious legacy for the future.³⁵⁸ What is more surprising is that a consensus arose around these radical reforms, and that no steps were taken to revert to the traditional system of rent regulation or to undo the right to buy when 'New Labour' gained power under Tony Blair in 1997. From that time forward the implications of the right to buy have been realised, with a substantial reduction in public sector stock and segregation of those estates remaining in public hands. During this era, attention has gradually shifted from councils as public sector landlords to the provision of social housing by housing associations, and large scale transfers of housing stock from the public to the social sector. Other recent concerns have been limiting entitlement to public sector housing to those with the right to reside in the UK, and limits to security in the interests of tackling anti-social behaviour.

Finally mention should be made of the continuing debate about Scottish independence. Clearly the ruling Scottish executive from the Scottish Nationalist Party is anxious to present policies which are popular whilst they seek a mandate through a referendum for political independence, and so housing policy is partly being driven by a desire to present distinctive and attractive policies to the Scottish electorate. However, it is also apparent that Scottish housing law and policy has been going its own way from the early years following devolution and indeed prior to the current tenure of the Scottish Nationalist Party.³⁵⁹ For instance the Housing (Scotland) Act 2001 and the Housing (Scotland) Act 2006 were introduced by a Scottish executive from a Labour/Liberal coalition government and the resulting development of Scottish housing law during this period could also be said to reflect the traditional Labour dominance in Scotland.

What were the principal reforms of tenancy law and their guiding ideas up to the present date?

If attention is confined to housing law at the level of the individual tenant as it operates today, the law is essentially statutory and contained in a small number of statutes enacted from 1984 onwards. The earlier statutes were passed by the United Kingdom Parliament at Westminster and tend to follow English models, but since devolution took effect legislative competence has passed to the Scottish Parliament at Holyrood in Edinburgh, the first relevant Act of the Scottish parliament being

³⁵⁸ The Scottish Executive is currently proposing legislation to withdraw the right in three years' time.

³⁵⁹ For instance the Housing (Scotland) Act 2001 and the Housing (Scotland) Act 2006 were introduced by a Labour/Liberal coalition government.

passed in 2001. Although housing law remains in many ways similar to that operating in England, the devolved Scottish authorities have shown a marked tendency to innovate in the field of housing policy, and the position in Scotland is in many ways now more advanced than English law. This is because more legislative time has been available north of the border. The law governing individual tenants is mainly contained in three Acts of the United Kingdom parliament and a number of Acts of the Scottish Parliament, but there are proposals for major reforms in a Bill introduced into the Scottish Parliament in November 2013.³⁶⁰

Rent (Scotland) Act 1984.

This Act, and its English counterpart the Rent Act 1977, is primarily of historical interest. Throughout much of the twentieth century housing law throughout the United Kingdom was extremely interventionist in the private rental sector, seeking to redress the perceived imbalance of power between landlords and tenants in favour of the latter. Intervention was manifested in two main ways. First, security of tenure was conferred on a well-behaved tenant, which was virtually a guarantee of life long security coupled with succession rights for family members on the death of the tenant. Second, controls were imposed on recoverable rents, and this, in turn, required limits on other liabilities, such as premiums for the grant of a lease. After 1918 residential security became a political ping pong, with increased controls during periods of Labour government and relaxations during periods of Conservative administration,³⁶¹ the changes associated with confusing shifts of detail and terminology. The ultimate scheme provided for protected tenancies under what were generally known as the 'Rent Acts' which conferred on tenants long term security of tenure and a limit to a 'fair' rent set substantially below market levels because scarcity of accommodation was ignored. The legislation was consolidated in Scotland in 1984, towards the end of the time that it was possible to create protected tenancies, but this remains important because many of the key concepts of private residential tenancy law were litigated during the Rent Act period, and in particular the basic definition of the types of tenancy protected by modern legislation is drawn directly from the English and Scottish Rent Acts. The fair rent scheme fell victim to the Thatcher government and it has not been possible for a landlord to grant a protected tenancy to a new tenant since the beginning of 1989.³⁶²

Housing (Scotland) Act 1987.

The Rent Acts had created the conceptual divide between private sector rentals and 'housing with a public task', the former being highly regulated and the latter left largely to the unfettered discretion of local authority landlords. This Thatcher era legislation enacted a regime covering public sector tenants,³⁶³ though in subsequent years the emphasis has shifted towards 'social landlords' – primarily housing associations.

³⁶⁰ This summary does not cover the homelessness legislation which is treated immediately below.

³⁶¹ Prior to devolution this reflected the party in power of Westminster rather than in Scotland, which was traditionally Labour, but has recently been governed by the Scottish Nationalist Party, which favours independence from the United Kingdom.

³⁶² The assured tenancies regime applies to any new tenancy granted in Scotland after 2 January 1989, the 1st being devoted in Scotland to recovering from Hogmanay.

³⁶³ This was a re-enactment of the Tenants' Rights etc. (Scotland) Act 1980.

The depth of this divide explains why it is so difficult in English or Scottish law to set out the position in any given fact situation without first drawing the distinction between the private and the public/social sector. Part III of the 1987 Act set out the concept of secure tenancies for residential property held from public authorities.³⁶⁴ Security of tenure largely mirrored the security afforded to a private sector tenant under the Rent Act, with security of tenure, succession rights on the death of the tenant, and strict controls on the grounds for repossession; unfortunately, although the practical effect was very similar, the legislation was drafted afresh, and this has created some significant conceptual dislocations between the two regimes. So in the public sector there was strong security of tenure, reflected in the term 'secure tenant' but local authority landlords were largely left to their own devices when setting rents. Although the security of public sector tenants was greatly enhanced, the main reason for legislating was not to define public sector rights but rather to facilitate the expansion of the Right to Buy.³⁶⁵ A tenant in the public sector who had served a qualifying period became entitled to acquire the home at a discounted price and also had the right to a mortgage to assist with funding the price. A detailed procedural mechanism was laid down. Subsequent amendments are considered in the detailed discussion of the Right to Buy. This scheme was extremely attractive to tenants and enabled many former tenants to migrate to home ownership, a political masterstroke, but twenty five years on the legacy of the Right to Buy is extremely controversial. Little provision was made for investment in new public or social housing, and so the Right to Buy has impoverished the stock of affordable housing, to such an extent that the Scottish Executive has laid a bill before Parliament proposing to abolish the Right to Buy after a period three years.³⁶⁶ The 1987 Act also began to tackle the issue of sub-standard houses, laying down the tolerable standard and action to be taken against what was intolerable, as well as repair, closing and demolition orders and tackling overcrowding. Existing rules for grants to assist in the repair of housing stock were consolidated. It also consolidating the licensing rules for Houses in Multiple Occupation.

Housing (Scotland) Act 1988

This legislation, in the last full year of the Thatcher government laid down what has proved to be an enduring basis for the private rental sector. The Scottish legislation more or less follows the Housing Act 1988 governing the private sector in England but with one key difference explained below. It was no longer possible to grant Rent Act (protected) tenancies. Instead the legislation introduced the concept of the assured tenancy. As with the scheme replaced, it was necessary for the tenant to take a lease of a self-contained dwelling (described in Scotland inaccurately as a 'house'), but the rights of the tenant were greatly attenuated. Under a full assured tenancy, the tenant has security of tenure not unlike that available to a Rent Act protected tenant, but in practice this is virtually a dead letter and few tenants enjoy this protection. The key change made in 1988 was a move to market rentals. The concept of the fair rent was swept away, no account was to be taken of market

³⁶⁴ Powers over housing were vested in district rather than regional councils until 1996, when all councils were reorganised into unitary authorities.

³⁶⁵ Originally in the Housing (Scotland) Act 1987 ss 61-84. The right to buy was introduced by the Tenants Rights etc (Scotland) Act 1980 (which also introduced the secure tenancy), and these provisions were consolidated and amended by the 1987 Act; see section 1.4 above.

³⁶⁶ See discussion of the Housing (Scotland) Bill 2013 immediately below.

scarcity, and landlords and tenants were left to negotiate initial rents for themselves.³⁶⁷ This obviously increased the return to landlords and led to a reinvigoration of the private rental market. However, since many tenants were unable to afford the rents demanded, it led to an increase in housing benefit claims, and unsustainable pressure on the housing benefit budget. No attempt was made during the period of Labour government between 1997 and 2010 to reverse the assured tenancy reform.

In practice it is rare for tenants to be granted fully assured status. This is because the Housing (Scotland) Act 1988 provided for the grant of short assured tenancies, and this has become the almost universal practice in the Scottish rental market. In England these are called 'shortholds' and they have become the default form of tenancy in the private rental sector,³⁶⁸ but in Scotland it is necessary for the landlord to serve a warning notice before granting a short assured tenancy, so full assurance remains the default position. Service of warning notice is so beneficial to landlords, however, that few neglect this simple precaution and the Scottish private rental market is dominated by offers of short assured tenancies.³⁶⁹

Housing (Scotland) Act 2001

We now pass to legislation of the devolved Scottish Parliament. Very early in its existence it legislated for feudal reform of basic land tenure³⁷⁰ before turning to housing. This legislation consolidated the existing public and social sector legislation under the new name 'Scottish Secure Tenancies', including the basic nature of the tenancy, repossession, succession, variations (including rent increases), repairs and controls of assignment and subletting. It substantially restricted the right to buy in the case of new tenancies, inter alia by greatly reducing the amount of discount available.³⁷¹ An innovation was the 'short Scottish secure tenancy',³⁷² mirroring the provisions in England for the demotion of tenants with a record of anti-social behaviour. Housing functions became vested in the new Scottish executive.

Antisocial Behaviour etc. (Scotland) Act 2004

Part 7 of this Act set out a procedure whereby a local authority could serve a notice on the landlord of a house where antisocial behaviour has occurred requiring the landlord to take the action specified in the notice to deal with the behaviour complained about. Part 8 introduced a register of private landlords, and gives the authority power to vet prospective landlords and screen them for matters such as offences of violence and frauds, and to register those that pass the test of being fit and proper persons. Registration was introduced in April 2006 and the registration scheme was amended by the Private Rented Housing (Scotland) Act 2011.

³⁶⁷ Controls were imposed to limit rent increases to market levels, so as not to negate the assurance of full security of tenure; controls are also imposed to protect the housing benefit budget.

³⁶⁸ Short tenancies could be created between 1 December 1980 and 1 January 1989, but it is unlikely that any such tenancy still exists.

³⁶⁹ The Scottish Executive has estimated that short assured tenancies account for 94% of the tenancies in this sector. See *Review of the Private Rented Sector* (Edinburgh: Scottish Government, 2009), para. 4.56.

³⁷⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000.

³⁷¹ McAllister, *Scottish Law of Leases*, para. 20.1.

³⁷² S. 34ff.

Housing (Scotland) Act 2006

Provision was made by this Act for the repairing standard to be required of private sector housing, as well as protection for tenant's deposits, and improved licensing of Houses in Multiple Occupation.³⁷³ It also made amendments to the Mobile Homes Act 1983 which provides limited protection for those living in mobile homes.

Housing (Scotland) Act 2010

Provision had been made in the Housing (Scotland) Act 2001 for housing associations in language mirroring that in England, that is "Registered Social Landlords",³⁷⁴ but in 2010 this was turned into a comprehensive scheme of regulation and inspection under the Scottish Housing Regulator.

Housing (Scotland) Bill 2013.

This bill introduced in November 2013 contains a number of significant proposals:

- abolition of the right to buy after a period three years;
- amendments to the rules of allocation of social housing, the short Scottish secure tenancy and the Scottish secure tenancy;
- transfer of jurisdiction over repossessions and most other aspects of private sector assured tenancies to a First-tier Tribunal;
- a regulatory framework for letting agents;
- a scheme for licensing of mobile home sites; and
- amendments to the law affecting the condition of private housing.

Human Rights:

To what extent and in which fields was tenancy law since its origins influenced by fundamental rights enshrined in

- **The national constitution**

There is no constitutional right to housing in Scotland, simply because neither the United Kingdom nor Scotland has a written constitution.

- **International instruments, in particular the ECHR**

In the field of housing law the European Convention on Human Rights has a pervasive influence in Scotland³⁷⁵ as it has throughout the United Kingdom. Its influence is probably more direct in the United Kingdom than in many other European states. Several reasons can be advanced. First the Human Rights Act 1998 incorporated the Convention directly into the national legal systems. British law does not recognise the public/private divide recognised in many continental jurisdictions, so human rights arguments are raised directly in many civil cases. There is no separate body of administrative courts to conduct judicial reviews.

Public bodies are required not to infringe the human rights of citizens, so in many aspects of housing law, the decisions of public officials are directly open to scrutiny. This can affect, for example, the decision to take repossession proceedings against

³⁷³ These reforms came into force respectively on 3 September 2007, 21 December 2010 and 31 August 2011.

³⁷⁴ Before 2001 councils granted secure tenancies and housing associations granted

³⁷⁵ F. McCarthy 'Human Rights and the Law of Leases' (2013) 17(2) *Edinburgh Law Review* 184.

a public tenant. Social landlords are not generally public bodies when acting as landlord, but they can become subject to a direct duty to observe the human rights of their tenants when that tenant has been allocated housing under the public allocation rules.³⁷⁶ Even when a private landlord seeks possession from a particular tenant human rights issues come into play despite the horizontality of the action raised because the court hearing the repossession is itself defined to be a public body which is required to act in a fashion that is human rights compliant, and very often this requires that the court has a discretion to consider the proportionality of ordering possession in each individual case.

Another factor in the explosion of case law on human rights as applied to housing, is the wide range of substantive rights that may come into play. Perhaps central to the current investigation is Article 8 which guarantees respect for the home, and which is obviously brought into play whenever any public decision adversely affects a tenant's home, not least when it is sought to evict him. Any residential repossession, therefore, requires consideration of whether or not the infringement upon the home is justified in the particular circumstances. Probably next in importance is Article 6(1) which confers procedural guarantees whenever a civil right is determined. This is of central importance because Scottish law gives rights to the allocation of housing to public sector applicants and also rights to the provision of housing those unintentionally homeless (as indicated immediately below) and the form of the two legislative codes makes these rights justiciable and so brings into play the procedural guarantees of Article 6. Next, there is Article 1 of Protocol 1 guaranteeing that the enjoyment of possessions will not be subject to unjustified controls. In recognising that many controls on tenants are justified, this article is self-limiting, and is probably less significant in pure housing law than the articles previously discussed. However, it can be of great use to a landlord, since every decision in favour of a tenant is an interference by the court with the enjoyment by the landlord of his possessions. Finally, mention should be made of Article 14, the prohibition of discrimination in the exercise of Convention rights. The Convention is not in general a good way to address substantive injustices in the law of landlord and tenant, but the prohibition on discriminatory rules (in the narrow context of Article 14) does provide a vehicle to attack substantive rules, by arguing that they impact differently on differently placed tenants.

It is scarcely possible to overstate the amplitude of the explosion in housing litigation generated by the Human Rights Act 1998.³⁷⁷ The main areas affected are challenges to:

- administrative decisions by housing officials;
- homelessness decisions;
- allocation decisions;
- discretionary decisions about repossessions; and
- mandatory repossession grounds.³⁷⁸

In some areas, notably the standard of judicial review, there have been a series of strikes by the Strasbourg court against the decisions of the domestic courts, but these tend to arise not because the standards that a tenant is entitled to expect have been flouted, but because of Convention law and domestic law are not compatible at

³⁷⁶ *R. (Weaver) v. London and Quadrant Housing Trust* [2008] EWHC 1377 (Admin); contrast *YL v. Birmingham City Council* [2008] 1 AC 95, HL (patients in private care home where they had been placed by the local authority).

³⁷⁷ McAllister, *Scottish Law of Leases*, para. 18.6 ff.

³⁷⁸ McAllister, *Scottish Law of Leases*, para. 18.11 ff.

a technical level. The most important decision in England is *Manchester City Council v. Pinnock*³⁷⁹ in which it was held that the domestic courts must, in order to comply with Strasbourg jurisprudence, have power to assess the proportionality of ordering repossession. This particularly affected the so-called “mandatory” grounds of repossession. Nevertheless, *Pinnock* has been followed in *South Lanarkshire Council v. McKenna*³⁸⁰ in which case it was held that a local authority was required to give reasons for seeking repossession in order that proportionality could be considered, even though there was no express requirement for this in the legislation. On balance, the human rights case law has generated a great deal of heat but has illuminated relatively few cases.

The United Kingdom has acceded to a number of international human rights instruments which contain provisions relating to housing rights, most notably article 16 of the European Social Charter, 1961, but the utility of these is limited because the rights have not been made justiciable.

- **Is there a constitutional (or similar) right to housing (droit au logement)?**

The right to housing in Scottish law is statutory in character and divided between two different, though closely related, regimes.

(A) Homelessness

UK wide legislation dating from 1977³⁸¹ was re-enacted separately for Scotland in Part II of the Housing (Scotland) Act 1987. As already explained,³⁸² a local authority is under a duty to provide accommodation when an applicant is (a) homeless and (b) not intentionally homeless, whether or not the applicant can demonstrate a priority need for accommodation. The duty is to “secure that accommodation becomes available for his occupation”, first on a temporary basis and then as soon as possible permanent accommodation.³⁸³ Lesser duties apply to those threatened with homelessness or becoming homeless intentionally, but in all cases a careful enquiry must be carried out into the circumstances of a person presenting themselves as homeless. This legislation is structured in such a way as to create justiciable rights for homeless people since duties are imposed throughout on local authorities, who may require social landlords to cooperate by making accommodation available to a person qualifying as homeless.³⁸⁴ Review procedures are laid down, but the ultimate decisions remain susceptible to judicial review and to human rights arguments.³⁸⁵

Examples of successful³⁸⁶ challenges to homelessness decisions in the courts are not as numerous in Scotland as they are in England. One example is *McAuley v. Highland Council*³⁸⁷ in which the local authority failed properly to consider the circumstances in which a couple left their home after a window

³⁷⁹ [2010] UKSC 45.

³⁸⁰ [2012] CSIH 78; A. Stalker ‘Article 8 and Evictions by Public Authorities’ (2009) 380 *SCOLAG* 145; G. Junor ‘A *Pinnock* Defence in Scotland?’ 2011 *SLT (News)* 45.

³⁸¹ Housing (Homeless Persons) Act 1977.

³⁸² See section 6.1 below.

³⁸³ Housing (Scotland) Act 1987 s. 31(2).

³⁸⁴ Housing (Scotland) Act 2001 ss 5-6.

³⁸⁵ Housing (Scotland) Act 1987 s. 35A inserted in 2001.

³⁸⁶ For unsuccessful cases see e.g. *Ellis v. Angus Council* 2011 *SLT* 942, and *Morgan v. Stirling Council* 2006 *SLT* 962.

³⁸⁷ 2003 *SLT* 986.

had been smashed and so failed to decide properly whether they were homeless intentionally or unintentionally. Another example is *Gallacher v. Stirling Council*³⁸⁸ where the issue was the suitability of the accommodation on offer to a homeless family.

(B) Allocation of social housing (housing with a public task)

Allocation of social housing takes place within a framework first laid down in 1987.³⁸⁹ This does not provide directly justiciable rights to housing in quite the same way, but rather requires the local authority to lay down a framework for allocation decisions and to reach decisions within that framework. It may be difficult to challenge the actual decision reached, but decisions can be attacked for procedural flaws. Thus, for example, in *Gallacher v. Stirling Council*³⁹⁰ a decision about the allocation of housing to a person who was homeless was ruled to be illegal because the authority had a policy covering the situation which was not, as was required, publicly available.

In summary the right to housing in Scottish law is provided by a duty on a local authority to rehouse those found to be unintentionally homeless and a framework for making allocation decisions, both of which are justiciable. A tenant allocated housing under these rules may continue to enjoy stronger protection in human rights jurisprudence than the generality of tenants. Patriation of the European Convention rights has increased the scope for judicial challenges and emphasises the quasi-constitutional character of these rights.

³⁸⁸ 2001 SLT 94.

³⁸⁹ Housing (Scotland) Act 1987 s. 20 ff, as amended.

³⁹⁰ 2001 SLT 94.

6 Tenancy regulation and its context

6.1 General introduction

- **As an introduction to your system, give a short overview over core principles and rules governing the field (e.g. basic requirements for conclusion, conditions for termination of contracts by the landlord, for rent increase etc.; social orientation of tenancy law in force; habitability (i.e. the dwellings legally capable of being leased))**

Statute has overlaid the common law of leases so effectively in the field of residential tenancies that it is necessary at the outset to differentiate the key types of tenancy, Scottish law being sectoral.³⁹¹ The discussion which follows only discusses new leases granted under current law.

[1] Short assured tenancy – private sector

The private rented sector is dominated by the short assured tenancy. Detailed conditions will be explained later,³⁹² but in essence an assured tenancy is a lease of a separate dwelling, which includes flats as well as separate buildings, to an individual who occupies the dwelling as his principal home.³⁹³ The tenancy is a short assured tenancy if the initial term is for at least six months and the landlord serves a notice before the grant warning the tenant of his limited security.³⁹⁴ This tenancy will be governed by contractual rules for its duration. At the term date, the 'ish', the parties may contract for a new tenancy or a new tenancy may be implied from the payment and acceptance of rent (that is by tacit relocation), and in either case this new tenancy will continue to be a short assured tenancy. The landlord will have an automatic right to possession of the property when the current contractual arrangement comes to an end, that is either at the ish of the initial grant or when any express or implied relocation ends.³⁹⁵ The rent is a matter for free market negotiation, but if housing benefit is used to cover any of the rent payment, there will be limits on the rent level accepted for benefit claims. It will be seen that the landlord can increase the rent payable under a short assured tenancy most easily by granting a series of short contractual terms, thus reserving the possibility of increasing the rent at the next contractual renewal. Residential property must be habitable and the landlord must carry out major repairs, though it may obviously be difficult for a tenant lacking long-term security to make a complaint about such matters.

[2] Secure tenancy – social sector

An alternative to the private sector is the social sector consisting of local authority landlords and registered social landlords. Scotland has long had a single housing

³⁹¹ 'Lease' and 'tenancy' are interchangeable terms, but 'tenancy' tends to be used for shorter and less formal arrangements.

³⁹² See section 6.3 below.

³⁹³ Housing (Scotland) Act 1988 s. 12; if granted to joint tenants one of them must occupy as his principal home. If the arrangement does not relate to a separate dwelling, the occupier will lack even the minimal security now described.

³⁹⁴ Scottish law departs from English law where, since 1996, no warning notice has been required.

There is a smaller market in fully assured tenancies.

³⁹⁵ Housing (Scotland) Act 1988 s. 13.

tenure throughout this sector, the Scottish Secure Tenancy, which is common whatever the nature of the landlord. The normal means of access to this sector (housing with a public task) would be by registration on a housing waiting list, though the wait may be substantial given the under investment in social housing stock over the years, though it may be shortened considerably by scoring highly in the points allocation process. People judged to be unintentionally homeless will have priority in seeking permanent accommodation. Some housing associations may also advertise the availability of accommodation. When a person reaches the top of the waiting list, an offer of accommodation will be made by a social landlord. The scope for negotiation is limited to the extent that it is permitted to reject offers and the extent to which the accommodation offered is unsuitable.

The social sector is dominated by the Scottish secure tenancy which is in essence a lease granted by a social landlord of a separate dwelling to an individual who occupies the dwelling as his principal home.³⁹⁶ The tenancy granted will follow a model prepared by the Scottish Executive and available on their website, extending to twenty seven pages and accompanied by a summary extending over four pages.³⁹⁷ The agreement must be signed by each party and the signatures witnessed. Social landlords are expected to grant Scottish secure tenancies in normal circumstances. The basis is an initial fixed period followed by a tacit relocation on a periodic basis, which may be weekly, fortnightly, four weekly or calendar monthly. However, the tenant has security of tenure so the landlord is prevented from simply terminating the relocation by notice; it will be necessary for the landlord to seek a court order for repossession, and this will only be granted on proof of a ground for possession. A well behaved tenant should be able to stay indefinitely, will have the opportunity to buy his property at a discount if he acts quickly, and will be able to pass on his tenancy by way of succession to family members living with him at his death. There are specific circumstances where it is permitted to grant a short Scottish secure tenancy, though the name is really a contradiction in terms since it confers a term of at least six months but no security thereafter.³⁹⁸ Otherwise full security must be given. The landlord will be obliged to carry out the major structural repairs.

- **Is the position of the tenant also considered as a real property right (and therefore also governed by property law) or (only) as a personal (obligatory) right?**

All leases take the form of a contractual arrangement between landlord and tenant and one might expect Scottish law to follow the Roman tradition in recognising the position of the tenant as personal, either with or without the Germanic tradition of persistence of a lease on sale. By way of contrast, the English common law allowed the lease to evolve into the form of an estate, an ownership right to set alongside the freehold, and long leases are commonly recognised.

³⁹⁶ Housing (Scotland) Act 2001 s. 22; if granted to joint tenants one of them must occupy as his principal home. If the arrangement does not relate to a separate dwelling, the occupier will lack any security and the occupation agreement will operate as a contractual agreement.

³⁹⁷ Model Scottish Secure Tenancy Agreement (July 2002).

³⁹⁸ Housing (Scotland) Act 2001 ss 34-37.

In Scots law the lease developed from a purely contractual arrangement which conferred only a personal right, into a contractual – proprietary legal hybrid enforceable against the singular successors of the lessor. The chief break from the Roman tradition took the form of a remarkable piece of social legislation, the Leases Act 1449, which was introduced to give security to agricultural workers, who in consequence of the devastation of the Black Death, enjoyed an marked elevation in political favour, however over time the Act was given wide application, granting protection to all who had terms of years regardless of their economic situation or profession.³⁹⁹ The extension of enforceability was premised upon the principle that the act of the lessee in taking possession operated to alert the world at large of the existence of the lease and therefore all singular successors of the lessor would be bound by it, provided that certain conditions were met. In particular, aside from the requirement that the tenant remain in possession of the subjects, the lease had to be in writing (where the term was greater than a year) and there had to be a term of expiry (or “ish” to use the correct Scots law terminology) as well as a fixed rent. Ultimately, the Act changed the form of the lease from a unilateral grant to a bilateral form of contract and in doing so formed the foundation of the modern landlord and tenant law. While possession formed the basis for this change, more recent tenancy legislation has relied on registration as the justification for extending enforceability. For instance under the Registration of Leases (Scotland) Act 1857 certain long leases could be recorded in the register of sasines and once registered they could be effectual against the singular successors of the grant.

It is not necessary to register short residential tenancies on the land register for them to bind purchasers because the Leases Act 1449 still applies to non-registrable leases (i.e. of 20 years or less).

- **To what extent is the legislation divided up into general private law and special statutes? To what extent are these rules mandatory and dispositive? Does the relationship between general and special rules work properly so as to create legal certainty?**

Scottish housing law resembles the law of England in being strictly sectoral. Legislation intervened in each sector of the leasehold and rental market with a specific, tailor made, regime, a situation which leads to a very complex legislative structure. Each regime excludes leases falling within the other, and there are detailed rules for borderline cases. The main categories (concentrating on the current law) are:

Assured tenancies and short assured tenancies: the private residential sector where a separate dwelling is let to an individual who occupies as his principal home;⁴⁰⁰ usually short, but also with a full security variant.

Secure tenancies: the social residential sector where a separate dwelling is let by a social landlord to an individual to occupy as his principal home,⁴⁰¹ usually with full security but also with a short variant.

Residential tenancies excluded from security; examples are second homes, police and fire service accommodation and lettings to students; these fall

³⁹⁹ McAllister, *Scottish law of Leases*, para. 2.29 ff.

⁴⁰⁰ Housing (Scotland) Act 1988 s. 12.

⁴⁰¹ Housing (Scotland) Act 2001 s. 11.

outside protection, other than protection against forcible eviction, and are subject to common law principles.

Long residential leases at low rents; these are “ownership” type leases.⁴⁰²

Agricultural tenancies.⁴⁰³

Commercial tenancies (including mixed lettings such as a shop with flat over).

On the whole the sectoral legislative scheme works well, at the price of considerable complexity, since the substantive rules of landlord and tenant law are well tailored to the specific situation in which they are to be applied.

- **What is the court structure in tenancy law? Is there a special jurisdiction or is the ordinary one competent? What are the possibilities of appeal?**

Jurisdiction over tenancy law disputes is determined by the nature of the tenancy and also the nature of the dispute. Most disputes are subject to litigation in the normal civil courts. The court of first instance is the Sheriff Court, a local court of which there are forty nine spread across Scotland. The Housing (Scotland) Bill 2013 proposes to remove some housing cases from the Sheriff Court and direct them instead to the First-tier Tribunal, including assured tenancies, and remaining Rent Act tenancies, landlord registrations and disputes about Houses in Multiple Occupation.⁴⁰⁴ This would not affect the social sector. Here the Sheriff Court would remain the venue for eviction cases etc. Appeals lie to the Court of Session, the supreme civil court based in Edinburgh. Relatively few housing cases reach this level; there were forty or so cases reported involving disputes between landlord and tenant during the 2000s, but this figure included commercial and agricultural tenancies as well as housing disputes. Only at the Court of Session can judicial reviews of decisions by administrative authorities be heard.

Certain matters have been taken out of the hands of the civil courts and devolved to specialist tenancy bodies, of which the Private Rented Housing Panel is the prime example. The Panel provide mediation services to tenants of the private rented sector in cases relating to the landlord's repairing obligations and also certain disputes concerning the setting of rent. In the social and public rented sector the courts remain the primary dispute resolution mechanism however the Scottish Housing Regulator plays a role in ensuring landlords abide by their legal obligations. Furthermore local authorities have certain regulatory responsibilities with regard to enforcement of minimum housing standards and registration, with all landlords required to register each tenancy with their local authority.

- **Are there regulatory law requirements influencing tenancy contracts**

⁴⁰² Long Leases (Scotland) Act 2012; McAllister *Scottish Law of Leases* ch. 8.

⁴⁰³ Also a specialised regime for crofters: Crofters (Scotland) Act 1993; McAllister, *Scottish Law of Leases*, ch. 16.

⁴⁰⁴ Cls. 17-21.

- **E.g. a duty to register contracts; personal registration of tenants in Eastern European states (left over of soviet system)**

Since the end of April 2006, every landlord in the private rented sector must register with their local authority and in order to secure registration the landlord must pass a fit and proper person test.⁴⁰⁵ The registration requirement was introduced in the fight against antisocial behaviour. Where the tenant or any visitor is engaging in antisocial behaviour at the dwelling, the local authority may serve an antisocial behaviour notice on the landlord, which specifies action that is to be taken to abate the problem.⁴⁰⁶ Failure to act may lead to suspension of the rent and a management control order, though these draconian measures are subject to review procedures. In this context local authorities were required to maintain a register of private sector landlords.⁴⁰⁷ The register records the landlord and the dwelling, but not the tenant or other occupier; there is no scheme for registering individual tenancy contracts. The obligation to register is triggered where a person unconnected to the landlord can occupy a house as a dwelling – this may be under a tenancy or any other occupation agreement, and includes arrangements covering parts of a building.⁴⁰⁸ Owners of care homes, religious communities and holiday homes do not have to register.⁴⁰⁹ In order to secure registration the landlord has to pass the test of being a fit and proper person,⁴¹⁰ taking into account:

convictions involving fraud, dishonesty, violence or drugs, and also firearms and sexual offences;⁴¹¹

any record of unlawful discrimination;

contraventions of housing or tenant law;⁴¹²

failure to observe a Letting Code;⁴¹³ and

other relevant circumstances.

It is important to emphasise that this test is not onerous on the landlord and should not be treated as a complete check on the landlord's previous dealings etc. There is a detailed procedure for determining applications and reviews.⁴¹⁴ It is an offence to

⁴⁰⁵ Antisocial Behaviour etc. (Scotland) Act 2004, as amended by Housing (Scotland) Act 2006 s 175 and Private Rented Housing (Scotland) Act 2011; McAllister, *Scottish Law of Leases*, para. 218, makes the point in the following para. that the register can be criticised as an example of ineffective bureaucracy.

⁴⁰⁶ Antisocial Behaviour etc. (Scotland) Act 2004 s. 68.

⁴⁰⁷ Antisocial Behaviour etc. (Scotland) Act 2004 s. 82; see www.landlordregistrationscotland.gov.uk.

⁴⁰⁸ It would include lodging arrangements where the occupier does not have exclusive use of a separate dwelling.

⁴⁰⁹ Antisocial Behaviour etc. (Scotland) Act 2004 s. 83(6); insolvency practitioners do not need to register: Private Landlord Registration (Modification) (Scotland) Order 2009.

⁴¹⁰ Antisocial Behaviour etc. (Scotland) Act 2004 s. 84.

⁴¹¹ The last two were added in 2011. The local authority will rely on a criminal record certificate.

⁴¹² Matters to be considered including records of antisocial behaviour orders and notices and housing related complaints were clarified in 2011.

⁴¹³ Antisocial Behaviour etc. (Scotland) Act 2004 s. 92A inserted in 2006, though no such code has yet been issued. Scottish Ministers may issue guidance to local authorities under powers given in 2011.

⁴¹⁴ The time limit is currently six months, but it is proposed to allow twelve months under the Housing (Scotland) Bill 2013 cl. 22. The number of landlords was underestimated and the system was overloaded as a result.

let out a dwelling without lodging an application for registration which may incur a fine, and it is also possible for the authority to serve a notice which will mean that the tenant or occupier does not have to pay rent while the notice remains in effect.⁴¹⁵ Advertisements of property to let must include the landlord's registration number.⁴¹⁶ Registrations are renewable every three years.

Regulatory law requirements on - new and/or old - habitable dwellings capable of being rented - e.g. on minimum size, number of bathrooms, other mandatory fittings etc.

Requirements fall into two categories, licensing of Houses in Multiple Occupation and rules against overcrowding.

(1) Houses in Multiple Occupation

A licence is required for a house in multiple occupation (commonly abbreviated to HMO) that is a property shared by three or more occupiers who are not members of the same family.⁴¹⁷ This applies to a "house" and also any premises where basic amenities are shared. So it would include a flat shared by a group of students or young professionals, or a house subdivided into bed sitting rooms with shared kitchen, toilet or bathroom.⁴¹⁸ The current scheme was enacted in 2006⁴¹⁹ though the origin is much older. This licence must be obtained before the property is rented out,⁴²⁰ and renewed every three years. The council must check that the owner and anyone who manages the property (for example, a letting agent) doesn't have any criminal convictions, for example, for fraud or theft. The council will inspect the property to check on safety and that it is suitable for the proposed number of tenants, and they will also ensure that proper management practice is followed. Local authorities have recently been given new powers to refuse licences where use as a house in multiple occupation would infringe planning controls and to consider overprovision when deciding whether to grant a licence.⁴²¹ The possibility of a public nuisance must be considered, and complaints from neighbours are also relevant. Once the licence is issued, and entered on the register of HMOs, the landlord will be free to let out the property, subject to any conditions attached to the licence in order to address concerns. Appeals against the refusal of a licence⁴²² or against the

⁴¹⁵ Antisocial Behaviour etc. (Scotland) Act 2004 s. 94.

⁴¹⁶ Antisocial Behaviour etc. (Scotland) Act 2004 s. 92B, added by Private Rented Housing (Scotland) Act 2011 s. 6.

⁴¹⁷ Housing (Scotland) Act 2006 s. 125(1). People only count to the total when the property is the person's main residence, but this includes a student's term time address.

⁴¹⁸ There are a number of exemptions e.g. for care homes, property occupied by members of the armed forces, prisons, religious communities and co-operative housing associations; other exempted groups may be designated. The rules cannot be avoided by treating a group of six students as an independent religious order: *Thomson v. Aberdeen City Council* 2011 SLT (Sh. Ct) 218.

⁴¹⁹ Housing (Scotland) Act 2006 Part 5 (s.124 ff); McAllister, *Scottish Law of Leases*, para. 21.16ff. Councils must consider Guidance issued by the Scottish Ministers.

⁴²⁰ It is a criminal offence for a landlord to operate an HMO without a licence, and they could face a fine of up to £50,000.

⁴²¹ Private Rented Housing (Scotland) Act 2011 s.13.

⁴²² In one case, for example, the reasons for refusal of a licence could be overcome by removing a group of male students and replacing them by female students: *Hart v. Aberdeen Council* 2006 H.L.R. 93; see also *Them Properties v. Glasgow City Council* [2010] CSIH 51; *Coyle v. Glasgow City Council* [2012] CSIH 33.

imposition of conditions are common. Indeed the whole procedure is laid down in detail.

Should the landlord fail to maintain the common areas etc then a tenant may contact the council who may serve a notice on the landlord requiring them to take action⁴²³ and may also prosecute the landlord for breaking the condition of their licence. If an occupier has to move out to enable work to be carried out, this will not terminate their lease or occupation agreement.⁴²⁴ They also have power to order that no rent shall be payable for the duration of a breach, and various other enforcement powers, for example disqualifying the landlord's agent from acting as such.

(2) Overcrowding

Landlords must ensure that private rented housing is not overcrowded,⁴²⁵ based on the number of people sleeping in the property. This is based on the lower of two tests. Under the room standard, two people of the opposite sex should not be required to sleep in the same room except for couples living together and children up to the age of 10.⁴²⁶ Under the space standard, the number of persons sleeping in a house has also to be tested against the number and floor area of the rooms available as sleeping accommodation according to the tables given below; here children under the age of 1 are disregarded and children up to the age of 10 count as a half.⁴²⁷ The limit is the lowest of these various figures.

Table 1		Table 2	
No rooms	No persons	Floor area of room	No persons
1	2	110 sq. ft. or more	2
2	3	90 - 110 sq. ft.	1½
3	5	70 - 90 sq. ft.	1
4	7½	50 - 70 sq. ft.	½
5 or more	2 for each room	Less than 50 sq ft.	0

An occupier of premises commits an offence by allowing overcrowding to occur. If property is overcrowded so as to affect the health or well-being of occupiers or the amenity of the house and its locality, the local authority can serve an 'overcrowding statutory notice' requiring this to be rectified.⁴²⁸

(3) Under occupancy

⁴²³ An amenity notice under Housing (Scotland) Act 2006 s. 146 ff.

⁴²⁴ Housing (Scotland) Act 2006 s.152.

⁴²⁵ Housing (Scotland) Act 1987 part VII; McAllister, *Scottish Law of Leases*, para. 21.22 ff.

⁴²⁶ Housing (Scotland) Act 1987 s. 136.

⁴²⁷ Housing (Scotland) Act 1987 s. 137.

⁴²⁸ Private Rented Housing (Scotland) Act 2011 part 3 (s. 17ff).

This is one of the most contentious issues in Scottish housing law, or indeed in Scottish politics at present (end of 2013).⁴²⁹ The Coalition government in Westminster introduced severe restrictions on the social welfare budget, and in particular in the context of this report on the budget for housing benefit. There are several aspects of this, but the most significant is the 'under occupancy charge' effective from April 2013.⁴³⁰ This is opposed vehemently by Labour, who dubbed it the 'bedroom tax', a term taken up by the Scottish Nationalist Party administration in Holyrood. This attack is also supported by many housing organisations, notably Shelter Scotland. The word 'tax' has been very astute politically but it is technically inaccurate. In fact the charge is a percentage reduction in housing benefit to reflect the fact that a family is occupying accommodation larger than the family requires.

For housing benefit purposes it is assumed that the following require one bedroom each:

- a couple;
- an adult;
- two children of the same sex or children under 10;
- any other child; and
- a carer providing overnight care.⁴³¹

The reduction in housing benefit (which includes both rent and any service charge) is as follows:

- one extra bedroom – 14%;
- two extra bedrooms – 25%.

The number of families affected is estimated by the Scottish government as 82,500 households, around 15,500 cases involving families with children, and very many involving disabled adults, and it even includes homeless families offered temporary accommodation by the council.⁴³² It is reckoned that households will lose £50 a month on average.⁴³³ It is believed that many tenants are in arrears with rent, though the precise figures are difficult to gather. However, the effects have been mitigated in Scotland by the provision of £50 million to local authorities to fund discretionary payments.

The intention is to shift families to smaller properties, and there is plenty of evidence that social landlords are adapting their allocation policies to fit with the new housing benefit scheme. It is believed that the effect will be felt most strongly in inner city areas. It will create a large demand for one bedroomed properties that cannot be satisfied from existing stock. The redistribution put in place may take up to ten years to work through. However, Labour is pledged to abolish the 'tax' if it wins the next

⁴²⁹ Welfare Reform Committee, *The 'Bedroom Tax' in Scotland* (Edinburgh: Scottish Parliament, SP Paper 469, Session 4 (2013)). The report includes the results of a lot of academic research and a full bibliography.

⁴³⁰ Housing Benefit (Amendment) Regulations 2012, S.I. 2012/30; there are a series of Housing Benefit Circulars on the issue: A4/2012, A10/2013, A21/2013.

⁴³¹ There are some exceptions eg for pensioners, the parents of those serving in the Armed Forces, some residents of supported accommodation and occupants of caravans and houseboats.

⁴³² Discretionary payments might be made in such cases.

⁴³³ It has been estimated that Registered Social Landlords will lose £20 million in total.

general Election and the SNP to abolish it in Scotland if the country votes for independence.

- **Regulation on energy saving**

The Scottish Ministers are responsible for developing and implementing a strategy to improve home efficiency.⁴³⁴ The Energy Efficiency Standard for Social Housing is intended to improve energy efficiency in the social sector, by reducing energy consumption, fuel poverty and the emission of greenhouse gases. The targets are a reduction in carbon emission of 42% by 2020 and 80% by 2050.⁴³⁵

The provisions of the 2002 Directive on the Energy Performance of Buildings⁴³⁶ were implemented in Scotland between 2007 and 2009, a key aspect being the introduction of Energy Performance Certificates for new buildings under legislation on building standards⁴³⁷ and for existing buildings under separate regulations.⁴³⁸ In May 2010 the original directive was recast so as to clarify the provisions.⁴³⁹ This was transposed in Scotland within the deadline in 2012.⁴⁴⁰ Energy performance certificates must be produced when dwellings are first rented out, though this is not required when existing tenancies are renewed.⁴⁴¹ A separate certificate is required for each flat in a block. A specimen certificate is available for inspection on the internet.⁴⁴² The certificate must be accompanied by a recommendations report directed to both landlord and potential tenants, though the tenant cannot compel the landlord to carry out works that are recommended. Registration is required of the information on the energy performance certificate. Specific information from energy performance certificates must be included when flats are advertised for rental in commercial media. Once a certificate has been produced it will last for ten years before it needs to be renewed. Advertisements of accommodation should specify the energy rating.

⁴³⁴ Housing (Scotland) Act 2006 s. 179.

⁴³⁵ Climate Change (Scotland) Act 2009.

⁴³⁶ Energy Performance of Buildings Directive 2002/91/EC.

⁴³⁷ Building (Scotland) Regulations 2004.

⁴³⁸ Energy Performance of Buildings (Scotland) Regulations 2008.

⁴³⁹ Energy Performance of Buildings Directive 2010/31/EU.

⁴⁴⁰ Energy Performance of Buildings (Scotland) Amendment Regulations 2012; Energy Performance of Buildings (Scotland) Amendment (No. 2) Regulations 2012.

⁴⁴¹ The requirement does not apply when a room in a building is let out with shared access to kitchen, bathroom and living areas.

⁴⁴² A specimen is available at <http://www.scotland.gov.uk/Resource/0041/00414384.pdf>.

6.2 The preparation and negotiation of tenancy contracts

- **Freedom of contract**

- **Are there cases in which there is an obligation for a landlord to enter into a rental contract?**

The private residential sector consists of an open market in lettings and private landlords are not obliged to enter into a rental contract.

A landlord may be obliged to extend his obligations under an existing tenancy beyond the term stated in the lease by tacit relocation. Where a lease has a fixed term, termination will not automatically occur at the expiry of that term unless one of parties serves notice to quit. Should the parties fail to serve notice then the rule of tacit relocation will operate to renew the lease on the same conditions as the old lease. Where the term of the lease in question is under a year then the process of tacit relocation will extend the lease for the same term however where the term is greater than one year, tacit relocation will limit the renewed lease to a term of one year. Relocation may mean that a lease initially granted for a short term endures over an extended period. It is possible to contract out of the operation of tacit relocation or to prevent its operation by timely notice.⁴⁴³

Social landlords (local authorities and registered social landlords) are to some extent under an obligation to enter into a rental contract with a person experiencing housing need arising from their public housing duties, but this process is strictly regulated by statute and will be examined in detail in following sections.⁴⁴⁴

- **Matching the parties**

- **How does the landlord normally proceed to find a tenant?**

(1) Private rented

In the private rented sector there are a variety of ways by which vacant property is matched to potential tenants. Generally, where the landlord wishes to fill a vacancy the landlord will advertise the vacancy through one or more media outlets. In the past, local print media provided the most effective means of finding a tenant, and local newspapers had pages devoted to advertising accommodation vacancies. Some landlords preferred to advertise vacancies via a letting agent or estate agent. An agent must not charge the tenant for registering as a person seeking accommodation nor for providing details of accommodation available to rent,⁴⁴⁵ so essentially the landlord has to pay the agent's fees.⁴⁴⁶ While both means of finding a tenant remain in use, the vast majority of landlords now find tenants through dedicated online tenancy advertising websites such as EasyRoommate, Lettingweb, Letting in Scotland, SSPC, Property Squirrel as well as Gumtree and Share A Room. Such websites allow the landlord to post a picture and a short description of the

⁴⁴³ In *Macdougall v. Guidi* 1992 SCLR 167 the Court held that the term of a lease which set out that it 'shall not be capable of renewal or continuation by tacit relocation' was effective to terminate the lease at the ish and that the landlord was entitled to remove the tenant.

⁴⁴⁴ See following answer below.

⁴⁴⁵ Accommodation Agencies Act 1953.

⁴⁴⁶ A search of the internet suggests the Act is not enforced effectively.

accommodation available, enabling prospective tenants to contact the landlord in order to arrange a viewing. It should be recalled that landlords must include their registration number in advertisements.⁴⁴⁷

(2) Allocation of social housing (housing with a public task)

Local authorities and Registered Social Landlords are the main providers of housing with a public task in Scotland. Rents in accommodation provided by a council or a not-for-profit housing association are generally cheaper than in the private rented sector.⁴⁴⁸ Social housing is allocated in accordance with an allocation scheme determined by each social landlord. Every social landlord must have rules covering transfers and exchanges as well initial allocations, and the whole scheme must be published.⁴⁴⁹ In *Gallacher v. Stirling Council*⁴⁵⁰ the normal points based allocation policy was not applied to homeless people under an unwritten coda to the written policy so any decision reached on the basis of that unpublished policy was automatically invalidated. At all stages when carrying out their housing functions, local authorities and RSLs are regulated by the Scottish Housing Regulatory Performance Standard.

Social landlords are allowed a wide discretion in determining details of the scheme applied to their homes, but within a mandatory statutory framework which, in particular specifies priority cases. The whole is rather messily divided between Acts passed in 1987 and 2001 since the rules were originally laid down for local authorities⁴⁵¹ and then reframed for a single category of social landlords (including Registered Social Landlords) created in 2001.⁴⁵² Most applications are now made to a common register which includes the property of the local authority and Registered Social Landlords operating in the locality.⁴⁵³ Housing allocations can affect voting patterns and to avoid any possibility of Gerrymandering, councillors are required to recuse themselves from participation in allocation decisions affecting accommodation situated within their electoral area.⁴⁵⁴

A prospective tenant must take the initiative by making a formal application for accommodation to a social landlord. The applicant must be over the age of 16, but provided that is so anyone can apply for social housing in Scotland.

Upon submitting an application for housing from the council or registered social landlord, the applicant will be added to a housing waiting list. These lists vary in length greatly from area to area however they generally include people who are homeless, people with special housing needs as well as people seeking a transfer to another social sector property. Where the applicant has special needs the council may be able to match that person with suitable accommodation in supported or

⁴⁴⁷ See section 6.1 below.

⁴⁴⁸ The tenant will pay a lower rent and is not required to pay a deposit.

⁴⁴⁹ Housing (Scotland) Act 1987 s. 21. Public consultation would be required before rules were adopted under the Housing (Scotland) Bill 2013 cl. 4.

⁴⁵⁰ 2001 SLT 94.

⁴⁵¹ Housing (Scotland) Act 1987 ss. 19-21.

⁴⁵² Housing (Scotland) Act 2001 ss. 8-10.

⁴⁵³ Housing (Scotland) Act 2001 s. 9.

⁴⁵⁴ Housing (Scotland) Act 1987 s. 20(3), (4).

sheltered accommodation.⁴⁵⁵ An applicant may either be in a priority group or without special priority.

Priority groups

A social landlord is required to give priority to applicants from five groups, that is applicants:⁴⁵⁶

- occupying houses which do not meet the tolerable standard;
- occupying overcrowded houses;
- with large families;
- living under unsatisfactory housing conditions; and
- (most) who are homeless.⁴⁵⁷

Further favour is provided to the first four groups because the social landlord may not take account of a range of disregarded factors:

- length of residence in the area; or
- arrears which have been cleared, or minor arrears that are in the process of being cleared,⁴⁵⁸ or were attributable to someone else
- non-housing debt;
- age of the applicant;⁴⁵⁹
- family income; or
- ownership of property.⁴⁶⁰

This preferential group are also favoured because the duration of their residence in the local area is disregarded in many circumstances, where the applicant is

- employed in the area or seeking employment there;
- caring or cared for by someone in the area;
- needing housing in the area for social or medical reasons; or
- escaping conduct amounting to harassment or at risk of domestic violence.⁴⁶¹

⁴⁵⁵ For instance where the applicant is elderly or infirm, has mental health issues, has a disability, has learning difficulties, is a young person who needs support living independently, is a refugee or asylum seeker, is an ex-offender, or has an alcohol or drug related problem.

⁴⁵⁶ Housing (Scotland) Act 1987 s. 20(1), (1A), as amended in 2001.

⁴⁵⁷ It is proposed by Housing (Scotland) Bill 2013 cl. 3, to create three categories: (1) homeless persons with unmet housing needs; (2) persons living in unsatisfactory housing conditions with unmet housing needs, and (3) existing tenants of under-occupied accommodation.

⁴⁵⁸ Housing (Scotland) Act 1987 s. 20(2A).

⁴⁵⁹ Housing (Scotland) Act 1987 s. 20(2B); age may be considered where the houses are adapted for occupation by persons of a particular age group or housing support services appropriate to a particular age group are provided.

⁴⁶⁰ This should not be considered where an attempt to occupy the property would create the risk of domestic violence, a point to be made clear by Housing (Scotland) Bill 2013 cl. 6.

⁴⁶¹ The applicant may not be required to obtain a divorce or judicial separation nor to cease to live with his or partner before becoming eligible for a housing allocation.

Applicants outside priority groups

If an applicant does not have a priority need for housing allocation, the above provisions indicate the wide range of factors that might be considered relevant, including period of residence in the locality, age,⁴⁶² income, ownership or property, any record of defaults, and so on. The landlord can determine priority according to their published policy.

A majority of Scottish waiting lists are processed on a points system which is geared towards prioritising certain groups over others according to housing need, however in some regions housing is allocated by a choice based system which is considered below. With regard to the former, when awarding points during the allocation process, councils and RSLs will generally have regard to the amount of time spent on the waiting list, whether the applicant has been in tied accommodation i.e. in military service etc. In addition the process will have regard to any medical needs,⁴⁶³ social needs,⁴⁶⁴ social work,⁴⁶⁵ harassment,⁴⁶⁶ under occupation of present accommodation, shared living space, mobile homes, when allocating points.⁴⁶⁷ When an applicant comes to the top of the list, the social landlord will make an offer of accommodation which the applicant is free to accept or refuse. However, landlords are not obliged to make more than one offer and the practice after an initial refusal varies from area to area.⁴⁶⁸

Choice based letting system

A number of Scottish housing authorities, notably the City of Edinburgh Council, administer a choice based housing allocation system. As with a points based system, housing authorities and RSLs must draw up and adhere to a housing allocation policy which complies with the rules set out above. However, under a choice based letting system local authorities have a much more active role, as opposed to the passive role in points based systems, in matching tenants to housing vacancies. In the first place, the local authority will advertise available properties using a number of outlets including dedicated sites and property sites. An interested household, instead of being added to a waiting list, may bid for certain⁴⁶⁹ dwelling places. Where more than one bid is received for a dwelling then it will usually go to the person who has been waiting the longest, however some groups may be given special priority e.g. where they are homeless or have health problems. The scheme in Edinburgh involves the collaboration of the City of Edinburgh Council in partnership with Housing Associations and Co-operatives. Under this system, the Council and 16 Registered Social Landlords allocate housing under “EH: Your Key to

⁴⁶² It would be necessary to avoid unlawful discrimination on the protected characteristic of age, a point to be made clear by the Housing (Scotland) Bill 2013 cl. 5.

⁴⁶³ Such as a disability.

⁴⁶⁴ For instance looking after an elderly relative.

⁴⁶⁵ Where the applicant has care needs.

⁴⁶⁶ This would include domestic violence.

⁴⁶⁷ Conversely an applicant guilty of antisocial behaviour etc should be required to wait for a qualifying period before becoming entitled to housing: Housing (Scotland) Bill 2013 cl. 7.

⁴⁶⁸ It is important to realise that refusals could result in the applicant being designated intentionally homeless should the applicant subsequently attempt to make a homeless application.

⁴⁶⁹ Generally, a household cannot bid for a dwelling which is too big or too small for their household.

Choice". Interested persons must register online with EdIndex landlords, they may then browse through the empty homes available and where interested in a dwelling they for submit a bid for that dwelling. As with all allocation policies, the "EH: Your Key to Choice" model must be in line with the Housing (Scotland) Act 1987 as amended by the Housing (Scotland) Act 2001, 'Performance Standards for Social Landlords and homeless functions' and best practice guidance including "Suspending Housing Applicants- A Practical Guide". Furthermore, eligibility for housing with The City of Edinburgh Council will require to be assessed in terms of the legislation on allocation and on asylum and immigration legislation. Under the system applicants are considered as either starters, homeless households, people in hostels, supported or temporary accommodation, people staying in the care of friends or family, New households and private rented sector tenants or as movers; council tenants (including joint tenants), Registered Social Landlords or other social rented sector tenants, owner occupiers and households in tied accommodation. Under the system a couple will be expected to share a room while each household member over 14 years will be entitled to a room of their own. Two children from the age of 7 to 14 may share a room where they are of the same sex, while any two children under seven may share a room. Single applicants or couples with no children are not prohibited from acquiring a two bedroom dwelling.

Under the system, gold priority (urgent) is awarded when the current property does not meet, and cannot be adapted to, the housing needs of the applicant or a member of their household. This only arises in exceptional circumstances e.g. a hospital discharge. Silver priority may be awarded for a number of reasons including homelessness, overcrowding, etc. The order of priority is as follows with highest at the top; Gold, Urgent, Silver, Waiting Time/ Length of time in last tenancy and priority cases will be ranked by date of award of priority and then by date of application for starters and length of time at current address for movers. Under the system the Council make nominations to 25% of available properties. The housing allocation system operating in Edinburgh also includes a mutual exchange system whereby tenants of the City of Edinburgh Council, Housing Associations and Housing Co-operatives are eligible to exchange property. Households may only carry out a mutual swap where rent accounts are clear, the properties are deemed to be suitable by the Council, the landlord accepts the swap and finally the parties must have freely come to the arrangement. There are a number of factors which Councils and Registered Social Landlords are not allowed to take into account. These include the length of time the applicant has lived in the area, any rent arrears or council tax arrears relating to a property where the applicant lived but was not the tenant, any debt owed by the applicant as a tenant but since paid off, the age of the tenant so long as they are over 16 years old and any property owned by the tenant. Finally, Councils and Registered Social Landlords in Scotland are prohibited from taking into account the income of the applicant or anyone in their family when allocating housing. Under equality legislation it is illegal for a council or housing association to discriminate against an applicant on the grounds of race, sex or disability. In addition they should have an equal opportunities policy under which they should not discriminate against an applicant because of the legal status of their relationship, their age, their sexual orientation or gender identity, their language, their social background or their beliefs or opinions, for example their religious or political beliefs.

Homelessness

Provision of housing to homeless persons forms a major aspect of the functions of social landlords.

Legislation giving rights to homeless people was first enacted as the Housing (Homeless Persons) Act 1977 which extended throughout England, Scotland and Wales but this was consolidated separately for Scotland by Part II of the Housing (Scotland) Act 1987.⁴⁷⁰ This has been amended and updated by primary legislation, most notably the Housing (Scotland) Act 2001 and the Homelessness etc. (Scotland) Act 2003,⁴⁷¹ amplified by secondary legislation. Reference should also be made to the *Scottish Homelessness Code of Guidance* which has a focus on strategies to avoid homelessness arising.⁴⁷² The description below follows the legislative structure of the 2001 Act which sets out first the key concepts (ss. 24-27) before defining the duties owed to homeless people of varying descriptions (ss, 28-36) and more general administrative provisions.

A person is homeless if he has no accommodation⁴⁷³ either in Scotland or elsewhere; the legislation was originally confined to a home in Great Britain (excluding Northern Ireland) but it has been amended to refer to accommodation whether in the United Kingdom or elsewhere in the world.⁴⁷⁴ Homelessness is considered in the context of the applicant and his family, that is anyone who normally resides with him or with whom it is reasonable for the applicant to live. Accommodation which prevents homelessness may be owned or held on a tenancy or by statutory right or licence. It must be reasonable for him to occupy the accommodation with his family unit, regard being had to prevailing housing conditions where the application is made.⁴⁷⁵ Other circumstances equated to homelessness are⁴⁷⁶ where the applicant has accommodation but cannot secure entry to it, where any attempt to live there would carry with it the potential for abuse,⁴⁷⁷ where that accommodation is overcrowded and possibly a danger to health, or the occupier of a mobile home who lacks a pitch or of a houseboat who lacks a berth.

Prior to 31 December 2012, the authority would examine whether the applicant had a priority need. This concept first included only pregnant women and vulnerable persons (old age, mental illness),⁴⁷⁸ but was extended considerably in 2004 to include various forms of mental and physical disability or vulnerability, including for example the situation arising after discharge from prison or the regular armed forces.⁴⁷⁹ Should the applicant not fall into one of the categories on this list then they were only entitled to temporary accommodation and information/advice services. Reform of the law relating to homelessness was a key goal of the Scottish

⁴⁷⁰ S.24 ff.

⁴⁷¹ Parts in force are ss 1-3, 7, 9-12, excluding, therefore, ss 4-6 and 8.

⁴⁷² *Guidance on Legislation, Policies and Practices to Prevent and Resolve Homelessness* (May 2005). Decisions must be made under the statute where the Guidance differs: *Ellis v. Angus Council* [2011] CSOH 44.

⁴⁷³ Housing (Scotland) Act 1987 s. 24; *Homelessness Guidance* ch. 5.

⁴⁷⁴ As amended in 2001.

⁴⁷⁵ Housing (Scotland) Act 1987 s. 24(2), (2A), (2B).

⁴⁷⁶ Housing (Scotland) Act 1987 s 24(3);

⁴⁷⁷ Protection from Abuse (Scotland) Act 2001.

⁴⁷⁸ Housing (Scotland) Act 1987 s.25; *Morgan v. Stirling Council* [2006] CSOH 154.

⁴⁷⁹ Homelessness etc. (Scotland) Act 2003 s. 2; *Homelessness Guidance* ch. 6.

Government who made a commitment in 2003 to abolishing the requirement of priority need in order to be considered homeless,⁴⁸⁰ a vision eventually fulfilled in 2012.⁴⁸¹ As such, the test of priority need is now redundant.

However, the local authority will still examine whether the applicant is intentionally homeless.⁴⁸² An applicant will be considered intentionally homeless where he is responsible for finding himself homeless. One instance is when a tenant falls into rent arrears by failing to apply his housing benefit to rent payments.⁴⁸³ Another instance would be leaving accommodation when it would be reasonable for him to stay,⁴⁸⁴ but intentionality would not be found when a couple leave a property where they suffered harassment and violence, including windows being broken on three occasions, so that it would no longer be reasonable to stay in the accommodation.⁴⁸⁵ As is explained below the duty owed to someone who is homeless is greatly reduced if they became homeless intentionally.

Once a person makes a homelessness application, the local authority is required to carry out an assessment in order to determine whether the applicant is homeless or threatened with homelessness.⁴⁸⁶ Upon determining that the applicant is homeless the authority is required to then determine whether the applicant is homeless intentionally. Finally, the authority has discretion to examine whether the applicant has a local connection to the authority area.⁴⁸⁷ Prior to 2012, the authority was required to examine whether the applicant displayed a priority need. However, this requirement has since been abolished and therefore where a person has been assessed as unintentionally homeless they will be entitled to settled accommodation.⁴⁸⁸ While awaiting assessment an applicant is entitled to temporary accommodation. There are rights to review of all decisions.

The strongest homelessness duty arises when the local authority concludes that the applicant to it is unintentionally homeless. Homeless persons have a high priority status in housing allocation policies. The authority is required to ensure that 'accommodation becomes available' for those experiencing homelessness.⁴⁸⁹ This must be 'permanent' accommodation, giving (usually) a Scottish secure tenancy or (if a private sector provider is found) a fully assured tenancy. There are very limited circumstances where a short Scottish secure tenancy may be offered (ie accommodation offering security only for a short fixed term), notably where the applicant has been evicted within the past three years for antisocial behaviour.⁴⁹⁰ Often a local authority will have to offer temporary accommodation as a stop-gap, in which case the applicant remains technically homeless until suitable permanent

⁴⁸⁰ Homelessness etc. (Scotland) Act 2003 s. 2.

⁴⁸¹ Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012; this also amends the Housing (Scotland) Act 1987 by removing references to priority need.

⁴⁸² Housing (Scotland) Act 1987 s.26; *Homelessness Guidance* ch. 7.

⁴⁸³ *Ellis v. Angus Council* [2011] CSOH 44.

⁴⁸⁴ Housing (Scotland) Act 1987, s. 26(1) 'if he deliberately does or fail to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.'

⁴⁸⁵ *McAuley v. Highland Council* 2003 SLT 986.

⁴⁸⁶ Housing (Scotland) Act 1987 s. 28(1); see immediately below.

⁴⁸⁷ Housing (Scotland) Act 1987 s. 28(2).

⁴⁸⁸ Pending fulfilment of a local connection requirement.

⁴⁸⁹ Housing (Scotland) Act 1987 s. 31.

⁴⁹⁰ Homeless Persons (Provision of Non-Permanent Accommodation) (Scotland) Regulations 2010.

accommodation is offered.⁴⁹¹ In the past the local authority was the primary provider of housing with a public task in Scotland however Registered Social Landlords have, since the advent of the mass stock transfers of the 1990s, become major players in this field. This has been recognised in statute and since 2001 local authorities have the power to request that a Registered Social Landlord active in their area provide accommodation for a homeless person.⁴⁹² The local authority also needs to assess whether the applicant requires housing support services.⁴⁹³

In many cases authorities adopt the policy of making a single offer of accommodation on a take it or leave it basis.⁴⁹⁴ This is valid provided that the offer made is of accommodation that is suitable, to the family of the applicant including the children and to a pregnant woman. Suitability is tested by three standards, physical, proximity to health facilities and schools, and safety for children.⁴⁹⁵ Other members of the family have no standing to launch a challenge.⁴⁹⁶

Where the applicant has a local connection to the authority to which application is made, and no local connection to another authority in Great Britain, the obligation rests with the authority of application. If, however, enquiry reveals local connection with the area of another authority, the application can be referred to that authority.⁴⁹⁷ The local connection test is a real rather than technical test⁴⁹⁸ and usually involves examining the applicant's prior residence, employment history and family associations for at least five years, as well as any special circumstances such as education or health treatments. The connection must be established by choice, so a direction to an asylum seeker that he must move to Glasgow does not establish a local connection with Glasgow.⁴⁹⁹ Refugees and those with leave to remain do not require a local connection.⁵⁰⁰ This would involve the authority examining the applicants voluntary past residence. Under the Scottish Code of Guidance that period of residence must last for at least six months during the past twelve months or not less than three years during the previous five years.⁵⁰¹

The finding may also be that a person is not yet homeless, but is threatened with homelessness, that is where he is likely to lose his home within two months. In such cases the authority should take reasonable steps to ensure that the accommodation 'remains available' for those threatened with homelessness.⁵⁰² Threatened homelessness usually arises from eviction for rent arrears or mortgage repossession, and the landlord or creditor is now required to notify the local authority

⁴⁹¹ Housing (Scotland) Act 1987 s. 24(3)(c).

⁴⁹² Housing (Scotland) Act 2001 s. 5(1).

⁴⁹³ Housing (Scotland) Act 1987 s.32B, inserted by Housing (Scotland) Act 2010 s.158.

⁴⁹⁴ *Gallacher v. Stirling Council* 2001 SLT 94.

⁴⁹⁵ Homeless Persons(Unsuitable Accommodation) (Scotland) Order 2004; see *Homelessness Guidance* ch.9.

⁴⁹⁶ *Brown v. South Lanarkshire Council* 2001 Hous LR 34.

⁴⁹⁷ Power to restrict referrals in Homelessness etc. (Scotland) Act 2003 s. 8 has not been brought into force.

⁴⁹⁸ *Eastleigh BC v. Betts* [1983] 2 AC 613.

⁴⁹⁹ *Al-Ameri v. Kensington and Chelsea Royal London Borough Council* [2004] UKHL 4; this decision is confirmed by Homelessness etc. (Scotland) Act 2003 s. 7.

⁵⁰⁰ *Homelessness Guidance* ch.13.

⁵⁰¹ *Homelessness Guidance* para. 8.12.

⁵⁰² Housing (Scotland) Act 1987 s. 24(4), i.e. likely to become homeless within 2 months. They also need to assess the need for housing support services: Housing (Scotland) Act 1987 s.32B, inserted in 2010.

when proceedings for possession are raised to give the authority time to seek to avert the eviction.⁵⁰³

If the finding is that the homelessness is intentional the local authority will provide temporary accommodation for a reasonable period, as well as advice and support, but will not provide settled accommodation.

As well as providing housing, local authorities are required to make enquiries in their area about housing need, provide advice and assistance and generally must seek to prevent homelessness. The local authority owes a duty to any vulnerable person and their spouse and family.⁵⁰⁴

In certain very limited circumstances it is permissible to grant a Short Scottish secure tenancy; these include temporary letting to a person seeking accommodation or accommodating a homeless family, or temporary letting pending development or in property not belonging to the landlord.⁵⁰⁵ This grants a contractual term of at least six months, but no guarantee of security after the end of the fixed term. The landlord has a mandatory ground for possession if it chooses to exercise it, though in order to meet human rights standards there will be procedure to review the eviction decision.⁵⁰⁶

Persons not entitled to social housing

The crucial issue here is whether the applicant is subject to immigration control. People not subject to immigration control are entitled to apply for accommodation in Scotland on the basis that they are homeless and entitled to register with a social landlord for the allocation of accommodation. This category consists of:

British citizens;

Foreign nationals with a right of abode in the UK; and

Nationals of EEA member states.

The last category is of most importance in the context of this report and requires some clarification. EEA nationals divide into three groups with respect to the right to reside in Scotland:⁵⁰⁷

⁵⁰³ Housing (Scotland) Act 1988 s 19A (inserted by the Homelessness etc (Scotland) Act 2003 sch 1, para 3) and the Housing (Scotland) Act 2001 s 14(5A) & (5B) (inserted by the Homelessness etc (Scotland) Act 2003, sch 1 para 4(2)).

⁵⁰⁴ Housing (Scotland) Act 1987 s. 83, as amended by Housing (Scotland) Act 2001 s. 108 to include also same sex couples.

⁵⁰⁵ Housing (Scotland) Act 2001 sch. 6. .

⁵⁰⁶ Housing (Scotland) Bill 2013 cl. 12.

⁵⁰⁷ Immigration rules apply to the United Kingdom, but the rules in relation to countries which acceded to the EU in or after 2004 are tighter in England than in Scotland; what follows describes the position in Scotland. This also includes those states EEA states that remain outwith the EU – Liechtenstein, Norway and Iceland.

EEA nationals from old EU states with a right to reside include workers job seekers, the self-employed, and students and those who are self-sufficient and family members;⁵⁰⁸

EEA nationals from states which acceded to the EU in 2004 have a right of residence if they are a worker registered under the Worker Registration scheme or are self-sufficient;⁵⁰⁹ this also includes as from 1 January 2014 workers from Bulgaria and Romania.⁵¹⁰

Other EEA nationals fall into immigration control but also into an excepted category of people subject to immigration control who are nevertheless eligible to apply as homeless people or to seek the allocation of housing. The relevant exception is a national of a country which has ratified the European Convention on Social and Medical Assistance or the Council of Europe Social Charter, since all EEA states have ratified these.⁵¹¹ The right to housing can effectively be terminated here if the right to reside is terminated (because the EEA national is not a worker, self-supporting etc.).

⁵⁰⁸ EC Directive 2004/38/EC implemented by Immigration (European Economic Area) Regulations 2006, SI 2006/1003.

⁵⁰⁹ The rules in Scotland here differ from those in England.

⁵¹⁰ Subject to any tighter controls the UK Government introduces.

⁵¹¹ Asylum and Immigration Act 1999, ss. 118 (allocation), 119 (homelessness); Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000, SI 2000/706. SI 2000/706; Homelessness Guidance ch. 13, esp. paras 13.21 ff; *Ismail v. Barnet London Borough Council* [2006] EWCA Civ 84..

- **What checks on the personal and financial status are lawful and usual? In particular: May the landlord ask for a salary statement? May he resort to a credit info agency and is doing so usual?**

There are a number of checks which the landlord can perform on the personal and financial status of the tenant. Prior to letting a dwelling the landlord will often be concerned as to whether or not the tenant will be able to honour the tenancy agreement. In order to reduce some of the risk arising from this interaction the landlord or letting agency will often seek to carry out a range of checks on the tenant. These checks usually include credit referencing, bank referencing, employment referencing, and landlord referencing as well as personal referencing. There is nothing in law to prevent a landlord from asking for a salary statement but he cannot compel the prospective tenant to produce one. However, such a refusal may adversely affect the tenant's standing. In addition to direct enquiries from the tenant the landlord may resort to a credit information agency, however such practice would not be usual. With regard to housing with a public task, housing is allocated without reference to the income status of the applicant.

- **How can information on the potential tenant be gathered lawfully? In particular: Are there blacklists of "bad tenants"? If yes, by whom are they compiled? Are they subject to legal limitations e.g. on data protections grounds?**

The extent to which such checks are lawful depends on the manner in which they are carried out. In some cases the landlord may simply ask the tenant for certain information, for instance a letter from his employer stating his current employment status or for a certificate from a credit agency stating his credit worthiness. While the prospective tenant is at liberty to refuse the request, negative inferences would most likely be drawn from such a refusal. However, providing the landlord with such information involves time and expense burdens for the tenant and often it is the case that the landlord or estate agent will prefer to use a dedicated tenant referencing service. The private rented market across the UK has developed a sophisticated tenant referencing industry with a number of operators across Scotland offering swift tenant referencing services. While the procedure for following out the checks may in the most part be lawful, in particular the tenant must first provide consent for the check; there have been instances in which illegal fees have been charged to the tenant in order to carry out such checks.⁵¹²

- **What checks may and does the tenant carry out on the landlord (e.g. to avoid being trapped by a swindler landlord)**

There are a limited number of checks which a tenant may carry out on the landlord in order to ensure that all aspects of their agreement are in good faith. The main check

⁵¹² *Premiums in the Private Rented Sector* (Shelter Scotland, October 2011) found that letting agents were charging up to £180 for administrative services including personal and financial checks.

which the tenant may carry out is to consult the online database of landlords for their local authority in order to see whether he has registered with the council as is required by law. Given that the registration system is still relatively recent, it is advisable for tenants, when the landlord's details are absent from the online database, to contact the council in order to check their landlord's registration status. Every landlord in the private rented sector must register with their local authority. In order to be registered the landlord must pass a fit and proper person test. It is important to note that this test is not onerous on the landlord and should not be treated as a complete check on the landlord's previous dealings etc.

- **Services of estate agents**

- **What services are usually provided by estate agents?**

Estate agents provide a number of services in the Scottish residential sector ranging from providing basic advice and information through to agency and complete property management services. Amongst the main services provided are; a property appraisal service during which the letting agent will advise on the current rental value of the property as well as a range of insurance services for landlords. In addition, letting agents provide a means of marketing a rental property either through in store advertisement or via online mediums such as happylets.co.uk, rightmove.co.uk, citylets.co.uk, findaproperty.com and S1homes.com.

- **To what extent are estate agents regulated? In particular: are there rules on how an agent should present a house, i.e. on the kind of information which needs to be given?**

The Association of Residential Letting Agents is the voluntary self-regulating trade body for residential letting agents.⁵¹³ Letting agents regulated by the ARLA have their funds protected by a bonded scheme. In 2013 there are 155 registered ARLA agents and across the UK, there are currently around 6,000 individual members, representing 3,500 member offices. All letting agents under this scheme are subject to a code of practice which requires, amongst other things, that at least one staff member has a suitable letting agent qualification. There are a number of other bodies who operate a voluntary code of conduct, these include the Royal Institution of Chartered Surveyors, the Property Ombudsman, the National Approved Letting Scheme, the UK Association of Letting Agents, and the government backed National Landlords Association. Letting agents can also apply to Landlord Accreditation Scotland which is a voluntary scheme by which landlords and letting agents can assure tenants that the tenancy arrangements they have adhere to the standards outlined in the Scottish Core Standards for Accredited Landlords. In recent years there has been considerable focus on letting agent fees. It was an offence to charge or receive any premium or make any loan a condition of the grant, renewal or continuance of a protected (Rent Act) tenancy⁵¹⁴ and this same provision is applied

⁵¹³ The Estate Agents Act 1979 only covered registrable lease transactions which meant effectively that residential lease transactions would not be covered, except in the very rare cases where an old long residential lease, predating the 20 year rule imposed in 1974, is being transferred.

⁵¹⁴ Rent (Scotland) Act 1984 s. 82.

to assured tenancies.⁵¹⁵ A 'premium' is 'any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge'.⁵¹⁶ Ministers have power to make provision about charges that may be made in connection with the grant, renewal or continuance of a tenancy, including categories of sum which are not to be treated as a premium.⁵¹⁷ Secondary legislation now clarifies the law in this area to the effect that such fees are illegal.⁵¹⁸ New tenancy referencing schemes have been launched in Scotland whereby tenants pay for the background check while letting agents get a referral fee.

Legislation is proposed to set up a national register of letting agents, matching the registration of private landlords. The proposal is contained in outline in Part 4 of the Housing (Scotland) Bill 2013.⁵¹⁹ Letting agency work is defined as things done by a person in the course of that person's business in response to relevant instructions which are—

(a) carried out with a view to a landlord ... entering into, or seeking to enter into a lease or occupancy arrangement by virtue of which an unconnected person may use the landlord's house as a dwelling, or

(b) for the purpose of repairing, maintaining, improving, insuring or otherwise managing a house which is, or is to be, subject to [such] a lease or arrangement.⁵²⁰

The register will include prescribed information against the name of each registered letting agent and will be published – presumably online. The registration number will have to be included in all documents and advertisements produced by the letting agent. Applications will need to specify their trading structure and information to enable decisions on whether the applicant is a fit and proper person to be registered. The considerations are not unlike those taken into account when registering private landlords, including

a criminal record of offences involving fraud and dishonesty, violence, drugs, firearms or sex;

unlawful discrimination practices;

contraventions of housing law; and

breaches of letting codes of practice.

Registrations will be renewable after three years. Registered letting agents will have to observe a Code of Practice, which will be enforceable at the First-tier Tribunal. It will be an offence to operate an unregistered letting agency and no fees will be recoverable.

- **Ancillary duties of both parties in the phase of contract preparation and negotiation ('*culpa in contrahendo*' kind of situations)**

In contrast to the requirement in civilian countries to negotiate with care, common law systems do not recognise a duty to negotiate a contract in good faith,⁵²¹ a "classic example of how irreconcilably different English law is from codal systems",

⁵¹⁵ Housing (Scotland) Act 1988 s. 27.

⁵¹⁶ Rent (Scotland) Act 1984 s. 90.

⁵¹⁷ Rent (Scotland) Act 1984 s. 89A, inserted by Private Rented Housing (Scotland) Act 2011.

⁵¹⁸ Rent (Scotland) Act 1984 (Premiums) Regulations 2012.

⁵¹⁹ Part 4, cls. 26-52.

⁵²⁰ *Ibid.*, cl. 51(1).

⁵²¹ *Walford v. Miles* [1992] 2 AC 128, 138, Lord Ackner; *Yeoman's Row Management v. Cobbe* [2008] UKHL 55.

according to Professor MacQueen.⁵²² He concludes that the *culpa in contrahendo* principle is not a part of Scots law. A negotiating party may be liable for contractual promises and misrepresentations, and also be liable to make restitution of benefits received during unsuccessful negotiations, but is not liable for lack of good faith as such.

Table 6.2 Preparation and negotiation of tenancy contracts

	Main characteristic(s) of Scottish Secure Tenancy	Main characteristic(s) of short assured tenancy.
Sector	Social	Private
Choice of tenant	(1) Homelessness duty (2) Allocation	Landlord's choice
Method	Application to local authority	Advertisement/letting agent
Ancillary duties	Checks on statements in application	Avoid misrepresentation

⁵²² H.L. MacQueen 'Good Faith in the Scots Law of Contract: An Unrecognised Principle?' in A.D.M. Forte *Good Faith in Contract and Property* (Oxford: Hart, 1999), 17.

6.3 Conclusion of tenancy contracts

- **Tenancy contracts**
 - **distinguished from functionally similar arrangements (e.g. licence; real right of habitation; Leihe, commodato)**

The distinction between tenancy contracts conferring full security, limited security tenancies and licences is exceedingly complex because of the historical position in which very great protection was conferred on Rent Act tenants in the private sector, a position which provided great incentives for landlords to seek to evade full security. This historical reason has largely disappeared because most private sector tenants now have short assured tenancies, the protections of which are scarcely worth the trouble of evading. Nevertheless the basic definition of tenancies with security dates back to Rent Act days, the structure now being far more complex than it needs to be. When protection was introduced for public sector tenancies, it too was modelled on the same basis, so there is an essential commonality of definition, not least because the secure tenant has full security, so exceptions are needed where full security is inappropriate. There is also an important difference derived from the fact that the secure tenancy was a vehicle for conferring a right to buy, and therefore it was essential to confine the definition of the secure tenancy to property which it was appropriate to sell as a unit; this makes a big difference as will be seen where the tenant shares some accommodation.

(1) Basic requirements for residential security

Section 12 of the Housing (Scotland) Act 1988 defining the assured tenancy (and thus also the short assured tenancy) has many features in common with section 11 of the Housing (Scotland) Act 2001 defining the Scottish secure tenancy and short Scottish secure tenancy. The basic elements are as follows:⁵²³

A house – this is the basic concept of Scottish housing law, the corresponding expression in English legislation being a “dwelling-house”. A house is not necessarily a house, since of course many residential tenants occupy flats or tenements, but it must be part of a building. This initial requirement therefore removes full residential security from residents of mobile homes,⁵²⁴ house boats and anyone choosing to camp out permanently.

Let as a separate dwelling - the essential concept is a separate unit of living accommodation, something on which one can close the front door, and find within self-contained residential accommodation including living room, sleeping accommodation, washing facilities and toilet. There is no requirement that cooking facilities should be provided, and so a person occupying a single room may be an assured tenant.⁵²⁵ Self-contained accommodation is fully necessary for public sector security, but some sharing of facilities is tolerated in the private sector.⁵²⁶

⁵²³ McAllister, *Scottish Law of Leases*, para. 17.9 ff.

⁵²⁴ There are limited protections in the Mobile Homes Act 1983; these are modified by Housing (Scotland) Act 2006 ss167ff. This gives eg a right to a written statement of terms and some limits to variation and termination. The Housing (Scotland) Bill 2013 proposes an improved scheme of licensing sites with permanent residents.

⁵²⁵ *Uratemp Ventures v. Collins* [2001] UKHL 43.

⁵²⁶ See section 6.3.

A tenancy – the requirement that a house is ‘let’ to a tenant serves to exclude from security a licence arrangement. McAllister defines a lease as ‘a contract by which a person, known as a tenant, is allowed to occupy someone else’s heritable property for a finite period. In return for this the tenant pays to the person granting this right (ie the landlord) a periodical payment known as rent.’⁵²⁷ In general the test for a grant of a lease is exclusive possession, that is the right for the tenant to have exclusive control of the premises free from interference by the landlord or any other person.⁵²⁸ The extent to which this can be avoided is considered immediately below.

An individual tenant – both private and public sector regimes limit security to situations where the tenant is an individual (though in the private sector it is sufficient to have one tenant who is an individual). It follows that company lets are outside both the assured tenancy and Scottish secure tenancies regimes and are treated contractually.

A tenant’s principal home – both private and public systems limit residential security to cases where the property is let as the tenant’s only (or at least his principal) home. Case law establishes that one cannot have two principal homes,⁵²⁹ so a lease of a second home will be subject to contractual rules.

(2) Shared accommodation

In the social sector recognition of a secure tenancy offers a gateway to the right to buy, so the property must be physically separate from other dwellings. Thus a person occupying one bedsit in a residential house that it is otherwise empty pending redevelopment is not a tenant of the whole house, even if he has been told that he is likely to be the only occupier for a period of time.⁵³⁰ In the private sector the concern is to ensure that tenants are protected as widely as possible. A tenant must have exclusive occupation of some (“separate”) accommodation – usually a bedroom at least. If so, he may share the use of other accommodation with other tenants (but not the landlord); this “shared accommodation” would commonly be a bathroom or kitchen. The whole is effectively treated as a single unit and the tenancy of the shared accommodation cannot be terminated apart from the tenancy of the separate accommodation.⁵³¹

(3) Avoidance of security by granting a licence

Security in both the private and the public sectors attaches only to a tenancy and only where a house is let. Thus a licence will not confer security.⁵³² This seems to open the possibility that a landlord could evade the security regimes by artificially altering a lease into a licence. This has attracted much more litigation in England than in Scotland, not least because the definition of a lease is wider in Scotland. The English test is that a tenant must be given exclusive possession of property, and this requires that the tenant is able to exclude the landlord and all others from the property for the duration of the lease.⁵³³ A guest in a hotel lacks exclusive

⁵²⁷ McAllister, *Scottish Law of Leases*, para. 1.1.

⁵²⁸ *Street v. Mountford* [1985] AC 809 HL. See below for the treatment of exclusive possession in Scots law.

⁵²⁹ *Miller v. Falkirk District Council* 1990 SLT (L. Tr.) 111.

⁵³⁰ *Bolton v. Aberdeen City Council* 2002 Hous LR 40.

⁵³¹ Housing (Scotland) Act 1988 s 14; similarly if the tenant sublets part of the house to a sub-tenant: s. 15. These provisions are missing from Housing (Scotland) Act 2001 s. 11.

⁵³² McAllister, *Scottish Law of Leases*, para. 2.50 ff.

⁵³³ It is perfectly permissible for the landlord to have limited rights of access e.g. to inspect the state of repair.

possession because the hotel management has access to the room to service it. A tenant must have exclusive control. In England many unscrupulous landlords sought to exploit this distinction in order to avoid conferring full security on people who were in substance tenants; devices included the provision of minimal breakfasts, reciting the absence of exclusive possession,⁵³⁴ or requiring a couple to sign two separate licence agreements.⁵³⁵ These avoidance devices were invalidated by the rule that the test of exclusive possession was substantive and by allowing the courts to ignore any document that could be labelled as a 'pretence'.⁵³⁶ It appears that this was always less of an issue in Scotland.⁵³⁷ A licence is "a contract, falling short of a lease, whereby not the heritage itself but a right to use a particular part of it to some use is granted" which does not attract the protections attending a tenancy.⁵³⁸ It is arguable that this is because of a wider definition of a lease in Scots law,⁵³⁹ and the possibility that exclusive possession is not essential, albeit a prime indicator of a lease. In the event of a dispute as to whether an occupancy agreement is a lease or a licence the critical issue⁵⁴⁰ will be determining whether the agreement has conferred exclusive possession on the tenant and the title put on an agreement will not be determinative.⁵⁴¹ Where the landlord retains possession rights the occupancy agreement will most likely be a licence.⁵⁴² The ability to control and regulate the dwelling in question is the best indicator of factual possession and this is often enough to conclude the legal status of many occupancy agreements. For instance, where there is a bed and breakfast or hotel, although the occupant is in possession of a self-contained area for a period in return for a rent the overall owner never relinquishes ultimate control over the accommodation space, that is, the power to exclude any person from the space. However, in an occupancy agreement where there is exclusive possession of a dwelling, the occupier could be said to be a tenant and consequently the principles of tenancy law would apply. Likewise, where the

⁵³⁴ *Street v. Mountford* [1985] AC 809, HL.

⁵³⁵ *Antoniades v. Villiers* [1990] 1 AC 417, HL.

⁵³⁶ *Street v. Mountford* and *Antoniades v. Villiers* as above.

⁵³⁷ In theory it should have been possible for protection to be evaded in Scotland by the use of licences, though the complete lack of case law on this suggests that it was not common, perhaps because of the less developed concept of a licence in Scotland. However, there is anecdotal evidence that attempts to evade protection by means of the notorious "bed and breakfast" lets were widespread north of the border, for which there is also some case evidence – see *Holiday Flat Co v Kuczera* 1978 SLT (Sh Ct) 47 (a successful attempt at evasion) and *Gavin v Lindsay* 1987 SLT (Sh Ct) 12 (an unsuccessful attempt).

⁵³⁸ Paton and Cameron *Law of Landlord and Tenant in Scotland*, page 12. Aside from not attracting the substantial statutory protections attending a tenancy, a licence does not confer a real right on the licensee.

⁵³⁹ McAllister notes that, Rankine's definition of a lease included 'certain uses' as well as 'the entire control' of lands.

⁵⁴⁰ *Conway v. Glasgow City Council* 1999 SCLR 248 held that a resident sharing a two bed room in a hostel for homeless persons did not have a lease, the degree of possession enjoyed by the occupier coming nowhere near that required for a lease.. However the sheriff reserved his opinion on whether exclusive possession is necessary for a lease and acknowledged that 'the law has come increasingly to talk of exclusive possession as a necessary condition of a lease' at 255.

⁵⁴¹ *Bradford Properties v. British Telecommunications* 1992 SLT 490. McAllister points out that the court rejected the English authority for the distinction between leases and licences and cast doubt on the Scottish authority quoted by Paton and Cameron regarding the need for exclusive possession.

⁵⁴² *Broomhill Motor Co. v. Assessor for Glasgow* 1927 SC 447; *Chaplin v. Assessor for Perth* 1947 SC 373.

landlord has reserved the right to share the occupation, exclusive possession has not been granted and as such a tenancy will usually be held not to exist.⁵⁴³ People living in hostels will therefore lack security.⁵⁴⁴

(4) Exclusions from private sector security

Various exclusions exist from the concept of the assured tenancy (and these also cannot be short assured tenancies):⁵⁴⁵

lettings to students;
holiday lettings;⁵⁴⁶
resident landlord leases;
temporary lettings to homeless persons or where housing support is provided; and
shared ownership leases.

Occupation agreements falling outside the assured tenancy scheme attract protection against eviction without due process of law.⁵⁴⁷ This protects any person occupying premises as a residence, whatever the basis of his occupation.⁵⁴⁸

(5) Exclusions from public sector security

Various exclusions exist from the concept of the Scottish secure tenancy (and these also cannot be short Scottish secure tenancies):⁵⁴⁹

service accommodation of an employee;⁵⁵⁰
police and fire service property;
lettings to students;
lettings to offenders;
shared ownership leases; and
a house within the curtilage of non-residential property.

In these cases (and also where some other sectoral legislation applies⁵⁵¹) some rights of a secure tenant are included, notably the right to a written agreement, controls on variation, provisions about repairs and improvement, and restraints on assignation.⁵⁵²

- **specific tenancy contracts, e.g. contracts on furnished apartments; student apartments; contracts over room(s) only (e.g. student rooms); contracts over rooms or apartments located in the house in which the landlord lives himself as well. Please describe the legal specificities in these cases.**

Contracts on furnished apartments

⁵⁴³ A lease may extend to rights such as game or minerals which are divorced from rights of occupation, but this is rare in general practice and rarer still in the context of residential tenancies.

⁵⁴⁴ There is power (as yet unexercised) to make regulations to confer minimum rights on occupiers of rooms in hostels and other short term accommodation: Housing (Scotland) Act 2001 s. 7; similar powers existed in relation to the former Rent Acts: *Conway v. Glasgow City Council* 2001 SLT 1472.

⁵⁴⁵ Housing (Scotland) Act 1988 sch. 4; McAllister, *Scottish Law of Leases*, para. 1713 ff.

⁵⁴⁶ *Barns-Graham v. Balance* 2000 Hous LR 11, Sh. Ct.

⁵⁴⁷ Rent (Scotland) Act 1984 Part III (s. 22 ff); various forms of harassment are criminalised; damages may be substantial under Housing (Scotland) Act 1988 s. 36ff.

⁵⁴⁸ Rent (Scotland) Act 1984 s. 22(5).

⁵⁴⁹ Housing (Scotland) Act 2001 sch. 1.

⁵⁵⁰ E.g. the house of a school caretaker: *Glasgow City Council v. Torrance* 2000 SLT (Sh. Ct) 32.

⁵⁵¹ Housing (Scotland) Act 2001 sch.1 paras 1-9.

⁵⁵² Housing (Scotland) Act 2001 ss. 23-33.

Prior to deregulation of the private rented sector the distinction between the letting of furnished and unfurnished accommodation was of fundamental importance in determining the scheme of regulation which applied to the tenancy contract. Since deregulation of the private rented sector in the late 1980s the distinction has ceased to be of importance from a legal or regulatory standpoint with residential tenancies attracting the same level of protection regardless of whether the flat is furnished or unfurnished.

Student apartments

Scottish law excludes student lettings from both social sector and private sector protection, so they will be essentially contractual in nature. The exclusion of student lets in both cases of course only applies where the landlord is the student's own educational institution (i.e. in the case of student flats, halls of residence etc).

Resident landlord arrangements

A tenant who shares a house with a resident landlord is outside the protection of the assured tenancy scheme,⁵⁵³ and will have far fewer rights, but a tenant who has a self-contained flat in the same building as his landlord has a self-contained flat will be a normal private sector residential tenant (usually having a short assured tenancy). For a tenancy to be excluded from the assured tenancy scheme on account of a resident landlord the conditions are:

- the tenancy relates to part of a building;
- access to one part was via the other part;
- the landlord occupied as his principal home at the time of the grant;⁵⁵⁴
- he has continued to do so; and
- the tenant did not previously have an assured tenancy.

Where a tenant rents a room in their landlord's house their tenant rights differ and are considerably more limited as they have what is known as a common law tenancy. Under such a tenancy the lease agreement will form the basis of regulation of the relationship.

Contracts over rooms (Bedsits)

There is a fundamental distinction between sharing with a landlord and sharing with another tenant (or sharing with a landlord who does not meet the resident landlord conditions). A tenant must have exclusive occupation of some ('separate') accommodation – usually a bedroom at least. If so, he may share the use of other accommodation with other tenants (but not the landlord); this 'shared accommodation' would commonly be a bathroom or kitchen. The whole is effectively treated as a single unit and the tenancy of the shared accommodation cannot be terminated apart from the tenancy of the separate accommodation.⁵⁵⁵

Where a tenant is sharing their accommodation with others i.e. living in a bedsit, shared flat, lodging, shared house, hostel or bed and breakfast accommodation which requires them to share some facilities, e.g. a bathroom or kitchen, then they will be living in a house in multiple occupation ('HMO') and this attracts additional statutory protections. An HMO is a property that is shared by three or more tenants who aren't members of the same family and HMO landlords are licenced by the

⁵⁵³ Housing (Scotland) Act 1988 sch. 4

⁵⁵⁴ There are limited exceptions eg where the landlord is selling the house.

⁵⁵⁵ Housing (Scotland) Act 1988 s. 14; similarly if the tenant sublets part of the house to a sub-tenant: s. 15. These provisions are missing from Housing (Scotland) Act 2001 s. 11 governing the social sector.

council.⁵⁵⁶ The landlord must obtain an HMO licence from the council and in order to consider the landlord's application the council must check that the owner doesn't have any criminal convictions, for example, for fraud or theft. Checks will extend to anyone who manages the property, for example, a letting agent. The council will ensure that the tenants' rights are respected; should the landlord fail to maintain the common areas etc., then a tenant may contact the council who may serve a notice on the landlord requiring them to take action and may also prosecute the landlord for breaking the conditions of their licence.

- **Requirements for a valid conclusion of the contract**
 - **formal requirements**

These can be classified into general formality requirements, requirements to create a private sector assured tenancy, specific rules necessary for the creation of a short assured tenancy and information requirements in the social sector (housing with a public task).

General formality requirements: the basic legal requirements for a valid conclusion of a tenancy contract in Scotland vary according to the length of the tenancy entered into. A *short term tenancy* may be created orally with very limited formal requirements, contractual creation being based on offer and acceptance.⁵⁵⁷ Under the Requirements of Writing (Scotland) Act 1995 a lease for one year or less do not require to be in writing.⁵⁵⁸ This includes a yearly tenancy, even one which rolls over so as to last many years, and any periodic tenancy with a period of less than a year.⁵⁵⁹ The same is true of other occupation rights. In the case of a lease for one year or less which complies with statutory requirements but has been created orally, a party may be prevented from withdrawing from the agreement where the other party has done something in reliance of the contract and would be materially affected by such a withdrawal.⁵⁶⁰ Where a *lease is for more than one year* then it should be in writing,⁵⁶¹ and should be signed⁵⁶² by both landlord and tenant.⁵⁶³ Attestation by a single witness is required to make the document self-proving.⁵⁶⁴ In terms of a *contract for a lease*, a number of formal requirements existed prior to 1995 for the

⁵⁵⁶ It is a criminal offence for a landlord to operate an HMO without a licence, and a landlord could face a fine of up to £50,000.

⁵⁵⁷ Other issues arising under contract law include consensus in idem, capacity (in Scotland achieved at age 16 under the Age of Legal Capacity (Scotland) Act 1991), duress, fraud or negligence.

⁵⁵⁸ Requirements of Writing (Scotland) Act 1995, s. 1(7) (as amended by the Abolition of Feudal Tenure etc (Scotland) Act 2000, s 76(1) and sch 12, para 58). Also under Part 10 of the Land Registration etc (Scotland) Act 2012 (which is not yet in force) documents requiring writing under the 1995 Act can be in electronic form.

⁵⁵⁹ The formality requirement applies to the first period ignoring tacit relocation; formality will be required if the tenancy itself envisages recurring periods spread over a period of more than a year, see Requirements of Writing (Scotland) Act 1995 s. 1(7).

⁵⁶⁰ Requirements of Writing (Scotland) Act 1995 s. 1(3). The concept of promissory estoppel is not a part of Scots law however this provision bears a similar operation.

⁵⁶¹ Requirements of Writing (Scotland) Act 1995 s. 1(7). S. 14(3) applies to pre-1995 tenancies which need not concern us.

⁵⁶² Signatures should appear at the end of the last page: Requirements of Writing (Scotland) Act 1995 s 7(1).

⁵⁶³ Requirements of Writing (Scotland) Act 1995 s 2(1).

⁵⁶⁴ Requirements of Writing (Scotland) Act 1995 s 3.

creation of a valid contract concerning heritable property; such contracts had to be in writing, signed and attested,⁵⁶⁵ but the old law has been abolished.⁵⁶⁶ At present contracts in general do not require to be in writing,⁵⁶⁷ but where the contract concerns heritable property, i.e. a real right in land, that contract must be in writing.⁵⁶⁸

There are a number of elements which should be present in a lease. Although these have been set out in the previous heading it is worth repeating the main characteristics. In the first place there must be a landlord and a tenant who are separate persons. There must be some property which is the subject of the lease and this must be identified. In addition there should be a rent arrangement present in the agreement. Where an occupancy agreement has been created without a requirement of rent then it is most likely this will be a licence and not a lease.⁵⁶⁹ In general practice the term of the lease should be stated, but failure to state a term is not fatal and instead the law will imply a term of one year in cases where no term has been set out.⁵⁷⁰

Rent Book: in an assured tenancy and a Scottish secure tenancy a landlord is under a duty to provide a tenant with a rent book if rent is paid weekly,⁵⁷¹ a provision which also applied to older tenancies and occupation agreements under the Rent Acts.⁵⁷²

Scottish secure tenancies: it is perfectly possible to create a secure tenancy orally, since there is no requirement of writing.⁵⁷³ However, the tenant has a right to a written tenancy agreement; the landlord is obliged to draw up a written tenancy agreement stating the terms of the lease and this must be subscribed by landlord and tenant so as to comply with the Requirements of Writing (Scotland) Act 1995.⁵⁷⁴ In other words it must be signed by each party and each signature must be witnessed. This must be done before the commencement of the tenancy and a copy must be supplied with a copy without any fees.

The tenancy agreement should follow the model provided to social landlords in a revised form in June 2002.⁵⁷⁵ In its introductory section this sets out:

Parties, the landlord and tenant;

⁵⁶⁵ The attestation requirement was satisfied where one of the following forms were present: a formal deed signed by both landlord and tenant with a witness, a holograph document, either handwritten by one of the parties and signed or a document adopted as a holograph. i.e. a document handwritten or type by another party and adopted as holograph.

⁵⁶⁶ Requirements of Writing (Scotland) Act 1995 s. 11(3).

⁵⁶⁷ Requirements of Writing (Scotland) Act 1995 s. 1(1).

⁵⁶⁸ Requirements of Writing (Scotland) Act 1995 s 1(2).

⁵⁶⁹ *Mann v. Houston* 1957 SLT 89.

⁵⁷⁰ *Gray v. Edinburgh University* 1962 SC 157, 1962 SLT 173. Upon expiry of the one year term, the lease will renew perfectly, without further action by the parties, by the process of tacit relocation. For more detail see the section on termination.

⁵⁷¹ Housing (Scotland) Act 1988 s. 30(4); Assured Tenancies (Rent Book) (Scotland) Regulations 1988 (notices etc. to be included).

⁵⁷² Rent (Scotland) Act 1984 ss. 79, 113.

⁵⁷³ *Bolton v. Aberdeen City Council* 2002 Hous LR 40.

⁵⁷⁴ Housing (Scotland) Act 2001 s. 23. This also applies by s. 39 to tenancies which are excluded from the definition of the Scottish secure tenancy by Housing (Scotland) Act 2001 sch. 1. See also: Model Scottish Secure Tenancy (2002); *Guidance on Social Tenancies* (SEDD 6/2002) paras 69-77.

Agreement to rent the property;

Full address;

Entry date – usually a fixed term followed by a weekly or fortnightly relocation (either weekly, fortnightly, four weekly or calendar monthly);

Rent (weekly, fortnightly or calendar monthly, in advance or arrears);

Services such as heating; and

Preliminary clauses.

There follow terms (to be discussed in the following pages) about:

Use of the house;

Respect for others;

Subletting, Assignment and Exchange;

Repairs, Maintenance, Improvements and Alterations;

Ending the tenancy;

After the tenant's death; and

Information, consultation, complaints, and interpretation.

The model covers twenty seven pages and it must be supplemented by a briefer (four page) summary of the key terms.⁵⁷⁶ Information must be provided about the Right to Buy and other information must be provided on request. It is envisaged that this will be provided as a Tenant Information Pack.

Assured tenancies: full assurance will arise where residential property is let to a tenant in such a way as to fall within the definition of an assured tenancy in the Housing (Scotland) Act 1988.⁵⁷⁷ This could occur orally if the tenancy is for a year or less and otherwise in writing. Usually the landlord will be very anxious to avoid any such informal letting because he will wish to create a short assured tenancy. In any event the tenant is entitled to a written tenancy agreement; a duty is imposed on the landlord to draw up a document stating the terms of the tenancy (though these may be incorporated by reference) and to give a copy of the executed tenancy agreement to the tenant.⁵⁷⁸ It should be executed either probative or holograph of the parties.⁵⁷⁹ This must be done without cost to the tenant. If the landlord fails to do this the tenant can apply to the court for an order amending any written document or creating one setting out the terms of the tenancy.⁵⁸⁰

More recently the landlord under an assured tenancy has become obliged to provide a Tenant Information Pack, whatever the duration of the tenancy. The landlord must provide to the tenant no later than the commencement date the 'standard tenancy

⁵⁷⁶ Additional notices are required in the rarer cases where the tenant becomes a short Scottish secure tenant, see section 6.6 below.

⁵⁷⁷ Housing (Scotland) Act 1988 s. 12.

⁵⁷⁸ Housing (Scotland) Act 1988, s. 30(1).

⁵⁷⁹ ie it must be signed but the signatures may or may not be witnessed.

⁵⁸⁰ Housing (Scotland) Act 1988, s. 30(2). The tenant also has the right to apply to fix the terms of a statutory tenancy within one year of the ending of the contractual tenancy by s. 17.

documents'. This came into force on 1 May 2013.⁵⁸¹ The standard tenancy documents for a fully assured tenancy are:

a copy of the document stating the terms of the tenancy;

a copy of any gas safety record; and

a Tenant Information Pack in the form set out in the (amended) Schedule,⁵⁸² and including in a manner specified in detail,⁵⁸³ information about:

the tenancy;

the house;

the landlord;

rights and responsibilities of both parties; and

any other compulsory documents;

An acknowledgement form is included for the tenant to sign to indicate receipt of the information.

Short assured tenancies: most private sector landlords will wish to grant only short assurance to their tenants. In order to do this they must make sure that the tenancy complies with the minimum term and must give notice to the tenant that his security will be limited before entering into the tenancy.⁵⁸⁴

The *term* of a short assured tenancy must be not less than six months.⁵⁸⁵ It is obviously essential in order to prove conclusively that the term is of the necessary duration to conclude the agreement in writing; if the initial term is for more than a year probative writing will be required as already explained. There are a considerable number of cases about how precisely to measure six months.⁵⁸⁶ Once the initial term is a short assured, any continuation of it after the ish date will also be a short assured tenancy.⁵⁸⁷

A short assured tenancy *notice* (Form AT5) warns the tenant that his tenancy will be with limited security, so it must state that the tenancy will be a short assured tenancy and be in a prescribed form; it is essential that this is served by the

⁵⁸¹ Housing (Scotland) Act 1988 ss. 30A, 30B, inserted by Private Rented Housing (Scotland) Act 2011 s. 33.

⁵⁸² The energy certificate must be provided on request by the tenant.

⁵⁸³ Details are set out in the Tenant Information Packs (Assured Tenancies) (Scotland) Order 2013, SSI 2013/20, with a new format prescribed by SSI 2013/90.

⁵⁸⁴ McAllister, *Scottish Law of Leases*, para. 17.63 ff.

⁵⁸⁵ Housing (Scotland) Act 1988 s. 32(1)(a).

⁵⁸⁶ *Wishaw and District Housing Association v. Neary* 2004 SC 463 (break clause allowing termination after any month did not prevent it being for a minimum of six months!); *McCabe v. Wilson* 2006 Hous LR 86. Under older legislation it appears that a provision for termination on insolvency within six months prevents short status: *William Grant & Son Distillers v. McClymont* [2009] CSH 8, 2009 SLT 305.

⁵⁸⁷ Housing (Scotland) Act 1988 s. 32(3); *Cavriani v. Robinson* 2002 Hous LR 67.

landlord and served on the tenant or all joint tenants.⁵⁸⁸ A copy of the section 32(2) notice must be included in the Tenant Information Pack.

The following is for illustrative purposes only:⁵⁸⁹

FORM AT5: FOR USE ONLY BY A LANDLORD

ASSURED TENANCIES

HOUSING (SCOTLAND) ACT 1988

NOTICE UNDER SECTION 32 TO BE SERVED ON A PROSPECTIVE TENANT
OF A SHORT ASSURED TENANCY

IMPORTANT: INFORMATION FOR PROSPECTIVE TENANT(S)

This notice informs you as prospective tenant(s) that the tenancy being offered by the prospective landlord(s) is a short assured tenancy under Section 32 of the Housing (Scotland) Act 1988.

Please read this notice carefully.

Part 1 To (name of prospective tenant)

NOTE 1 TO PROSPECTIVE TENANT. TO BE VALID THIS NOTICE MUST BE SERVED BEFORE THE CREATION OF A TENANCY AGREEMENT. A SHORT ASSURED TENANCY WILL NOT EXIST IF A VALID NOTICE HAS NOT BEEN SERVED.

Part 2 I your prospective landlord (name of landlord) of (address and telephone number of landlord) give notice that the tenancy being offered to you of the house at address of house) to which this notice relates is to be a short assured tenancy in terms of Section 32 of the Housing (Scotland) Act 1988.

Signed (landlord) Date

NOTE 2 TO PROSPECTIVE TENANT. A SHORT ASSURED TENANCY IS A SPECIAL FORM OF TENANCY. UNLESS IT FOLLOWS IMMEDIATELY AFTER ANOTHER SHORT ASSURED TENANCY OF THE SAME HOUSE, (WITH THE SAME TENANT). IT MUST BE FOR NOT LESS THAN 6 MONTHS.

NOTE 3 TO PROSPECTIVE TENANT. A LANDLORD OF A SHORT ASSURED TENANCY HAS SPECIAL RIGHTS TO REPOSSESS THE HOUSE. IF THE LANDLORD TERMINATES THE TENANCY BY ISSUING A VALID NOTICE TO QUIT AND GIVES THE TENANT AT LEAST 2 MONTHS NOTICE (OR A LONGER PERIOD IF THE TENANCY AGREEMENT PROVIDES) OF HIS INTENTION TO REPOSSESS THE HOUSE THE

⁵⁸⁸ Housing (Scotland) Act 1988 s. 32(2).

⁵⁸⁹ It is important to follow the statutory format of the form available at <http://www.prhpscotland.gov.uk/prhp/files/AT5.pdf>

COURT MUST GRANT THE LANDLORD AN ORDER ALLOWING HIM TO EVICT THE TENANT IF HE APPLIES FOR ONE AT THE END OF THE TENANCY PERIOD SET OUT IN THE TENANCY AGREEMENT.

Part 3 Address and telephone number of agents if appropriate: of landlord(s) agent; of Tenant(s) agent

NOTE 4 TO PROSPECTIVE TENANT. A TENANT OF A SHORT ASSURED TENANCY HAS A SPECIAL RIGHT TO APPLY TO A PRIVATE RENTED HOUSING COMMITTEE FOR A RENT DETERMINATION FOR THE TENANCY.

NOTE 5 TO PROSPECTIVE TENANT. IF YOU AGREE TO TAKE UP THE TENANCY AFTER YOUR LANDLORD HAS SERVED THIS NOTICE ON YOU YOUR TENANCY WILL BE A SHORT ASSURED TENANCY. YOU SHOULD KEEP THIS NOTICE IN A SAFE PLACE ALONG WITH THE WRITTEN DOCUMENT SETTING OUT THE TERMS OF TENANCY WHICH YOUR LANDLORD MUST PROVIDE UNDER SECTION 30 OF THE HOUSING (SCOTLAND) ACT 1988 ONCE THE TERMS ARE AGREED.

NOTE 6 TO PROSPECTIVE TENANT. IF YOU REQUIRE FURTHER GUIDANCE ON ASSURED AND SHORT ASSURED TENANCIES, CONSULT A SOLICITOR OR ANY ORGANISATION WHICH GIVES ADVICE ON HOUSING MATTERS.

SPECIAL NOTES FOR EXISTING TENANTS

1. If you already have a regulated tenancy, other than a short tenancy, should you give it up and take a new tenancy in the same house or another house owned by the same landlord, that tenancy cannot be an assured tenancy or a short assured tenancy. Your tenancy will continue to be a regulated tenancy.
2. If you have a short tenancy under the Tenants' Rights Etc (Scotland) Act 1980 or the Rent (Scotland Act 1984) your landlord can offer you an assured tenancy or short assured tenancy of the same or another house on the expiry of your existing tenancy.
3. If you are an existing tenant and are uncertain about accepting the proposed short assured tenancy you are strongly advised to consult a solicitor or any organisation which gives advice on housing matters.

- **is there a fee for the conclusion and how does it have to be paid? (e.g. "fee stamp" on the contract etc)**

Each residential sectoral regime expressly provides, as already noted, that the tenant must not be charged a fee for the preparation of the tenancy agreement and tenancy information pack. There is no stamp duty land tax on a short residential tenancy.

- **registration requirements; legal consequences in the absence of registration**

There is no requirement to register individual tenancy agreements (though private landlords must be registered⁵⁹⁰ and a licence is required before letting a flat in a house in multiple occupation⁵⁹¹).

- **Restrictions on choice of tenant - antidiscrimination issues**

- **EU directives (see enclosed list) and national law on antidiscrimination**

Antidiscrimination provisions apply to landlords in both the private and social rented sectors. When a landlord is letting accommodation he must ensure that no person or group of persons is treated less favourably than any other person or group of persons because of their race, colour, ethnic or national origin, sex, disability or sexual orientation.⁵⁹² The landlord should not discriminate against a tenant or prospective tenant because of their entitlement to Housing or other Benefits and should not advertise vacant properties in a manner that could be described as discriminatory. When dealing with persons with a disability a landlord must not unreasonably withhold consent to the tenants to adapt the rented accommodation to meet the needs of the disabled occupants.⁵⁹³ The Disability Discrimination Act 2005, which amended the early Act of 1995, introduced a set of positive general duties which require public bodies to promote equality of opportunity for disabled people. The general duty for disability states that public authorities must have due regard, when carrying out their functions, to the need to:

- a) eliminate unlawful discrimination;
- b) eliminate harassment of disabled persons that is related to their disability;
- c) promote equality of opportunity between disabled persons and others;
- d) take steps to take account of disabled persons' disabilities, even where that involves treating disabled people more favourably than other persons;
- e) promote positive attitudes towards disabled persons; and
- f) encourage participation by disabled persons in public life.

Equal treatment of disabled people should be part of the culture of public authorities, and in practical and demonstrable ways going beyond simple consultation to include the promotion of positive attitudes and to ensure the involvement of disabled people. In drawing up the local housing strategy, local authorities should demonstrate that needs have been researched, supportive and meaningful involvement has occurred and actions to be taken have been identified. The strategy should be monitored and evaluated for its effectiveness .

It is illegal for a landlord, mortgage lender or other service provider to discriminate because a person is disabled.⁵⁹⁴ The Equality Act 2010 defines a disability as a physical or mental condition that has a long-term, adverse effect on a person's day-to-day life. Disability discrimination occurs when a disabled person is treated less favourably than a non-disabled person, and they are treated this way for a reason

⁵⁹⁰ See section 5 above.

⁵⁹¹ See section 6.1 above.

⁵⁹² Race Relations Act 1976; Disability Discrimination Act 1995; Sex Discrimination Act 1975.

⁵⁹³ Housing (Scotland) Act 2006.

⁵⁹⁴ Equality Act 2010; Disability Discrimination Act 2005.

arising from their disability, and the treatment cannot be justified. A letting agent would be treating a disabled person less favourably if they refused to serve them when providing a service, offered a reduced service or a worse standard of service or made an offer on poorer terms. Aside from statute there is also a Code of Practice on Racial Equality in Housing 2006 which provides guidance.

The Equality Act 2010 amends the Sex Discrimination Act 1975 and introduced the Gender Equality Duty. The general duty states that public authorities must have due regard, when carrying out their functions, to the need to eliminate unlawful discrimination and harassment; and promote equality of opportunity between women and men. The duty places the legal responsibility on public authorities to positively demonstrate that they treat men and women fairly. Racial discrimination occurs when a person is treated less favourably than someone else, because of their race, colour, nationality, or national or ethnic origins. Race is one of the characteristics protected by the Equality Act 2010.⁵⁹⁵

- **Limitations on freedom of contract through regulation**

- **mandatory provisions in rental contracts, in particular: mandatory minimum requirements of what needs to be stated in a tenancy contract**

The contents of secure tenancies granted should follow the Model Scottish Secure Tenancy Agreement (July 2002); variations are permitted but ought to follow the Guidance to social landlords and would be subject to judicial review. Social landlords must be careful to avoid unfair commercial practices since the EU protections apply to tenancies.⁵⁹⁶ One example of a practice that would surely attract censure is the former practice of one London borough requiring homeless families to sign a tenancy agreement without seeing the property on offer.⁵⁹⁷ In the private sector there is more scope for a landlord to dictate the terms of an assured tenancy, though even here many terms are implied especially in relation to major structural repairs.⁵⁹⁸ The terms must be communicated to the tenant in the Tenant Information Pack, as already explained.⁵⁹⁹

- **control of contractual terms (EU directive and national law); consequences of invalidity of contractual terms**

Domestic legislation governing unfair contract terms did not apply to land, but this is not the case with the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.⁶⁰⁰ It covers both the private and social sectors.⁶⁰¹ One London borough attracted opprobrium for its practice of requiring homeless families to sign a tenancy agreement without seeing the property on offer, the resulting terms being unfair.⁶⁰² Guidance here has to be sought from the Office of Fair Trading operating

⁵⁹⁵ The Equality Act 2010 replaces the Race Relations Act 1976 and any complaint of racial discrimination should now be made under the 2010 Act.

⁵⁹⁶ Consumer Protection from Unfair Trading Regulations 2008; Sparkes, *European Land Law*, ch. 5.

⁵⁹⁷ *Newham London Borough Council v. Khatun* [2004] EWCA Civ 55; the case predates the adoption of the Unfair Practices Directive.

⁵⁹⁸ See section 6.4 below.

⁵⁹⁹ See section 6.3 above.

⁶⁰⁰ Sparkes, *European Land Law*, para. [8.35]; McAllister, *Scottish Law of Leases*, ch. 22.

⁶⁰¹ S Bright 'Unfair Contract Terms and Local Authority Tenants' [2004] *Journal of Housing Law* 2.

⁶⁰² *Newham London Borough Council v. Khatun* [2004] EWCA Civ 55.

United Kingdom wide⁶⁰³ since there is no specific guidance in Scotland. The problem is particularly acute if, as usual, the landlord provides standard terms on a take it or leave it basis, but presumably use of the Model Scottish secure Tenancy will be safe. McAllister identifies a non-exhaustive list of potential problems: unfair disclaimers, repairing obligations, rent retention clauses, rights of entry, financial providers, variation of tenancies, rent reviews, irritancy and restrictions on assignment and subletting.

Any terms included in the tenancy must not amount to unfair contract terms.

- **statutory pre-emption rights of the tenant**

Statutory pre-emption rights do not operate in the private sector in Scotland. The Right to Buy operates in the social sector though increasingly this is being constricted and proposals have been made for its abolition.⁶⁰⁴

- **are there provisions to the effect that a mortgagor is not allowed to lease the dwelling (charged by the mortgage) or similar restrictions?**

There are no provisions to the effect that a mortgagor is not allowed to lease the dwelling rather such matters may be decided by agreement between the mortgagee and mortgagor. A clause to this effect is an invariable term of a residential purchase, except where the borrower has disclosed that the purchase is a “Buy to Let” transaction.

⁶⁰³ *Guidance on Unfair Terms in Tenancy Agreements (OFT356).*

⁶⁰⁴ See section 5 above.

Table for 6.3 Conclusion of tenancy contracts

	Main characteristic(s) of Scottish Secure Tenancy	Main characteristic(s) of short assured tenancy.
Requirements for valid conclusion	Allocation Written agreement and summary	Registration of landlord Written agreement AT5 warning notice
Regulations limiting freedom of contract	Model agreement	Standard form provided by landlord on take it or leave it basis

6.4 Contents of tenancy contracts

- **Description of dwelling; indication of the habitable surface (and consequences in case of the provision of wrong data)**

Accurate description of the dwelling being let is important for a number of reasons. Practice is rather sloppy but this may not matter overmuch because residential tenants invariably take the opportunity to view the dwelling prior to signing the lease agreement. During the viewing the prospective tenant has the opportunity to ask the landlord about the physical extent of the dwelling. The tenancy agreement may contain a description of the dwelling; outlining the number of rooms and their functions. Where the landlord has provided the tenant with inaccurate data about the dwelling there are a number of outcomes depending on the nature of the error, but the misdescription may be so serious as to amount to a material breach of contract which could lead to rescission of the lease and/or a claim of damages.

In the private sector the description of the tenancy must match the landlord's registration and any House in Multiple Occupation licence. The tenancy should also match the Tenant's Information Pack and also, if the tenancy is as usual a short assured tenancy, also the landlord's warning notice (AT5). It is necessary that the tenancy should refer to a house (or part of a house) let as a separate dwelling⁶⁰⁵ subject to the possibility that the complete dwelling may include shared accommodation,⁶⁰⁶ so it is clearly desirable to identify the separate accommodation and any that is shared in detail.

A Scottish secure tenancy granted by a social landlord must relate to a separate dwelling, with no vital accommodation shared, and the tenancy agreement itself must identify the property. The Model Tenancy⁶⁰⁷ is lax in this regard since property is only identified by the "full address of the house" the intention being to enable a single tenancy agreement to be used for a multiplicity of property.⁶⁰⁸ There is provision for the tenant to ask for a detailed description of the property, a plan, and a statement of rights over common parts and access rights. One wonders whether this is sufficient to secure legal certainty.

- **Allowed uses of the rented dwelling and their limits**
 - **In particular: to what extent are mixed (residence/commercial) contracts lawful and usual (e.g. having a shop, a legal office or a doctor's studio in the dwelling)**

A use clause is crucial in order to secure the correct application of the sectoral divisions in Scottish tenancy law. What is important is the purpose for which the property is let. Scottish tenants are under a common law duty not to "invert possession" that is to use the property for purposes other than those for which it was let. Residential schemes require property to be let as a separate dwelling for the use

⁶⁰⁵ Housing (Scotland) Act 1988 s. 12.

⁶⁰⁶ Housing (Scotland) Act 1988 s. 14.

⁶⁰⁷ Model Scottish Secure Tenancy (2002) cl. 1.3.

⁶⁰⁸ *Secure Tenancy Guidance* (SEDD 6/2002), Legal Note 1.2.

of the tenant as his principal home.⁶⁰⁹ If the residential purpose is mixed with a commercial purpose it will take the whole letting into the commercial scheme. In one case this was true of a letting of a house together with a craft shop, even though, in course of time, domestic use had come to account for 90% of the total; the tenant was not a Scottish secure tenant and had no Right to Buy.⁶¹⁰ In principle the same is true of agricultural uses, though there is a special provision allowing the assured tenancy regime to operate despite the fact that the tenancy of the house includes an area of land along with it.⁶¹¹ Use for a commercial purpose will commonly be a ground for possession.

In the social sector it is more obviously necessary to control the use of property to ensure fairness to others seeking social housing. The model Tenancy Agreement therefore imposes an obligation on the tenant to enter the property and to use it solely as the tenant's principal home and expressly prohibits business use.⁶¹²

With regard to the carrying on of ancillary commercial activity from the rented dwelling it has consistently been held that such use may be permissible so long as the residential use of the dwelling remains real and effective. While this has been established with regard to the former regulated (Rent Act) tenancies,⁶¹³ it has been argued that this would also be the case with regard to assured tenancies. While some business or commercial use is permissible in this case, it is clear that any commercial activity involving the sale of alcohol for consumption on the premises or if it is a shop to which the Tenancy of Shops (Scotland) Act 1949 applies, is inconsistent with an assured or regulated tenancy.

- **Parties to a tenancy contract**

- **Landlord: who can lawfully be a landlord?**

The private and social sectors are rigidly distinct and mutually exclusive. In the private sector anyone who can hold heritable property can be a landlord, the age of majority being 16, and there are also many corporate landlords. In the private sector landlords must register and pass a "fit and proper person" test, the main object being to address antisocial behaviour.⁶¹⁴ It is easy to see whether this has been done because since 1 June 2013 any advertisement of property available for letting must include the landlord's registration number. Errant landlords potentially face a large fine. A House in Multiple Occupation licence may also be required.

In the public sector, local authorities took on housing functions after 1918 and increasingly after 1945. The period between 1945 and 1980 saw large scale redevelopment in large scale public estates, often very unpopular. Landlords permitted to act as social landlords are local authorities, waste and sewerage authorities and registered social landlords, the latter mainly consisting of housing associations. These have increased in importance since 1974 and now dominate the social sector in many parts of Scotland, not least because of large scale stock

⁶⁰⁹ Housing (Scotland) Act 1988 s.13; Housing (Scotland) Act 2001 s. 11.

⁶¹⁰ *Scherrer v. Dumfries and Galloway Council* 2000 Hous LR 42, Lands Tr.

⁶¹¹ Housing (Scotland) Act 1988 s.12; Housing (Scotland) Act 2001 s. 11.

⁶¹² Model Scottish Secure Tenancy (2002) cl. 2.1. There is the possibility of asking permission for ancillary business use, which must not be unreasonably refused.

⁶¹³ A.G.M. Duncan & J.A.D. Hope. *The Rent (Scotland) Act 1984* (1986), para. 58.23.

⁶¹⁴ Antisocial Behaviour etc. (Scotland) Act 2004 Part 8; see section 6.6 above.

transfers from around 1980 onwards. All social landlords must be entered on the register of social landlords.⁶¹⁵

- does a change of the landlord through inheritance, sale or public auction affect the position of the tenant?

Again the private and social sectors must be distinguished. However, throughout, it must be remembered that a tenancy is proprietary in character and it will therefore bind a purchaser; a short tenancy does not need to be entered on the Land Register since it will be an overriding interest.⁶¹⁶

Where there is a change of the landlord through inheritance, sale or public auction the impact on the position of the tenant will vary. In the first instance the successor is bound by the terms of lease and as such they cannot terminate the tenancy without a good reason. In the case of inheritance, the successor may wish to keep the tenant and therefore the position of the tenant would be unaffected, however the successor may elect to sell the dwelling and they may seek to bring about termination of the tenancy (see section on termination). Where the landlord sells the property either privately or through public auction, they may elect to terminate the tenancy prior to sale. This would be common practice as in general a property with vacant possession will fetch a higher price and the provisions concerning termination of assured tenancy facilitate such action (see section on termination). When selling the property the landlord may need to access the property in order to show estate agents, surveyors and prospective buyers around the property. In doing so the landlord must give the tenant reasonable notice (24 hours) and the access must be reasonable (within suitable hours). Should the landlord sell the property without terminating the lease then the new owner will not be able to terminate the lease without good reason and may not increase the rent without following the statutory procedure (see section on rent increase).⁶¹⁷

In the public sector, the powers of disposal of a social landlord are strictly limited (apart from sales to the sitting tenant under the Right to Buy) and will require the consent of the Housing Regulator.⁶¹⁸ Recent years have seen mass stock transfers from local authorities to housing associations.⁶¹⁹ Tenants must be consulted before their landlord is changed.⁶²⁰

⁶¹⁵ Housing (Scotland) Act 2001 Part 3; registration criteria are set out in Housing (Scotland) Act 2010 ss 24-26. Social landlords are subject to the oversight of the Scottish Housing Regulator.

⁶¹⁶ See section 6.1. above.

⁶¹⁷ The implication of this is that the landlord would have the right to terminate the tenancy, which might be the case where the tenancy has been inherited, but not necessarily so. As already discussed, it is *not* so when the property has been sold, as a result of the operation of the Leases Act 1449.

⁶¹⁸ Housing (Scotland) Act 1988 part III; Housing (Scotland) Act 2010 Part 2.

⁶¹⁹ This may have consequences for the Right to Buy; but rights to buy are preserved on a switch of landlord.

⁶²⁰ Housing (Scotland) Act 2001 s. 76, sch. 9.

- Tenant:

- Who can lawfully be a tenant?

Contractual capacity accrues at 16, so a persons below that age could not be a tenant. Some people may be disqualified from renting particular properties as a result of previous antisocial behaviour. Otherwise there are no restrictions on who can lawfully be a tenant. In the social sector, landlords are obliged to follow their allocation policies and the immigration status of the applicant must be taken into account.⁶²¹

- Which persons are allowed to move in an apartment together with the tenant (spouse, children etc)?

In the private sector, this is a matter of contractual negotiation between landlord and tenant.⁶²² It appears that a spouse has a common law right to live with his or her spouse. Today it is generally assumed that a tenant may live with a spouse, civil partner or cohabitee (of whatever gender), but it is usual for a couple to take a tenancy as joint tenants to make occupation rights clear. It is usual also for children to live with their parents and for the tenant to share with other family members, but this should be negotiated with the landlord. Family courts have powers to direct the residence of children, but only after landlords have been heard. Rights of family members may be limited as a result of previous antisocial behaviour. In the social sector this is again a matter for the tenancy agreement, but the Model⁶²³ states that:

You are entitled to have members of your family occupying the house with you, as long as this does not lead to overcrowding.

Family members will have been identified during the allocation process. Tenants should tell their landlord who is in occupation, and landlords may require tenants to disclose this information.

Occupancy of the apartment will be limited to a certain number of people. The limit will usually be set by the overcrowding rules⁶²⁴ and possibly the terms of any House in Multiple Occupation licence.

- Changes of parties:

- joint tenants

Two or more individuals renting together will be joint tenants. The common law position in Scotland⁶²⁵ is very controversial because one joint tenant is entitled to give notice unilaterally which has the effect of terminating the tenancy completely. This point is made clear in the Tenant's Information Pack, but may well not be understood by the parties in advance. It really requires modification in the tenancy agreement.

⁶²¹ See section 6.2 above.

⁶²² Tenant Information Pack para. 2.5.

⁶²³ Model Scottish Secure Tenancy Agreement (2002) cl. 2.1.

⁶²⁴ See section 6.1 above.

⁶²⁵ *Smith v. Grayton Estates* 1960 SC 349. The rule is the same in England; see below.

In the social sector, there is a possibility of a person who occupies the property as his or her principal home to seek to become a joint tenant with the landlord's permission;⁶²⁶ this is intended to be exceptional and to be in the uncontrolled discretion of the landlord. Here, in the social sector, one joint tenant can give notice to leave and end his interest whilst leaving the tenancy in the remaining tenant or tenants.⁶²⁷ The law is thus different from England where, under the controversial rule in *Hammersmith and Fulham Royal London Borough Council v. Monk*,⁶²⁸ a social landlord can end a joint tenancy when one joint tenant gives notice, evict the other joint tenant, and regrant a tenancy of the flat to the person who has given notice; this power is usually exercised when a couple split after allegations of domestic violence. If one joint tenant leaves this will have immediate implications for housing benefit, especially in terms of space allocation.

- in case of divorce (and equivalents such as separation of non-married and same sex couples);

In the past tenancies in the private rented and social rented sector were granted to the husband and the housing rights of women were quite limited in Scotland. In the event of a relationship breakdown the spouse who was neither owner nor tenant had no right to remain in the property.⁶²⁹ The Matrimonial Homes (Family Protection) (Scotland) Act 1981 introduced protections for parties without formal property rights. These "occupancy rights" allowed the party without formal property rights not to be summarily evicted and not to have to endure intolerable conduct because of their decision to remain in the property. Under this Act the non-entitled spouse may make an application to have the tenancy transferred in an action for separation. In the event that a person occupies a dwelling as tenant or joint tenant then they may rely on their tenancy rights to remain in the dwelling and they may not be lawfully evicted by force. Where a tenant seeks the other to vacate the property they must seek an exclusion order. The landlord must be notified of applications and has an opportunity to object.⁶³⁰

- apartments shared among students (in particular: may a student moving out be replaced by motion of the other students);

This is covered by the discussion of joint tenants immediately above; the default position is that one joint tenant can give notice to terminate the tenancy on the spot (but not before) and this will end the tenancy of all the others. If this is not desired, the lease agreement must include a contrary provision.

⁶²⁶ Housing (Scotland) Act 2001 s. 11(5); *Guidance of Scottish Secure Tenancy* (SEDD 6/2002) paras 20-21.

⁶²⁷ Housing (Scotland) Act 2001 s.13; the landlord may take unilateral action (by notice) after abandonment by one joint tenant: s.20.

⁶²⁸ [1992] 1 AC 478, HL. Various challenges based on trust law and human rights principles have failed.

⁶²⁹ There is no Scottish equivalent to the English legal concept of beneficial interest and therefore rights to remain in the property were limited to those named on the title deeds or in the rent book.

⁶³⁰ McAllister, *Scottish Law of Leases*, para. 7.38 ff.

- death of tenant

Residential tenancies are subject to sectoral schemes for succession to tenancies. In the *private sector* where the tenant is a post-1988 tenant with a fully assured tenancy,⁶³¹ succession can occur to a sole tenant's

spouse or civil partner, or

cohabitant living with the tenant as man and wife (though regardless of gender).⁶³²

Succession can only occur to someone who was also occupying the house as his or her principal home immediately prior to the death of the tenant.⁶³³ In these circumstances the surviving partner will retain possession of the house under a statutory assured tenancy.

Succession rights to *social tenancies* are set out in the Housing (Scotland) Act 2001⁶³⁴ and apply to the death of a tenant of a local authority or registered social landlord. Upon the death of a tenant the tenancy will pass to a qualified person,⁶³⁵ unless the survivor killed the tenant.⁶³⁶ The Act also provides for a further succession on the death of the first successor. However, upon the death of the second successor the tenancy is terminated except where a joint tenant continues to use the house as that person's only or principal home.⁶³⁷

. The definition of a qualified person is broad and includes in order of priority:⁶³⁸

a tenant's spouse or civil partner,⁶³⁹

a cohabitee (regardless of gender),⁶⁴⁰

a member of the tenant's family, and

a carer.

Where several people with equal property claims qualify, they must agree who is to take, or otherwise the landlord can determine the successor.

⁶³¹ Succession to earlier Rent Act tenancies, since January 1989, may be to a surviving spouse or cohabitee or other family member, but the successor will always take an assured tenancy.

⁶³² Housing (Scotland) Act 1988 s. 31(4). Reliance on succession can be avoided if the tenancy is held by the couple as joint tenants.

⁶³³ Housing (Scotland) Act 1988 s. 31(1).

⁶³⁴ Housing (Scotland) Act 2001 s. 22.

⁶³⁵ Reliance upon it is avoided if a couple hold as joint tenants.

⁶³⁶ *McCreighton v. West Lothian Council* [2009] CSIH 64.

⁶³⁷ Housing (Scotland) Act 2001 s. 22 (4).

⁶³⁸ Sch. 3.

⁶³⁹ A spouse or partner requires residence at the time of the death but with no qualifying period.

⁶⁴⁰ This and the subsequent categories requires residence for six months before the death, a period to be increased to twelve months. There is a considerable case law on previous schemes about what is evidence of a sufficient connection with the property: *Scottish Homes v. Fairbairn* 2000 Hous LR 114; *Monklands District Council v. Gallagher* 2000 Hous LR 112; *East Lothian Council v. Sheldon* 2004 Hous LR 123; *Edinburgh City Council v. Johnston* 2005 SLT (Sh. Ct) 160.

- **Subletting:**
 - **Under what conditions is subletting allowed? Is subletting being abused e.g. with the aim of circumventing the legal protection of tenants (when the tenant is offered not an ordinary lease contract but a sublease contract only)?**

In order for the creation of a sub tenancy in the private rented or social rented sectors consent from the landlord is an essential requirement.

When a lease is assigned, the landlord is unchanged, so the status of the tenancy (e.g. as an assured or Scottish secure tenancy) would be unchanged also. If a social tenancy is sublet, then the subtenancy cannot be a Scottish secure tenancy, since the head tenant is not a local authority or registered social landlord, and will be prevented from being a regulated or assured tenancy by virtue of s 32(7) of the Housing (Scotland) Act 2001. If a private sector tenancy is sublet with the landlord's consent, then the sublet will normally qualify as an assured tenancy

So far as a private sector tenancy is concerned, a tenant holding under an assured tenancy is not permitted to assign the tenancy or sublet or part with possession of the whole or any part of the house without the consent of the landlord.⁶⁴¹ This is subject to the terms of the tenancy either allowing or restricting transactions; to allow free assignation would be very unusual. No premium may be charged.

In the social sector, a tenant holding under a Scottish Secure tenancy is not permitted to assign the tenancy or sublet or part with possession of the whole or any part of the house without the written consent of the landlord.⁶⁴² In the case of assignation, the dwelling must have been the purported assignee's principal home in the six months prior to the application for landlord consent to the assignation.⁶⁴³ Where the landlord is a registered social landlord then the assignee or subtenant must be a member of the association at the time of the transfer. An authorised subtenant is a qualifying occupier who is entitled to receive notice of, and defend, an action raised for possession. A Scottish secure tenant is entitled to exchange his home for another property also held subject to a Scottish secure tenancy if he is able to find a suitable match and obtain the consent of both landlords.⁶⁴⁴

- **Is it possible, and if yes under what conditions, to conclude a contract with a multiplicity of tenants (e.g. group of students)?**

It is possible and quite usual to conclude a contract with a group of tenants, who would be called joint tenants. This could arise between a couple such as husband and wife but also between a greater number of tenants acting jointly. Any private sector arrangement that is periodic can be terminated by notice to quit by one of the joint tenants acting unilaterally, and if this is not desired it is necessary to include a counter provision in the tenancy agreement.

⁶⁴¹ Housing (Scotland) Act 1988 s. 23; this is an implied term of every assured tenancy;

McAllister, *Scottish Law of Leases*, para. 17.59.

⁶⁴² Housing (Scotland) Act 2001 s. 32 and sch 5, pt 2; Model Scottish Secure Tenancy (2002) cl. 4;

McAllister, *Scottish Law of Leases*, para. 18.94 ff.

⁶⁴³ It is proposed to extend this to twelve months by Housing (Scotland) bill 2013 cl. 13; and allow the landlord to refuse consent where the assignee would not have a reasonable preference in housing allocation. On the current law see *East Lothian Council v. Duffy* 2012 SLT (Sh. Ct) 113.

⁶⁴⁴ Housing (Scotland) Act 2001 s.33; McAllister, *Scottish Law of Leases*, para. 18.99ff.

- **Duration of contract**
 - **Open-ended vs. limited in time contracts**
 - **for limited in time contracts: is there a mandatory minimum or maximum duration?**

In Scots law a lease must have a term. In the past this term did not have to be definite and indeed it was possible to grant a lease for an indefinite period, until the occurrence of an event or even in perpetuity.⁶⁴⁵ However this is no longer the case, at least in the following areas, as the term of a commercial lease has been fixed to a maximum duration of 175 years and in a residential lease the maximum term is twenty years.⁶⁴⁶ However, uncertainty of term is not a real problem because of the rule that a term of one year is implied in a letting in the absence of any other clear arrangement.⁶⁴⁷

Further a private landlord has a strong incentive to grant a tenancy for a specific term, since only if the initial term is for six months or more (and the requisite form AT 5 is served) can the tenancy be a short assured tenancy.⁶⁴⁸ This is so important that it has attracted a considerable case law. What happens if a term is to run from 7 April to 6 October in a given year, but the tenancy is actually signed sometime during the entry date (7 April), so the tenant actually has access to the property for some hours short of six months? The courts have treated the whole of the day on which the lease is signed as within the term and so have recognised the 'short' status of the tenancy.⁶⁴⁹

It is usual to grant a Scottish secure tenancy for an initial fixed term.⁶⁵⁰ However, a social landlord can grant a short Scottish secure tenancy in certain very limited circumstances: as a temporary letting to a person seeking accommodation or accommodating a homeless family, or temporary letting pending development or in property not belonging to the landlord.⁶⁵¹ This grants a contractual term of at least 6 months, but no guarantee of security after the end of the fixed term. The landlord has a mandatory ground for possession if it chooses to exercise it, though in order to meet human rights standards there will be procedure to review the eviction decision.⁶⁵² A recovery notice must be served between two and six months before repossession is sought.⁶⁵³

⁶⁴⁵ *Carruthers v. Irvine* 1717 Mor 15195 accepted as valid a lease to endure perpetually and continually as long as 'the grass growth up and the water runneth down'.

⁶⁴⁶ Land Tenure Reform (Scotland) Act 1974.

⁶⁴⁷ *Gray v. Edinburgh University* 1962 SC 157.

⁶⁴⁸ Housing (Scotland) Act 1988 s. 32; McAllister, *Scottish Law of Leases*, para. 17.63.

⁶⁴⁹ *Key Housing Association v. Cameron* 1999 Hous LR 47; *Wishaw & District Housing Association v. Neary* 2004 SC 463; *McCabe v. Wilson* 2006 Hous LR 56.

⁶⁵⁰ Model Scottish Secure Tenancy (2002) cl. 1.4.

⁶⁵¹ Housing (Scotland) Act 2001 sch. 6.

⁶⁵² Housing (Scotland) Bill 2013 cl. 12.

⁶⁵³ Housing (Scotland) Act 2001 s. 36; Short Scottish Secure Tenancies (Proceedings for Possession) Regulations 2002; this notice is not a notice to quit: *Aberdeenshire Council v. Shaw* 2012 SLT (Sh. Ct) 144.

- **Other agreements and legal regulations on duration and their validity: periodic tenancies (“chain contracts”, i.e. several contracts limited in time among the same parties concluded one after the other); prolongation options; contracts for life etc.**

Prolongation of residential tenancies occurs under a mix of contractual provisions, tacit relocation and sectoral specific rules.

With a short assured tenancy the initial term must be for six months or more, and when that term ends succeeding tenancies will also be short assured tenancies (without service of a further AT 5 warning notice). So the continuation may be a contractual regrant, an extension under contractual provision, or a tacit relocation. Tacit relocation occurs when the existing term runs out and the tenant holds over without any specific agreement, the period of the holding over depending upon the basis on which rent is paid. If there is a contractual provision for the extension this prevails over any tacit relocation. Thus in *Cavriani v. Robinson*⁶⁵⁴ the term of a short assured tenancy was one year, following which the term could be ended at the end of any month of the tenancy; this provision prevented any tacit relocation on an annual basis. A fully assured tenancy may be periodic or it may be for a fixed term which is followed by an open ended statutory extension.

A Scottish Secure Tenancy usually states that it will continue on a periodic basis after the initial fixed period, on a basis which may be weekly, fortnightly, four weekly or calendar monthly depending on the practice of the particular social landlord.⁶⁵⁵

- **Rent payment**

- **In general: freedom of contract vs. rent control**

- **Rent control: how is it legally framed; when does it apply; who carries it out; what are the consequences when the parties agree on an excessive rent**

Again this needs to be considered sectorally. However, a general point must first be made, that housing benefit rules are of key importance here, and especially in some locations where a high percentage of renters receive benefit. Payments of benefit will be capped to reflect what the Rent Officer regards as an appropriate level of rent,⁶⁵⁶ and in practice this is the most effective determinant of rents in a certain sector of the market.

The private rental market was deregulated in 1988 and, for new grants made on or after 2 January 1989, market forces have determined the rent. This is particularly the case with short assured tenancies, where the landlord can always recover possession of the property and so tenants have little incentive to use statutory procedures to challenge rents. Deregulation has led to increased rents, a better quality and larger supply of property, and great pressure on the housing benefit budget. It is no longer politically contentious.

⁶⁵⁴ 2002 Hous LR 67.

⁶⁵⁵ Model Scottish Secure Tenancy (2002) cl. 1.4.

⁶⁵⁶ Rent Officers (Housing Benefit Functions) (Scotland) Order 1997, as frequently amended.

The position is different where full security continues. When full assurance is granted (which is unusual), the initial rent will be negotiated contractually,⁶⁵⁷ but when the initial term ends the tenancy will go into a statutory extension. During this phase the landlord may serve notice to increase the rent,⁶⁵⁸ the notice specifying a proposed rent which becomes the new rent if the tenant accepts it or fails to challenge the notice of increase. However, the tenant may refer the notice to the Private Rented Housing Panel who will determine the open market rental paid by willing parties ignoring the effect of the sitting tenant and any authorised improvements he has made.⁶⁵⁹ There is also provision for increasing rents to take account of increases in council tax.⁶⁶⁰ A few Rent Act tenancies still exist, and for these few lucky tenants a system of 'fair rents' operates.⁶⁶¹

Rents in the social sector are 'reasonable' rents⁶⁶² which are expected to be more affordable than in the assured sector. The initial rent is stated by the landlord, often plus a service charge.⁶⁶³ Increases are by four weeks' notice before the start of any rental period after consultation with the body of tenants.⁶⁶⁴

- Maturity (fixed payment date); consequences in case of delayed payment

This will be governed by the terms of the contract and usually in residential rented accommodation rent will be due monthly on the date on which the parties entered the agreement. It is usual in the private sector for rent to be demanded in advance, and with a deposit of up to two months.⁶⁶⁵ The model of the Scottish Secure Tenancy⁶⁶⁶ refers to rent payable in advance or in arrears; but housing benefit is paid in arrears and 70% of tenants in the social sector are in receipt of benefit which suggests that it is only realistic to ask for rent in arrears.

Should the tenant fail to pay the rent in time this will be a breach of the tenancy agreement. In an assured tenancy where there is consistent delayed payment the landlord may seek to terminate the tenancy and seek an order of possession on this ground and this is also a ground of possession in a Scottish Secure Tenancy.⁶⁶⁷

⁶⁵⁷ This may include a rent review clause.

⁶⁵⁸ Housing (Scotland) Act 1988 s. 24; usually six months' notice is required.

⁶⁵⁹ Housing (Scotland) Act 1988 s. 25.

⁶⁶⁰ Housing (Scotland) Act 1988 s. 25A. Council tax is the responsibility of the tenant, but may be collected by the landlord; full time students are exempt but must claim this exemption from the local authority.

⁶⁶¹ McAllister, *Scottish Law of Leases*, para. 17.90 ff. This remains true for any tenants of housing associations whose tenancies were granted before 1988.

⁶⁶² Housing (Scotland) Act 1987 s. 210.

⁶⁶³ Housing (Scotland) Act 1987 s. 211.

⁶⁶⁴ Housing (Scotland) Act 2001 s. 25.

⁶⁶⁵ See section 6.4 above.

⁶⁶⁶ (2002) cl. 1.5.

⁶⁶⁷ See section 6.6 below.

- **May the tenant exercise set off and retention rights over the rent payment? (i.e. the tenant withholding the rent or parts of it as the landlord does not respect his contractual duties, e.g. does not repair a defect);**

The practice of withholding rent where the landlord is in breach arises from the principle of mutuality in contracts.⁶⁶⁸ Where the landlord is in breach of the tenancy agreement then the tenant has a right to withhold. However for retention of rent to be permissible the breach must be more than merely trivial, though it need not be sufficiently serious to justify rescission. Given the contractual origins of the practice it is perhaps unsurprising that it is possible to contract out of the practice. However, in a residential tenancy such a provision could be considered to be an unfair term under the Unfair Terms in Consumer Contracts Regulations 1999. A practice which closely resembles retention of rent is abatement. This is where the tenant is entitled to a reduced rent rate, or even a complete reduction, due to some fault of the landlord. This practice may be available whether or not landlord is in breach. McAllister sets out that the basic idea is that the tenant is not at fault but has been partially deprived of the subjects that he has agreed to pay rent for.⁶⁶⁹ In *Renfrew District Council v. Gray*⁶⁷⁰ a council house was in such a state of disrepair that it was uninhabitable, as such the tenant was entitled to an abatement of the rent in full for the period, in spite of the fact that they had stayed in possession. In the context of a residential tenancy where non-payment of rent for three months is a mandatory ground of possession the utility of the practice of retention has been significantly reduced.

- **May claims from rental agreements be assigned to third parties (i.e. may the landlord assign his rent claim to a bank?)**

This is theoretically possible at least in the private sector⁶⁷¹ but is thought to be rare.

- **May a rent payment be replaced by a performance in kind (e.g. reparation, renovation)? Does the tenant have a statutory right to this effect? Could a lien of the “tenant-undertaker” create problems in that case? (a lien is a statutory right of an undertaker to ensure his being paid for his performances, e.g. improvements to the house, e.g. § 648 BGB)**

Rankine defines a lease in the following terms: "A lease or tack is a contract of location (letting to hire) by which one person grants and another accepts certain uses, current or definitive, or the entire control, of lands or other heritages for a period or periods, definite or indefinite, or even in perpetuity, in consideration of the delivery by the grantee of *money or commodities* or both, periodically or in lump or in both of these ways."⁶⁷² A number of key characteristics are identifiable which are also present in subsequent definitions, from Paton and Cameron, and McAllister. Whilst set out in detail elsewhere, it is worth reiterating that in order for a lease to

⁶⁶⁸ It was held that it was not possible during a statutory extension of a tenancy (under a previous regime): *Stobbs & Sons v. Hislop* 1948 SC 216; there is no clear authority on the position under an assured tenancy; McAllister *Scottish Law of Leases* para. 4.39 ff.

⁶⁶⁹ McAllister, *Scottish Law of Leases*, para. 4.47ff.

⁶⁷⁰ 1987 SLT (Sh Ct) 70; *Macleod v. Alexander* 2000 Hous LR 136.

⁶⁷¹ This may be caught by controls on disposals by regulated social landlords.

⁶⁷² Rankine on *Leases*, page 1.

exist there must be a rent. Paton and Cameron note that the rent need not be a definite sum of money: it may be illusory or nominal, it may be fruits or services, it may be expressly set off against interest or other debt due by the landlord to the tenant or it may be wholly or partially discharged.⁶⁷³ However where no rent is present then the agreement will not be a lease and will instead be considered a licence.⁶⁷⁴

Although arrangements of this kind are perfectly feasible in the commercial sector, there are problems in the residential sector because the landlord is bound to carry out major repairs.⁶⁷⁵

- **Does the landlord have a lien on the tenant's (movable) property in the house (Vermieterpfandrecht as in § 562 BGB, which functions as a guarantee for the payment of the rent by the tenant)? If yes, what is the scope of this right? How is it enforced?**

Scots law allows a commercial landlord a right of hypothec, that is a right of security over any moveable items which his tenant keeps on the leased premises.⁶⁷⁶ The right is implied by law and does not require a contractual provision, but is restricted only to rent. However, in recent times the right was not generally exercised in the residential sector and it is no longer applicable to residential tenancies.⁶⁷⁷

- **Clauses on rent increase**

- **Open-ended vs. limited in time contracts**
- **Automatic increase clauses (e.g. 3% per year)**
- **Index-oriented increase clauses**

Rent review clauses are very commonly employed in commercial leases⁶⁷⁸ but are rare in the residential field and unnecessary in the social sector. The one situation in which they might be used is if an assured tenancy is granted for a substantial fixed term; rent review might be appropriate if the term was for say five years or more. Indexation is uncommon, and instead rent review provides for an independent surveyor to determine an open market rental at a stated review date.

In general reliance is placed on the statutory procedures already outlined.⁶⁷⁹

⁶⁷³ Paton & Cameron, *Law of Landlord and Tenant in Scotland*, page 6.

⁶⁷⁴ *Mann v. Houston* 1957 SLT 89.

⁶⁷⁵ See section 6.6 below.

⁶⁷⁶ McAllister, *Scottish Law of Leases*, pages 115-116.

⁶⁷⁷ Debt Arrangement and Attachment (Scotland) Act 2002, s. 60; Bankruptcy and Diligence etc. (Scotland) Act 2007, s. 208.

⁶⁷⁸ McAllister, *Scottish Law of Leases*, ch. 12.

⁶⁷⁹ See section 6.4 above.

- **Utilities**

- **Describe the usual kinds of utilities (e.g. basic utilities like the supply of water, gas and electricity vs. additional utilities, i.e. services such as waste collection) and their legal regulation**

Water

Scottish Water, a public company, is responsible for the provision of water and sewerage services across Scotland. Their activities are regulated by the Water Industry Commission for Scotland which promotes the interests of water and sewerage customers in Scotland. The environmental regulator is the Scottish Environment Protection Agency. The drinking water standards and wastewater discharge standards are set by the EU, the three key pieces of law in this area are:

- The Urban Waste Water Treatment Directive concerning discharges of municipal and some industrial waste waters⁶⁸⁰;
- The Drinking Water Directive concerning potable water quality⁶⁸¹;
- The Water Framework Directive concerning water resources management.⁶⁸²

Customers of Scottish Water incur a number of charges for the water and waste management services which they provide. A household may pay water charges as part of the Council tax bill or direct to Scottish Water with the exact amount due varying either according to the property's council tax band or depending on the amount of use as measured by a water meter.⁶⁸³ These include water charges which arise by virtue of the property being connected to the public water supply. In addition the customer will incur waste water charges if the property is connected to the public sewer either to drain waste water from inside the property or to drain rainwater from the property. Finally, the customer will incur other charges for specific services such as: desludging private septic tanks, provision of standpipe licences and connecting properties to the public water and waste water networks.

Electricity and Gas

Energy policy was reserved to the UK parliament under the terms of the Scotland Act 1998 that created the devolved Scottish Parliament. Electricity and Gas supply has been privatised across the UK from the 1980s onwards. The electrical and gas markets are regulated by the Office of Gas and Electricity Markets which is a non-ministerial government department and an independent National Regulatory Authority. Where the tenant is directly responsible for paying the gas and/or electricity bills, they have the right to choose their own energy supplier. When letting a property the landlord must insure that the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order.⁶⁸⁴ Finally tenants are under a duty not to mistreat the property. This common law obligation includes a duty on the tenant to keep the property 'aired and fired'⁶⁸⁵, thus the tenant must

⁶⁸⁰ Directive 91/271/EEC of 21 May 1991.

⁶⁸¹ Directive 98/83/EC of 3 November 1998.

⁶⁸² Directive 2000/60/EC of 23 October 2000.

⁶⁸³ The average urban domestic water and sewer bill in 2008/2009 was £26 per month. *Scottish Water: Household Charges 2008-2009*.

⁶⁸⁴ Housing (Scotland) Act 1987 sch. 10 para. 3.

⁶⁸⁵ *Boyle v. Weddell* 1870 11 M. 223

make use of the heating system provided⁶⁸⁶ so long as this does not involve excess expenditure.⁶⁸⁷

Waste Management

Local authorities are responsible for collecting or arranging for the collection of domestic waste in their area. In this task they must provide or arrange for the provision of facilities for the disposal and recovery of household waste. Many local authorities have contracted out this task to private suppliers who generally collect household waste once a week. The majority of waste management facilities are licensed under the Waste Management Licensing Regulations 1994. Local authorities must also ensure that there are adequate facilities for recycling. Almost all households using a refuse collection service will have to pay waste charges which vary from area to area. The Scottish Government launched the Zero Waste Plan on the 9th June 2010. This plan set out the Scottish Government's vision for a zero waste society.

- **Responsibility of and distribution among the parties:**
 - **Does the landlord or the tenant have to conclude the contracts of supply?**
 - **Which utilities may be charged from the tenant?**
 - **What is the standing practice?**

Parties are free to apportion responsibility for arranging for utilities in the tenancy agreement however generally speaking the landlord will usually assume responsibility for connecting certain utilities, particularly water supply, electricity, heating etc. However generally the tenant will take over responsibility for making payments in respect of utilities encountered during the term of the tenancy. For instance with regard to electricity, common practice would be for the landlord to ensure that the property is connected to the national grid before letting and upon letting the tenant would take over responsibility for paying for the electricity for the duration of their lease.

- **How may the increase of prices for utilities be carried out lawfully?**

An increase of prices for utilities may be carried out unilaterally by the service provider and generally the cost will fall on the tenant.

- **Is a disruption of supply by the external provider or the landlord possible, in particular if the tenant does not pay the rent?**

Where a tenant does not pay rent the usual course of action for the landlord is to terminate the tenancy and seek possession of the premises. Cutting off the supply of utilities in response to rent arrears may lead to a claim of illegal eviction by the tenant and the landlord may be liable in damages to the tenant.

⁶⁸⁶ *Dover District Council v. Farrar* (1980) 2 Hous LR 32.

⁶⁸⁷ *McArdle v. GlasgowDC* 1989 SCLR 19.

- **Deposit:**

- **What is the legal concept (e.g. is the deposit an advance rent payment or a guarantee deposit to cover future claims of the landlord)?**
- **What is the usual and lawful amount of a deposit?**
- **How does the landlord have to manage the deposit (e.g. special account; interests owed to the tenant?)**
- **What are the allowed uses of the deposit by the landlord?**

There are no provisions in the social sector about premiums or deposits, and most social landlords do not ask for a deposit. In the private sector a distinction needs to be drawn between premiums and deposits. Premiums are prohibited, and this includes requirements for advance payment of rent.⁶⁸⁸ However it is permissible to take a deposit of up to two months to cover rent payments, damage, cleaning bills and unpaid utility bills and indeed a security deposit is normally required of a private sector tenant at the commencement of a tenancy. It is important to agree an inventory of goods at the property and a note of any defects.⁶⁸⁹

The landlord/agent who has received the tenancy deposit must turn over the deposit to an independent third party operating a deposit protection scheme.⁶⁹⁰ The vast majority of private rented tenants are regulated by the three deposit protection schemes:

- Letting Protection Service Scotland;
- Safe deposits Scotland; and
- My deposits Scotland.

When transferring the deposit to a deposit protection scheme the landlord must provide the tenant with relevant information concerning the scheme including the amount of the deposit, relevant dates, address of the property concerned, a statement from the landlord setting out that they are registered as well as the terms under which the deposit may be kept at the end of the tenancy. Should the landlord fail to register a deposit then the tenant can apply to the sheriff court which can order the landlord to pay the tenant up to three times the amount of the deposit. The function of the deposit is to provide security for the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or the discharge of any of the occupant's liabilities which so arise.⁶⁹¹ The usual amount of the deposit in Scotland is equivalent to one month's rent however the landlord or letting agent may require a deposit equivalent to two months' rent.⁶⁹² At the end of the tenancy the landlord must apply to the tenancy deposit scheme for repayment of the deposit. Where the landlord seeks to make deductions from the deposit, he must include details of those deductions and state the amount of deposit to be returned in the application. The tenant is then contacted

⁶⁸⁸ Housing (Scotland) Act 1988 s. 42, applying Rent (Scotland) Act 1984 ss. 82-83, 86-90, as amended by Private Rented Housing (Scotland) Act 2001 s. 32.

⁶⁸⁹ Tenant's Information Pack cl. 2.7; McAllister, *Scottish Law of Leases*, para. 21.29.

⁶⁹⁰ Tenancy Deposit Schemes (Scotland) Regulations 2011, reg. 3. Information about this must be included in the Tenant's Information Pack, cl. 4.5.

⁶⁹¹ Housing (Scotland) Act 2006 s. 120.

⁶⁹² Rent (Scotland) Act 1984 s. 112.

by the tenancy deposit scheme and given the opportunity to agree or disagree with the amount of the deposit to be returned. Where the tenant confirms the amount to be returned is correct he will receive the deposit within five working days. In the situation that the tenant does not agree with the amount of the deposit to be returned he may apply to the dispute resolution process. This involves an independent adjudicator making a decision based upon the evidence submitted during the dispute resolution process. Should either party be unhappy with the decision of the adjudicator they may apply for a review after which the decision will be final.

- **Repairs**

- **Who is responsible for what kinds of maintenance works and repairs? What kind of repairs or works may lawfully be assigned to the other party (especially the tenant)**

There are various repairing obligations placed on both landlord and tenant in Scots law arising under the common law and statute. While the primary duty will generally lie with the landlord the tenant must be alert to the fact that he must also undertake certain obligations with regard to maintenance of the property.⁶⁹³

The key concept in the private sectors is the repairing standard, which has been the subject of recent reform with major efforts aimed at raising the legal repairing standard. In essence major repairs and structural work falls to the landlord. Prior to 2001 the same set of rules applies to all rented households, but now schedule 4 of the Housing (Scotland) Act 2001 sets out the maintenance and repairing obligations within the social housing sector while part 2 of the Housing (Scotland) Act 2006 sets out the commensurate repair and maintenance obligations for tenancies in the private rented sector. While the local authority, in their capacity as landlord, will be concerned with maintenance and repair of their own housing stock, they also are under a wider public duty to ensure that all rented housing in their operational area meets the minimum legal standard i.e. the tolerable standard,⁶⁹⁴ are not overcrowded,⁶⁹⁵ and are not substandard.⁶⁹⁶ In carrying out this task the local authority have powers of inspection as well as the power to enable those properties be repaired,⁶⁹⁷ closed and demolished.⁶⁹⁸

At common law the landlord is under a number of repairing and maintenance duties. In the first place the landlord is under a duty to provide subjects that are reasonably fit for the purpose for which they are let. This is followed by a duty to carry out repairs to ensure the property is kept in a tenantable or habitable condition during the term of the lease.⁶⁹⁹ There are several elements to the landlord's duty to maintain the dwelling in tenantable or habitable condition. These include maintaining the property in a safe condition, keeping the dwelling wind and water tight against

⁶⁹³ McAllister, *Scottish Law of Leases*, ch. 19.

⁶⁹⁴ Housing (Scotland) Act 1987 Part IV.

⁶⁹⁵ Housing (Scotland) Act 1987 Part VII.

⁶⁹⁶ Housing (Scotland) Act 1987 Part 1.

⁶⁹⁷ Housing (Scotland) Act 1987 Part V.

⁶⁹⁸ Housing (Scotland) Act 1987 Part VI.

⁶⁹⁹ This duty may even require the landlord to make improvements to the dwelling. *Marianski v. Jackson* 1872 9 SLR 80.

usual weather conditions,⁷⁰⁰ and preventing damp.⁷⁰¹ The landlord will not be responsible for carrying out repairs arising from damage caused by acts of God or third parties or the tenant's negligence.

The repairing and maintenance duty relating to tenancies in the private rented sector is also a mixture of common law and statutory rights. The Housing (Scotland) Act 2006 introduced repairing standard in private sector residential tenancies.⁷⁰² It came into force on 3 September 2007. There is an implied condition that the house is in all respects reasonably fit for human habitation at commencement of tenancy and will be kept so throughout the tenancy. The local building regulations set the legal standard below which a house must not fall or it will be deemed unfit for human habitation. There are a number of factors which comprise the legal standard. These include the presence of sanitary defects, a lack of air space or ventilation, darkness, dampness, absence of adequate and readily accessible conveniences and inadequate paving or drainage of courts, yards or passages. Where the landlord fails to meet the duty the tenant may be able to rescind the lease or claim damages.⁷⁰³ The landlord is also responsible for external repairs and installations. As such the landlord must keep in repair the structure and exterior⁷⁰⁴ of house as well as any installations. Where the lease is of part of a building then the landlords obligations only extend to repairs affecting the tenants enjoyment of the leased premises or common parts.

The landlord must ensure that the dwelling meets the repairing standard at the start of the tenancy and at all times during the tenancy.⁷⁰⁵ In order to meet the repairing standard the house must be wind and watertight and in all respects reasonably fit for human habitation,⁷⁰⁶ the structure and exterior of the house (including drains, gutter and external pipes) must be in a reasonable state of repair and in proper working order.⁷⁰⁷ Any installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water must be in a reasonable state of repair and in proper working order. This also applies to any fixtures and fittings and appliances provided by the landlord under the tenancy. In addition, any furnishings provided by the landlord under the tenancy must be capable of being used safely for the purpose for which they are designed and finally the dwelling must be provided with fire alarms.⁷⁰⁸ Once the landlord becomes aware of a defect in the dwelling which requires repair or maintenance work he is under a duty to act within a

⁷⁰⁰ *Wolfson v. Forrester* 1910 SC 675.

⁷⁰¹ *Gunn v. National Coal Board* 1982 SLT 52, a tenant was awarded damages due to a landlords failure to prevent rising damp which caused dampness and mould in the house. Where the tenant has failed to use the heating system resulting in damp the landlord may avoid liability. Where the dwelling requires excessive heating in order to stay damp free the landlord will fail this duty. *McCarthy v. Glasgow District Council* 1988 Scolag 121 at 121.

⁷⁰² Housing (Scotland) Act 2006 s. 13, Tenancies with their own statutory regimes were not covered including Scottish Secure Tenancies, agricultural tenancies crofts and small landholding tenancies.

⁷⁰³ *McLeod v. Alexander* 2000 Hous LR 136.

⁷⁰⁴ *Hastie v. City of Edinburgh District Council* 1981 SLT (Sh Ct) 92 it was held that exterior includes windows as such the landlord was responsible for repair of windows broken by vandals.

⁷⁰⁵ Housing (Scotland) Act 2006 s. 14(1).

⁷⁰⁶ Housing (Scotland) Act 2006 s. 13(1) (a).

⁷⁰⁷ This was taken from the statutorily implied terms of the successor to the Housing (Scotland) Act 1962 and the Housing (Scotland) Act 1966.

⁷⁰⁸ Housing (Scotland) Act 1987 sch. 10 para. 3. Schedule 10 of the 1987 Act now only applies to private sector tenancies. The obligations of social landlords under the Housing (Scotland) Act 2001, rather anomalously, are now more restricted than they were before.

reasonable time. Essentially this means that the time in which the landlord should carry out the repairs depends on the nature of the defect in question with more material defects requiring prompt attention. When carrying out repairs the landlord will be responsible for any damage caused and he must make good any damage caused while carrying out any work.⁷⁰⁹ It is possible for a landlord to avoid the repairing obligation in certain situations. In particular where the tenant accepts responsibility for repairs in a lease with a term of three or more years in which neither party has a break clause during the first three years of the lease. In addition where the defect requiring maintenance work is down to the fault of the tenant the landlord will not be under a duty to carry out repairs. Furthermore, the landlord will not be liable for failure to carry out maintenance or repairs where the only reason for that failure was the tenant's refusal to grant access rights. The landlord is expressly prohibited from contracting out of the repair and maintenance obligations and any lease which purports to shift responsibility onto the tenant is prohibited.⁷¹⁰ There are two exceptions to this. In the first place, as set out above, in a lease for more than three years⁷¹¹ and secondly where parties gain⁷¹² the express consent of the sheriff for this transfer of responsibility.⁷¹²

Operation of the Private Rented Housing Panel

The Private Rented Housing Panel is the overall body of professional people from which small Private Rented Housing Committees are drawn in order to decide individual cases. A tenant's initial application is to the Panel, which vets applications and only refers a dispute to a committee to decide if it is considered to be worth pursuing. The Private Rented Housing Panel is primarily responsible for enforcement of repair and maintenance obligations⁷¹³ in the private rented sector.⁷¹⁴ The tenant may apply to the panel for a determination that the landlord has breached his repairing duty. However, in order to make such an application the tenant must first have notified the landlord of the defect which requires attention and allowed the landlord a reasonable amount of time to carry out the maintenance or repair in question. Upon receipt of the application the panel must serve notice on both landlord and tenant as soon as is practicable, generally speaking this is usually within a number of days. This notice must set out details of application, including relevant dates such as the date by which written representations must be received or when a request for oral representations must be made. The minimum period is at least fourteen days after the day on which the panel notice is served. The panel have a wide range of powers available to them when determining a dispute. Essentially their powers of enquiry and inspection⁷¹⁵ make it an investigative body. There are a

⁷⁰⁹ Housing (Scotland) Act 2006 s. 14(2); this follows the Sheriff's decision in *Little v. Glasgow District Council* 1991 1 SHLR 195 at 199.

⁷¹⁰ Housing (Scotland) Act 2006 s. 17.

⁷¹¹ Housing (Scotland) Act 2006 s. 16.

⁷¹² Housing (Scotland) Act 2006 s. 18. The Sheriff may grant permission where tenant and landlord both agree to the transfer of responsibility and it is reasonable to do so having regard to all the circumstances.

⁷¹³ Housing (Scotland) Act 2006 s. 22(5) and sch. 2 para. 8; Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007. There is a proposal to allow third party applications: Housing (Scotland) Bill 2013 cls 23-25.

⁷¹⁴ Right of application is not available to a Scottish secure tenancy etc.

⁷¹⁵ Housing (Scotland) Act 2006 sch. 2 para. 2.

number of key issues which must be addressed during an enquiry including consideration of any written representations of either landlord or tenant made within the time limit, hearing an oral representation where requested by one of the parties, and considering any report as to the state of repair of the house prepared by a third party.⁷¹⁶ With regard to admissibility of evidence,⁷¹⁷ the Committee has the power to compel attendance by landlord, tenant or any other person at an oral hearing. However, once presented that person may not be required to answer or disclose anything which they would be entitled to refuse to answer or disclose on the grounds of confidentiality in civil proceedings in the Court of Session. However, a failure to attend or to attend and not answer any questions or giving false information is an offence liable on fine on summary conviction. The Committee may also require written evidence to be presented; once again the confidentiality exception applies. The committee have powers to provide expenses to certain parties for attending a hearing or providing a report etc. Upon hearing a dispute the Committee will reach a decision, with majority decisions accepted, which must be recorded and must set out all relevant facts and reasons for the decisions, in line with statute.⁷¹⁸ Should there be a failure to comply with the obligations then the committee can order the landlord to carry out certain works to bring the defect into order so that the dwelling meets the repairing standard.⁷¹⁹ Should the landlord fail to carry out the repairs in the manner required then the Committee may impose a rent relief order. Finally, the tenant may apply to secure repairs through the service by the local authority of either a repair notice or an improvement notice. Local authorities have discretion in this area. Local authorities have wide powers stemming from public health concerns.⁷²⁰ They also have the power to deal with emergency situations.⁷²¹ Finally overall obligation is laid on local authorities and registered social landlords to meet the national Scottish Housing Quality Standard. Local authorities and RSLs are required to meet the Scottish Housing Quality Standard by 2015. In recent years there have been marked improvements in this area. In order to meet this standard the dwelling must meet the tolerable standard, be free from serious disrepair, be energy efficient, be provided with modern facilities and services and be healthy safe and secure.

Social rented

The Housing (Scotland) Act 2001 applies to Scottish secure tenancies and in general while restating the common law obligation. The landlord has an obligation to repair a dwelling let under a Scottish secure tenancy.⁷²² In particular, the landlord must ensure that the dwelling is wind and watertight⁷²³ and in all other respects reasonable fit for human habitation⁷²⁴ and the landlord must ensure that the dwelling be kept in this condition throughout the tenancy.⁷²⁵ Additionally, the landlord must ensure that the dwelling does not fall below the standard set out in the building

⁷¹⁶ Housing (Scotland) Act 2006 sch. 2 para. 2(3).

⁷¹⁷ / Housing (Scotland) Act 2006.

⁷¹⁸ Private Rented Housing Panel (Applications and Determination) (Scotland) Regulations 2007.

⁷¹⁹ Housing (Scotland) Act 2006 s 24(2).

⁷²⁰ Repair notices, improvement notices, maintenance notice, closing and demolition orders are available under the Housing (Scotland) Act 1987 Part VI, s. 114.

⁷²¹ Civic Government (Scotland) Act 1982.

⁷²² Housing (Scotland) Act 2001 s. 27(1).

⁷²³ *Campbell v. Aberdeen City Council* 2007 Hous LR 26.

⁷²⁴ Housing (Scotland) Act 2001 sch. 4 para 1(a). This would include eg a reasonably adequate heating system: *Buchan v. North Lanarkshire Council* 2000 Hous LR 98.

⁷²⁵ Housing (Scotland) Act 2001 sch. 4 para. 1(b).

regulations due to disrepair or sanitary defect etc.⁷²⁶ Prior to letting the dwelling the landlord must inspect the house and identify any work necessary to bring it up to standard and the tenant must be notified.⁷²⁷ Once the landlord becomes aware of a defect in the dwelling which requires repair or maintenance work he is under a duty to act within a reasonable time. Essentially this means that the time in which the landlord should carry out the repairs depends on the nature of the defect in question with more material defects requiring prompt attention.⁷²⁸ When carrying out repairs the landlord will be responsible for any damage caused. In order to carry out the repairs the landlord will be required to give at least 24 hours' notice to the tenant for access. When carrying out repairs the landlord may at any reasonable time enter the house to view its state and condition or to carry out any work necessary to meet the statutory repair standard. Certain small urgent repairs, so called qualifying repairs, which might affect a tenant's health, safety or security, have to be done quickly.⁷²⁹ Where the landlord is unable to carry out such repairs within the time limit then the tenant may be entitled to carry out the repairs and charge them to the landlord.⁷³⁰ However, the tenant must not do any work to the property that consists of more than internal decoration without the permission of the landlord.⁷³¹

While the landlord has a general duty to carry out repairs and maintenance the tenant is also required to do their part. In particular, the tenant is under a common law obligation to keep the property "aired and fired"⁷³², this means that the tenant must use the heating system which is provided.⁷³³ However, this must be an efficient system and must not involve undue or excess expenditure on the tenant.⁷³⁴

- **Connections of the contract to third parties**

- **Rights of tenants in relation to a mortgagee (before and after foreclosure)**

Mortgages are made available for the purchase of residential property either to buyers who intend to become owner occupiers or on a buy to let basis. In the former, there will invariably be a clause of the mortgage deed which prohibits the grant of leases without the consent of the lender. If the borrower is unable to repay what he has borrowed, the lender is likely to repossess the property, a process in which the borrower is not entitled to appear as a party.⁷³⁵ In general a property with

⁷²⁶ Housing (Scotland) Act 2001 sch. 4 para. 5(1) and (6). These cover items as lack of air space or ventilation, lack of lighting, dampness, absence of adequate and readily accessible water supply or of sanitary arrangements or of other conveniences, and inadequate paving or drainage of courts, yards or passages.

⁷²⁷ Housing (Scotland) Act 2001 sch. 4 para. 2(b).

⁷²⁸ E.g. a gas leak: *MacKenzie v. Aberdeen City Council* 2002 Hous LR 88, Sh. Ct.

⁷²⁹ Housing (Scotland) Act 2001 s. 27(2).

⁷³⁰ Scottish Secure Tenants (Right to Repair) Regulations 2002 setting out the max amount for any single qualifying repair as well as the period in which it is to be completed.

⁷³¹ Housing (Scotland) Act 2001 s. 28.

⁷³² *Boyle v. Waddell* 1870 11 M. 223.

⁷³³ *Dover District Council v Farrar* (1980) 2 Hous LR 32.

⁷³⁴ *McArdle v Glasgow District Council* 1989 SCLR 19.

⁷³⁵ Home Owner and Debtor Protection (Scotland) Act 2010 s.5.

vacant possession will achieve a higher price on the market than one that is under a lease. In general the landlord or the mortgagee will seek to terminate the tenancy and as mortgage default is a ground of possession under the Housing (Scotland) Act 1988 this is quite straightforward.⁷³⁶

⁷³⁶ See section 6.6 below.

Table for 6.4 Contents of tenancy contracts

	Main characteristic(s) of Scottish Secure Tenancy	Main characteristic(s) of short assured tenancy.
Description of dwelling	Postal address	Depends on nature of property
Parties to the tenancy contract	Landlord and tenant	Landlord and tenant
Use	Principal residence	Principal residence
Duration	Often monthly	Minimum grant of six months
Rent	Affordable	Market
Deposit	No	Usually two months; subject to tenancy deposit scheme
Repairs, etc.	Major structural repair on landlord Model agreement provides for other matters	Major structural repair on landlord Agreement will provide for other matters
Assignment	Requires consent	Usually absolute bar

6.5 Implementation of tenancy contracts

- **Disruptions of performance (in particular “breach of contract”) prior to the handover of the dwelling**
 - **In the sphere of the landlord:**
 - **Delayed completion of dwelling**

It would be very unusual to enter into a rental agreement for a property that was not in a state that was fit for habitation and ready for immediate occupation. If it were decided to make a rental arrangement in such circumstances it would be essential to enter into a pre-tenancy contract and to include provisions dealing with delay comparable to the terms included when a flat is sold “off plan”. If the landlord does not protect himself in these circumstances the failure to hand over the property will be considered under the general contract law governing remedies for breach of contract. The tenant will be entitled to rescind the agreement and obtain damages.

- **Refusal of handover of the dwelling by landlord (in particular: case of “double lease” in which the landlord has concluded two valid contracts with different tenants over the same house)**

It would be unusual for a landlord to conclude two valid contracts with different tenants over the same dwelling. Indeed the move towards registration has reduced the possibility of such a practice still further.⁷³⁷ Priority would be determined on a first in time principle. For the sitting tenants there are a number of rights flowing from their right to possession which would ground an action against the landlord. He is under a duty not to derogate from his grant. That is, the tenant, upon taking possession of the dwelling, has the right to be maintained in possession and the landlord must not do anything that would deprive or partially deprive him of this. The remedies available to the tenant include damages, abatement and rescission.

- **Refusal of clearing and handover by previous tenant**

This will be a breach of contract both in the public sector⁷³⁸ and in the private sector; in the latter the landlord would be likely to make a deduction from the deposit held in a deposit protection scheme, though the tenant would have an opportunity to challenge any deduction.⁷³⁹

- **Public law impediments to handover to the tenant**

It would not be usual to conclude a rental arrangement until the property was ready for occupation. This stems from the landlord’s common law obligation to provide subjects that are in a tenable or habitable condition.

⁷³⁷ Antisocial Behaviour etc. (Scotland) Act 2004 Part 8.

⁷³⁸ Model Scottish Secure Tenancy (2002) cl. 1.4.

⁷³⁹ See section 6.4 above.

- **In the sphere of the tenant:**
 - **refusal of the tenant to take possession of the house**

In a lease the tenant is under an obligation to enter into possession of the dwelling on the date of entry. This will either be the date of the lease or a different date stated in it. Once in possession the tenant is required to remain in possession for the rest of the lease. A tenant may be held liable in damages for any damage caused to the property by his absence. In the case where there is a prolonged absence by the tenant the landlord may be able to escape the contract by rescission or he may elect to take action to compel the tenant to take possession by virtue of an order of specific implement.

This principle is emphasised in particular in the social sector. Occupation of properties keeps them in good condition, particularly in the Scottish weather, and a tenant is required to occupy property as his principal home. Failure to occupy property would be a ground for repossession, but in fact it is not necessary to go through a court repossession since there are specific provisions dealing with abandonment.⁷⁴⁰ A social landlord can give notice that the property appears to have been abandoned which places the onus on the tenant to challenge the notice or to give notice of their intention to occupy the property.⁷⁴¹ Notices are often disputed, in one case for example where the electricity supply was disconnected but the tenant was found scraping the wall with a screwdriver preparatory to redecoration.⁷⁴² If abandonment is established this involves the loss of the Right to Buy.⁷⁴³

- **Disruptions of performance (in particular “breach of contract”) after the handover of the dwelling**
 - **Defects of the dwelling**
 - **Notion of defects: is there a general definition?**

Defects in the dwelling are regulated by the common law and also by statute. The landlord is under a common law duty to provide subjects which are in a tenable or habitable condition. They must also be maintained in this condition, but no duty arises until the tenant has brought a defect to the landlord’s attention. Should the landlord fail to carry out repairs after notification then this will amount to a breach of the landlord’s obligation. For a defect of the dwelling to result in a material breach of the contract, entitling the tenant to rescind, it must be one which reduces the condition of the property in such a way as to make it substantially unsuitable.

A breach which is not so serious as to amount to a material breach may result in the award of damages or will allow the tenant to retain his rent. This common law duty is closely linked to the landlord’s duty to carry out repairs (dealt with in the previous section). The landlord’s duty in this regard is to maintain the property in a

⁷⁴⁰ Housing (Scotland) Act 2001 s 17 and 18.

⁷⁴¹ *Tannoch v. Glasgow City Council* 2000 Hous LR 64.

⁷⁴² *Smith v. Dundee City Council* 2003 Hous LR 55, Sh. Ct.; *Lech v. Highland Council* 2010 Hous LR 52, Sh. Ct.

⁷⁴³ *Smith v. Aberdeen City Council* 2001 Hous LR 17.

tenantable or a habitable condition during the currency of the lease. This requires the landlord to ensure that the dwelling is kept wind and watertight. This is limited to ordinary weather conditions and does not extend liability for exceptional conditions such as flooding. In addition the landlord must prevent damp and maintain the property in a safe condition. This final duty includes a requirement that the landlord must carry out any repairs to rectify any danger that might cause the tenant injury. The landlord is not required to carry out repairs arising from the actions of third parties or which arise from the tenant's negligence. Furthermore, where the tenant remains in the dwelling after notifying the landlord of the defect the tenant may be regarded as consenting to the danger and this may relieve a landlord of liability. The landlord is also under a statutory repairing obligation under the Housing (Scotland) Act 2006 and the Housing (Scotland) Act 2001; as already explained, there is an implied condition that the house is in all respects reasonably fit for human habitation at the commencement of, and throughout, the tenancy.⁷⁴⁴ A house will be considered unfit for human habitation if it is in breach of the local building regulations by reason of disrepair or sanitary defects.

The provisions of the Housing (Scotland) Act 2001⁷⁴⁵ apply only to Scottish Secure Tenancies and restate the common law obligation and also the general habitability provisions. However, the landlord is required to inspect the dwelling prior to letting and identify any work required after which he must notify the tenant.⁷⁴⁶ In addition the landlord must carry out any repairs in a reasonable time either upon notification or the landlord becoming otherwise aware that it is required.⁷⁴⁷ Furthermore the social landlord has greater access rights for carrying out the work and viewing the property.

- **Examples: Is the exposure of the house to noise from a building site in front of the house or are noisy neighbours a defect? What about damages caused by a party or third persons? Is the occupation of the house by third parties such as squatters considered as a defect in the legal terms?**

Traditionally a defect would be associated with the physical or structural condition of the dwelling. Noise from a building site or from noisy neighbours may constitute a nuisance⁷⁴⁸ for which the appropriate remedy would be an order for interdict, or action for damages. Once the tenant has taken possession of the dwelling and damage has been caused to the dwelling by a third party or parties, the landlord is not liable for the repairs and it will fall to the tenant to make good the damage caused, in this respect they may take action against the third party. Where the dwelling is not occupied by a tenant and a third party has caused damage to the dwelling then the landlord will be in the best position to take action against the party responsible.

Squatting

⁷⁴⁴ See section 6.4 above.

⁷⁴⁵ S. 7, sch. 4.

⁷⁴⁶ Model Scottish Secure Tenancy (2002) cl. 5.2.

⁷⁴⁷ Model Scottish Secure Tenancy (2002) cl. 5.3.

⁷⁴⁸ Environmental Protection Act 1990 ss 79-82.

Squatting is a criminal offence in Scotland punishable by a fine or imprisonment.⁷⁴⁹ As such Scots law differs significantly from English law in the area of possession based claims over interests in land. Under the English system the title of an owner may be lost by limitation while this is not possible in Scots law however law an interest in land may be acquired through the legal process of prescription as set out in the Prescription and Limitation (Scotland) Act 1973. At the root of this distinction is the fact that prescription is a rule of substantive law whereby certain rights and obligations are created (positive prescription) or extinguished (negative prescription) after a specified period of time while limitation is a rule of procedure whereby certain rights and obligations which are not extinguished but become legally unenforceable after a specified period of time.⁷⁵⁰ In order for a person to acquire an interest in land they must fulfil the three statutory criteria.⁷⁵¹ That is, the interest at issue must be possessed for 10 years, that possession must be open, peaceable and without judicial interruption and must be founded on and follow the recording or registration of an ex facie valid title to the land in question.⁷⁵² At any point during this period the land owner or occupier of the property has the right to eject the squatter from the premises. The presence of a squatter would prevent a landlord from granting possession to the tenant however given the ease with which the landlord may displace a squatter such an occurrence would be rare in practice.

⁷⁴⁹ Trespass (Scotland) Act 1865.

⁷⁵⁰ Prescription and Limitation (Scotland) Act 1973, as amended.

⁷⁵¹ Prescription and Limitation (Scotland) Act 1973 s. 1.

⁷⁵² Cusine, 'Adverse Possession of Land in Scots and English Law' *International and Comparative Law Quarterly*, (1996), pp 45; McCarthy 'Positive Prescription in the Human Rights Era', (2008) *SLT* 15.

- **Discuss the possible legal consequences: rent reduction; damages; “right to cure” (to repair the defect by the landlord); reparation of damages by tenant; possessory actions (in case of occupation by third parties) what are the relationships between different remedies; what are the prescription periods for these remedies**

As set out above the lease is a contract and therefore the usual contract law remedies are available. These include specific implement and interdict (enforcement orders), court action for debt, rescission and damages. A number of additional remedies are available under general landlord and tenant law, for the tenant these include retention of rent and abatement. However, statute has intervened to alter the availability of these remedies, for instance with regard to assured tenancies such remedies may not function. The landlord has a number of additional remedies arising under general landlord and tenant law, including irritancy, hypothec and summary diligence, though again the availability of some of these remedies has been curtailed by statute. These are now discussed in turn.

Specific implement and interdict (enforcement orders): Where a party has failed to carry out some action required under the contract then the court may award specific implement to ensure performance of the act. Should the party’s behaviour be in contravention of the contract then the court may award an interdict to ensure that such behaviour ceases. If the party acts in breach of either order they will be in contempt of court and may face a fine of imprisonment. The private rented housing committees have the power to issue repairing standard enforcement orders to private landlords who have failed in a repairing standard obligation.⁷⁵³ An RSEO is effectively a statutory form of specific implement

Rescission: this is the right of a party to exit a contract completely. Given the drastic nature of this remedy it is only available in limited circumstance. The other party’s actions must be sufficiently serious to constitute a material breach of the contract so where the landlord fails to hand over possession of the subjects there must be a substantial failure rather than a mere a delay. Delays of 20 and 35 days in giving entry have been held to be sufficiently material to allow rescission by the tenant.

Frustration: where the landlord is unable to hand over possession of the dwelling because of some event which has made this impossible the contract will be frustrated. However, frustration usually occurs during the course of the contract, e.g. by supervening impossibility if the leased premises are destroyed or severely damaged by fire.

Damages: this monetary remedy is designed to place the wronged party in the position they would have been had the wrong not taken place. Damages may be claimed, along with other remedies, by a party where a breach of contract has occurred. In *Mickel v. M’Coard*⁷⁵⁴ damages were awarded after tenants neglect caused the landlord to suffer a loss in the value of his property. The lease agreement may include a penalty clause. This a formula for calculating damages for specific breaches of contract. This formula must be a genuine pre-estimate of loss likely to occur and must not be excessive, disproportionate or punitive in any way.

⁷⁵³ Housing (Scotland) Act 2006 s 24.

⁷⁵⁴ 1913 SC 896.

Retention of rent and abatement: The practice of withholding rent where the landlord is in breach arises from the principle of mutuality in contracts. Where the landlord is in breach of the tenancy agreement then the tenant has a right to withhold. However, for retention of rent to be permissible the breach must be more than merely trivial, though it need not be sufficiently serious to justify rescission. Given the contractual origins of the practice it is perhaps unsurprising that it is possible to contract out of the practice, but an exclusion of this right in a residential tenancy agreement could be considered to be an unfair term under the Unfair Terms in Consumer Contracts Regulations 1999.⁷⁵⁵

Abatement: this is a practice which closely resembles retention of rent. This is where the tenant is entitled to a reduced rent rate, or even a complete reduction, due to some fault which is not caused by the tenant. This practice may be available whether or not landlord is in breach. McAllister sets out that the basic idea is that the tenant is not at fault but has been partially deprived of the subjects that he has agreed to pay rent for. In *Renfrew District Council v. Gray*⁷⁵⁶ a council house was in such a state of disrepair that it was uninhabitable as such the tenant was entitled to an abatement of the rent in full for the period, in spite of the fact that they had stayed in possession. In the context of a residential tenancy where non-payment of rent for three months is a mandatory ground of possession as such rent retention might be risky in such a situation.

Irritancy: Irritancy can only be used in relation to residential leases in certain very specific circumstances where certain statutory grounds of possession arise during the contractual period of the lease, and the irritancy clause mirrors these statutory grounds. This is only really appropriate in relation to assured tenancies, as social tenancies which follow the model tenancy agreement have very short contractual term. In the case of both private and social tenancies, the normal method of eviction would be by one of the statutory grounds of possession (except in short assured tenancies where the rent is due).

Landlords Hypothec: this is a right of security enjoyed by the landlord over any moveable items which his tenant keeps on the leased premises.⁷⁵⁷ The right is implied by law and as such is available regardless of whether it is provided for in the contract or not. Hypothec only covers rent and not other debts. In recent times the right was generally not applied in the residential sector and it is no longer applicable to dwelling houses.⁷⁵⁸

Summary Diligence: this is procedure for debt collection whereby court process can be bypassed and a creditor can proceed with diligence without first having to prove his debt, or otherwise obtain court authority. This is permissible (though not for an assured tenancy⁷⁵⁹) where the other party has consented to the use of this remedy. The method of consent is if the lease contains a clause of consent to registration for execution. The model tenancy agreement for Scottish secure tenancies does not contain such a clause, which would rule this remedy out for social tenancies. In

⁷⁵⁵ See section 6.3 above.

⁷⁵⁶ 1987 SLT (Sh Ct) 70.

⁷⁵⁷ McAllister, *Scottish Law of Leases*, para. 6.18ff.

⁷⁵⁸ Bankruptcy and Diligence etc (Scotland) Act 2007, s. 208.

⁷⁵⁹ Housing (Scotland) Act 1988 s. 29.

addition to the contract law remedies the landlord has additional remedies under the general law of landlord and tenant.

- **Entering the premises and related issues**

- **Under what conditions may the landlord enter the premises?**

The landlord has a right of reasonable access which he may rely upon to enter the dwelling in order to inspect the condition of the dwelling, to carry out repairs or to show prospective tenants around. In order to avail of rights of access the landlord must give the tenants at least 24 hours' notice and access must be limited to reasonable times of the day.⁷⁶⁰ Where the tenant refuses the landlord reasonable access then the landlord may not be liable for the repairs.

- **Is the landlord allowed to keep a set of keys to the rented apartment?**

It would not be unusual for the landlord or representative of the landlord to retain a set of keys to the rented dwelling in order to inspect the dwelling, carry out repairs or to show prospective tenants around. However, the landlord does not have a general right of access, rather, as set out above, the landlord has a right of reasonable access. This in turn is largely dependent on the landlord giving the tenant sufficient notice. Should the landlord attempt to exercise excessive access of the dwelling this could constitute an unfair exclusion of the landlord's common law duty to maintain the tenant in full possession and not to derogate from his grant, and as McAllister notes the inclusion of a term to this effect in the lease may be considered to be an unfair contract term.⁷⁶¹

- **Can the landlord legally lock a tenant out of the rented premises, e.g. for not paying rent?**

A landlord is not permitted to lock a tenant out of the rented dwelling. In the event that the landlord has given notice to quit but the tenant has refused to leave the landlord can only remove the tenant with a court action, during which the tenant will be allowed to lodge a defence. The competent court in this regard is the Sheriff Court and the action for recovery of heritable property will take the form of a summary cause. It is only when the Sheriff Court grants a decree of removing will the landlord be able to proceed with an eviction. Should the landlord try to evict the tenant without a court order, he may be liable to the tenant in damages. All occupiers of residential property are protected against unlawful eviction.⁷⁶² It is a criminal offence for a landlord to do 'acts calculated to interfere with the peace and comfort of the residential occupier or members of his household'. The tenant, on application to the court, could get a non-harassment order against the landlord or they could get a court order which will force the landlord to let the tenant back into the dwelling along. It is open to the tenant to claim damages for illegal eviction or for harassment. A

⁷⁶⁰ Housing (Scotland) Act 2001 sch. 4; Model Scottish Secure Tenancy (2002) cl. 5.12; Tenant's Information Pack cl. 2.6. For private rented tenancies see Housing (Scotland) Act 2006 ss 181(4) and 184 (3) & (4).

⁷⁶¹ McAllister, *Scottish Law of Leases*, paras 19.21, 22.12.

⁷⁶² Rent Act (Scotland) 1984 Part III, ss 22-27; this protects any 'residential occupier' and therefore much more widely than Rent Act tenants.

particularly high level of damages may be awarded under provisions introduced in 1988 and designed to penalise landlords who yielded to the temptation to evict a Rent Act tenant to relet on a more lucrative assured tenancy basis, that is to threaten force to persuade a tenant to move from a fair rent to a market rent.⁷⁶³

- **Rent regulation (in particular implementation of rent increases by the landlord)**

- **Ordinary rent increases to compensate inflation/ increase gains**
- **Rent increase after renovation or similar**

The system of rent regulation depends on the type of tenancy at issue with distinct systems applying to assured tenancies, regulated tenancies, Scottish secure tenancies and other tenancies.

Assured tenancy

A landlord is not free to increase unilaterally the rent during the fixed term of an assured tenancy. This is so unless the agreement contains a procedure for rent review during the fixed term. Otherwise when any fixed term ends, the landlord can give the tenant a written notice of the proposed increase⁷⁶⁴ or, alternatively, a written notice to change the terms of the tenancy including the rent charged.⁷⁶⁵ The length of the notice given before the rent increase takes effect must be at least one rental period. Therefore, if rent is paid monthly, the tenant must receive at least one month's notice before the rent goes up. In an assured tenancy the tenant does not have the option to have the rent considered during the term of the tenancy. There is nothing in law to prevent the inclusion in a tenancy agreement clauses relating to rent increase mechanisms. Where no such provision is present then the rent cannot be unilaterally increased and in this situation should the landlord wish to increase the rent he will usually have to terminate the contractual tenancy and utilise the statutory mechanism for increases in a statutory assured tenancies. The Private Rented Housing Committee will only regulate the fixing of market rents in a statutory assured tenancy,⁷⁶⁶ which has come into operation at the end of the term when the landlord serves notice terminating the tenancy. Then the landlord may seek an increase in rent and the tenant has the opportunity to refer the increase to the Committee.

Short assured tenants

Where the tenant has a short assured tenancy, the rent is fixed contractually during the initial fixed term, but the landlord can increase the rent when they renew the tenancy agreement. In theory rents can be referred to the Private Rented Housing

⁷⁶³ Housing (Scotland) Act 1988 s. 24 as amended; McAllister, *Scottish Law of Leases*, para. 17.55 ff.

⁷⁶⁴ Assured Tenants (Forms)(Scotland) Regulations 1988, Form AT2.

⁷⁶⁵ Assured Tenants (Forms)(Scotland) Regulations 1988, Form AT1(L).

⁷⁶⁶ The Committee also deals with rent increases for the few remaining Rent Act tenancies. Here the standard is a fair rent, that is the rent ignoring any scarcity of accommodation, which could in the major cities be well below the current market rent.

Committee but it can be difficult to challenge the increase when the landlord can evict a tenant quite easily.

Other types of tenants

Landlords of all other types of tenants do not have to follow specific procedures to increase the rent, so rent can be increased at any time after a contractual agreement has ended.

- **Rent increases in 'houses with public task'**

Scottish Secure tenancies

With regard to housing with a public task, local authority rents and Registered Social Landlords rents are lower than the market rate. Local authorities have discretion over the amount of rent to charge to their tenants and there are no external limitations on what landlords can charge tenants. Under a Scottish secure tenancy⁷⁶⁷ the local authority or RSL has the right to increase the rent, but that body must give the tenant at least four weeks' notice before doing so.⁷⁶⁸ In addition, they must consult with the tenant in a meaningful way, which takes into account the views of the tenant, before increasing the rent.⁷⁶⁹

- **Procedure to be followed for rent increases**
 - **Is there some orientation at the market rent; if yes, how is the market rent measured/calculated (e.g. statistical devices such as a Mietspiegel [= rent statistics for a certain area])?**
 - **Possible objections of the tenant against the rent increase**

Assured tenancies

Since deregulation of the late 1980s market rents have prevailed in the private rented sector in Scotland. A market rent is understood to mean the amount which the house in question might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy.⁷⁷⁰ While parties are free to include a term governing rent increases in the lease, the operation of this term must not result in an above market rent. Where the parties have not included a term governing rent increases then the landlord will not be able to increase the rent unilaterally. Rather he will have to terminate the contractual tenancy, converting it into a statutory tenancy which will allow the landlord to use the process for rent increase set out the Housing (Scotland) Act 1988. However, under a statutory assured tenancy the tenant may apply to have the new rent reviewed by a Private Rented Housing Committee which is responsible for determining the rent which the house would reasonably be let for in an open market by a willing landlord once the contractual

⁷⁶⁷ Some older housing association tenancies still have the right to have a fair rent registered.

⁷⁶⁸ Housing (Scotland) Act 2001 s. 25.

⁷⁶⁹ Housing (Scotland) Act 2001 s. 25(4).

⁷⁷⁰ Housing (Scotland) Act 1988 s. 24.

tenancy has been terminated, the Committee do not have authority to carry out a review during the term of the tenancy. In determining the market rent the Committee must ignore certain matters including any improvements made by the tenant, unless the improvement was carried out in pursuance of the terms of the tenancy, as well as the effects of any ill treatment by the tenant in breach of the lease. The Committee may visit the dwelling to gauge its condition. Parties may submit comparable lettings to support their contention as to the market rate however the Committee are able to use their own comparable lettings drawn from local newspapers and internet sites etc. So far the Committees have taken a broad approach when analysing the property which has taken into account location, energy efficiency, heating system, modern utilities and sanitary facilities. Information used by the Committees is made available to the public.⁷⁷¹

- **Improvements/changes of the dwelling**
 - **Is the tenant allowed to make (objective) improvements on the dwelling (e.g. putting in new tiles)?**
 - **Must, and if yes under what conditions, improvements of the dwelling by the tenant be compensated by the landlord?**
 - **Is the tenant allowed to make other changes to the dwelling?**
 - **in particular changes needed to accommodate a handicap (e.g. building an elevator; ensuring access for wheelchairs etc)?**
 - **fixing antennas, including parabolic antennas**

Assured tenancies

The extent to which the tenant is allowed to make improvements or changes to the dwelling depends primarily on the lease agreement as parties are free to include terms governing alterations of the dwelling and indeed the modern residential lease will usually contain a term restricting the tenant from carrying out improvements or alterations of the dwelling without the landlords prior consent. It is important that an assured tenancy should include this term. Should the agreement remain silent in this area then the issue will depend on the nature of the improvement or change and following this whether the landlord consents to the alterations. In particular the tenant will not be allowed to make such major changes that the possession is inverted, that is that the nature of the tenancy is changed unilaterally. Where the tenant makes material structural alterations of the dwelling without the landlord's approval he runs the risk of incurring liability for breach of contract and may be required to return the dwelling to its original condition. However where the changes are trivial or periodical then the tenant will not incur liability for breach. Finally, disabled tenants of private landlords have the right to make certain alterations under ss 52-54 of the Housing (Scotland) Act 2006.

Scottish Secure tenancy

⁷⁷¹ Housing (Scotland) Act 1988 s. 49.

Under the Housing (Scotland) Act 2001, a Scottish secure tenant is not permitted to carry out work in relation to the house without the written consent of the landlord, which must not be unreasonably withheld.⁷⁷² Work is defined as alteration, improvement or enlargement of the house or of any fittings or fixtures, the addition of new fittings or fixtures, the erection of a garage, shed or other structure.⁷⁷³ If the tenant wishes to carry out work on the dwelling there is a detailed statutory framework which the tenant must adhere. The tenant must make a written application to the landlord for the landlord's consent, giving details of the proposed work and the landlord has one month to either consent to the work, consent but impose conditions or refuse the request. Should the landlord fail to reply within the time period he will be taken to consent to the work. This reply must contain any conditions imposed or where consent is refused, it must contain reasons for the refusal. In deciding whether to impose conditions the landlord must have regard to the age and condition of the house as well as the cost of complying with the condition. A tenant may appeal a refusal or condition to the court by way of summary appeal. The court is to have regard to the safety of occupiers of the house or of any other premises, any expenditure which the landlord is likely to incur as a result of the work, whether the work is likely to reduce the value of the house or of any premises of which it forms part, or to make the house or such premises less suitable for letting or for sale, and any effect which the work is likely to have on the extent of the accommodation provided by the house. The effect of an authorised improvement will be ignored when the rent is reviewed and the tenant will be entitled to be reimbursed for the cost of a qualifying improvement at the end of the tenancy.⁷⁷⁴ Finally, landlords have the power to make a discretionary payment for improvements to a tenant at the end of the tenancy under s 29 of the Housing (Scotland) Act 2001.

Tenant's fixtures and improvements

Under the common law where the tenant makes improvements to the dwelling they will either become a part of the property, as a heritable fixture, and will no longer be removable by the tenant or the improvements will remain distinct from the property and will be removable by the tenant.⁷⁷⁵ In order for an object to become part of the dwelling as a heritable fixture it must be sufficiently attached to the property. As the heritable property belongs to the landlord this means that any fixture added will also belong to him regardless of the fact that the tenant may have made the installation. There are two exceptions to this rule which relate to trade fixtures and ornamental fixtures. Trade fixtures are objects which were attached to the property as part of the tenant's trade or business and the tenant is permitted to remove these provided that this does not result in substantial damage. Ornamental fixtures are objects which were attached to the property for the better enjoyment of the object itself rather than to effect a permanent improvement of the property. Where the improvement does not fall under one of these exceptions then the tenant will not be permitted to remove the object. This is significant because certain improvements to the dwelling may increase its value and consequently the landlord may lay claim to the improvement regardless of the fact that it was made at the tenant's expense. Under the common law the tenant does not have a general right to compensation for improvements

⁷⁷² Housing (Scotland) Act 2001 s. 28. This applies to any work beyond internal decoration.

⁷⁷³ Model Scottish Secure Tenancy (2002) cl. 5.21ff; McAllister, *Scottish Law of Leases*, para. 19.51 ff.

⁷⁷⁴ Housing (Scotland) Act 2001 ss 29-31, sch. 5; Scottish Secure Tenancy (Compensation for Improvements) Regulations 2002.

⁷⁷⁵ McAllister, *Scottish Law of Leases*, para. 10.38 ff.

made to the dwelling. While under certain tenancies, particularly agricultural tenancies and social tenancies, there is a statutory right to compensation for improvements made, however this group does not include assured tenancies. Indeed, the tenant may find himself liable for a higher rent should the landlord seek to include the improvements in a rent review. In assured tenancies and other tenancies the position with regard to rights to compensation will often be regulated by the lease.

- **Renovation and alterations of the dwelling by the landlord**
 - **What does the tenant have to tolerate?**
 - **What conditions should a landlord willing to make renovations fulfil (e.g. giving notice; offer an alternative dwelling etc)?**

Generally speaking a tenant may be expected to tolerate minor works. If major work is required, the landlord will have to provide alternative accommodation and will then have a ground for recovery of possession from the original property, whether held on an assured tenancy or a Scottish secure tenancy.⁷⁷⁶ With regard to minor works the landlord must be alert to his common law obligations. In particular, the landlord is under a duty not to derogate from his grant. As set out above, this means that the landlord must not do anything which would deprive or partially deprive the tenant of his right under the lease and the remedies are abatement, rescission and damages. In *Huber v. Ross*⁷⁷⁷ a tenant leased the top flat of a building owned by the landlord who carried out redevelopment works on the building which caused structural and other damage to the leased property as well as interference with tenants business. The court held that the landlord was bound to repair any damage caused and was also liable in damages for injury done to tenant's furniture and materials as well as to his business. In addition the landlord is under a duty to provide subjects which are reasonably fit for the purpose for which they are let and this means that they are tenantable or habitable. Should the landlord's actions, in carrying out renovations, make it substantially unsuitable this will be a material breach of contract.

- **Uses of the dwelling**
 - **Discuss allowed vs. forbidden uses such as: Keeping animals; smells; receiving guests; prostitution and commercial uses (e.g. converting one room in a medical clinic); removing an internal wall;⁷⁷⁸ fixing pamphlets outside.**

General

The tenant is under a common law duty to use the property only for the purpose for which it was let. Otherwise the tenant will invert the possession as set out above, and the tenant may be forced to reverse any structural inversions. The lease will generally contain a clause prohibiting use of the dwelling which could result in a

⁷⁷⁶ Private sector: Housing (Scotland) Act 1988 sch. 5 part 1, ground 15 and Housing (Scotland) Act 1988, sch. 5 part 1, ground 6. Social sector: Housing (Scotland) Act 2001 sch. 2, ground 10; Model Scottish Secure Tenancy (2001) cl. 5.14.

⁷⁷⁷ 1912 SC 898.

⁷⁷⁸ This is considered in the context of 'improvements'. See section 6.4 above.

nuisance; this could relate keeping animals, odours, receiving guests etc. It is illegal for landlords and letting agents to discriminate against a tenant if they are disabled. This means that the landlord must not treat the tenant less favourably than a non-disabled person because of their disability. With regard to keeping animals this means that the landlord is not allowed to refuse to let the tenant keep a guide dog or other assistance dog under a 'no pets' rule, Using or allowing the house to be used for immoral or illegal purposes is a ground for recovery of possession in assured tenancies and Scottish secure tenancies and therefore the landlord may rely on this as a ground to terminating the tenancy where the dwelling has been used for illegal or immoral purposes.

Antisocial behaviour

Antisocial behaviour by tenants and their families and visitors is a huge issue, sadly throughout the United Kingdom, as is the steps that can be taken against antisocial neighbours.⁷⁷⁹

The model Scottish secure tenancy has a lengthy section⁷⁸⁰ covering the behaviour expected of the tenant, who is responsible for the activities of those living with the tenant and visitors. The main points are:

- care of the home, decoration, furniture, fixtures;
- care of common parts;
- respect for neighbour's property;
- not to run a business from the property;
- prohibition on illegal and immoral activities, including drug taking, drug dealing, prostitution, handling stolen goods, betting and gambling;
- placing rubbish in allocated places; and
- care taken with heating appliances.

This is followed by a lengthy section on showing respect for others, an obligation which may be broken in numerous ways:⁷⁸¹

- excessive noise or allowing visitors to be noisy;
- failure to control pets;
- use for illegal or immoral purposes;
- leaving rubbish in unauthorised places;
- failure to control children;
- vandalism; harassment or assault of people in the neighbourhood;
- carrying offensive weapons;
- using or selling drugs;
- selling alcohol or using alcohol in an antisocial manner;
- running a business in an antisocial manner; or
- parking or carrying our work to vehicles.

There are innumerable cases on repossession for antisocial behaviour. drugs;⁷⁸²

⁷⁷⁹ Collins and O'Carroll (1997) *Antisocial Behaviour and Housing: The Law*.

⁷⁸⁰ (2002) Part 2.

⁷⁸¹ (2002) cl. 3.

⁷⁸² *Kirk Care Housing Association v. Clugston* 2000 Hous LR 106 Sh. Ct; *Edinburgh City Council v. Watson* 2002 Hous LR 2 (amongst much else); *Glasgow Housing Association v. Fisher* 2008 SLT (Sh. Ct) 142; *South Lanarkshire Council v. Nugent* 2008 Hous LR 92; *Glasgow Housing Association v. Hetherington* 2009 SLT (Sh. Ct) 64; *Glasgow Housing Association v. Gourlay* 2006 Hous LR 52; *Shetlands Islands Council v. Hassan* 2012 Hous LR 107; *South Lanarkshire Council v. Gillespie* 2012 Hous LR 45; *Perth and Kinross Council v. Gillespie* 2012 SCLR 1104 Sh. Ct.

drinking;⁷⁸³
possession of a revolver;⁷⁸⁴
late night disturbances (over a period of three years);⁷⁸⁵ and
rubbish flung from windows.⁷⁸⁶

Courts have refused, however, to impose a duty of care on housing authorities to prevent the death of a tenant through the antisocial behaviour of other tenants.⁷⁸⁷

A **Scottish secure tenancy** can be converted by the social landlord into a short Scottish secure tenancy by notice.⁷⁸⁸ This grants a contractual term of at least 6 months, but no guarantee of security after the end of the fixed term. The landlord has a mandatory ground for possession if it chooses to exercise it, though in order to meet human rights standards there will be procedure to review the eviction decision.⁷⁸⁹ A recovery notice must be served between two and six months before repossession is sought.⁷⁹⁰ The grounds on which this effective demotion can be made are set out in detail, including a previous antisocial behaviour order, the making of a new order, or antisocial behaviour by any other resident.⁷⁹¹

In the **private sector**, the main controls are:

antisocial behaviour orders against tenants or family members;
antisocial behaviour notice to landlord to control the activities of others;⁷⁹² and
refusal of a private landlord registration.⁷⁹³

The Tenant's Information Pack defines antisocial behaviour as any behaviour causing fear, alarm of distress, and this includes

persistent excessive noise;
verbal or physical abuse;
racial or sexual harassment;
vandalism; and
drug abuse or dealing.

It makes clear that the landlord is required to take action about complaints, by investigating, writing to the tenant, offering advice, involving the council, seeking an interdict or to evict. Failure to act may lead to the landlord becoming subject to an antisocial behaviour notice.

- **Is there an obligation of the tenant to live in the dwelling?**

⁷⁸³ *Glasgow City Council v. Ferguson* 2009 SLT (Sh Ct) 47 (out of control drinking over 26 months).

⁷⁸⁴ *Fife Council v. Buchan* 2008 SLT Sh. Ct 79.

⁷⁸⁵ *Glasgow Housing Association v. Marshall* 2006 Hous LR 56.

⁷⁸⁶ *Glasgow City Council v. Al-Abassi* 2009 Hous LR 23.

⁷⁸⁷ *Mitchell v. Glasgow City Council* [2008] CSIH 19.

⁷⁸⁸ Short secure tenancies can also be granted as a temporary letting to a person seeking accommodation or accommodating a homeless family, or temporary letting pending development or in property not belonging to the landlord: Housing (Scotland) Act 2001 sch. 6.

⁷⁸⁹ Housing (Scotland) Bill 2013 cl. 12.

⁷⁹⁰ Housing (Scotland) Act 2001 s. 36; Short Scottish Secure Tenancies (Proceedings for Possession) Regulations 2002; this notice is not a notice to quit: *Aberdeenshire Council v. Shaw* 2012 SLT (Sh. Ct) 144.

⁷⁹¹ Housing (Scotland) Act 2001 s. 53(3), sch. 6. Details will be varied by the Housing (Scotland) Bill 2013 cls. 8, 10, 11, 12.

⁷⁹² Antisocial Behaviour etc. (Scotland) Act 2004 part 7.

⁷⁹³ Antisocial Behaviour etc. (Scotland) Act 2004 part 8.

Under the common law there is an obligation on the tenant to enter into possession, to occupy and use the subject and once in occupation to remain so for the duration of the lease.

A tenant may be held liable in damages for any damage caused to the property by his absence. In the case where there is a prolonged absence by the tenant, the tenancy will cease to be assured or secure as the case may be. This principle is emphasised in particular in the social sector. Occupation of properties keeps them in good condition, particularly in the Scottish weather, and a tenant is required to occupy property as his principal home. Failure to occupy property would be a ground for repossession, but in fact it is not necessary to go through a court repossession since there are specific provisions dealing with abandonment.⁷⁹⁴ A social landlord can give notice that the property appears to have been abandoned which places the onus on the tenant to challenge the notice or to give notice of their intention of occupy the property.⁷⁹⁵ Notices are often disputed, in one case for example where the electricity supply was disconnected but the tenant was found scraping the wall with a screwdriver preparatory to redecoration.⁷⁹⁶ If abandonment is established it involves the loss of the Right to Buy.⁷⁹⁷ These provisions on abandonment only apply to social and not private sector tenancies.

- **Are there specificities for holiday homes?**

A holiday home is not let as a principal home and so is not an assured tenancy (in the private sector) and cannot be a secure tenancy in the social sector. An out of season let of a holiday home will usually be on a short assured basis, but if full assurance is granted by mistake there will be a mandatory ground for possession.

- **Video surveillance of the building:**

- **Is the surveillance of certain parts (e.g. corridors) of the building lawful and usual?**

Security surveillance of certain parts of the building is lawful and usual. However, any security cameras should only be installed in public places like entrances, parking lots, and laundry rooms to protect tenant privacy. Most uses of CCTV will be covered by the Data Protection Act which sets out rules which CCTV operators must follow. The tenant will have a number of rights including the right to see information held about him, including CCTV images of him, or images which give away information about him. Where a tenant is concerned that CCTV is being used for harassment, anti-social behaviour or other matters dealt with under the criminal law, then these are matters for the police. Law enforcement covert surveillance activities are covered by the Regulation of Investigatory Powers (Scotland) Act 2000

⁷⁹⁴ Housing (Scotland) Act 2001 ss 17 & 18.

⁷⁹⁵ *Tannoch v. Glasgow City Council* 2000 Hous LR 64.

⁷⁹⁶ *Smith v. Dundee City Council* 2003 Hous LR 55, Sh. Ct.; *Lech v. Highland Council* [2010] Hous LR 52, Sh. Ct.

⁷⁹⁷ *Smith v. Aberdeen City Council* 2001 Hous LR 17.

Table for 6.5 Implementation of tenancy contracts

	Main characteristic(s) of Scottish Secure Tenancy	Main characteristic(s) of short assured tenancy.
Breaches prior to handover	Landlord must carry out check	Tenancy only granted when property ready
Breaches after handover	Duty on landlord Complaints procedure	Action
Rent increases	Notice Challenge procedure	Statutory notice Can challenge
Changes to the dwelling	Requires written consent	Outright bar
Use of the dwelling	Principal residence	Residence

6.6 Termination of tenancy contracts

- **Mutual termination agreements**

The parties to a rental agreement are free to come to a mutual agreement which allows for termination prior to expiration of the term. The tenant needs to be aware that this can lead to him becoming homeless intentionally which would limit his possibility of applying for social housing in the future.

Termination will also occur where the parties to an existing tenancy agree to a new tenancy on different terms, the effect of the regrant being an implied surrender of the existing tenancy. When the assured tenancy regime replaced the Rent Act regimes in 1989, there were inadequate safeguards for Rent Act protected tenants, and many moved to an assured basis without adequate warning.

- **Notice by the tenant**

- **Periods and deadlines to be respected**

Where the tenant wishes to terminate the tenancy he must give the landlord valid notice to quit.⁷⁹⁸ Any notice of termination for tenancies of houses let for rent or other valuable consideration, whether by landlord or tenant, must be in writing and must be served not less than 4 weeks before the date on which it is to take effect.⁷⁹⁹ This minimum notice period applies to all residential tenancies regardless of whether the tenancy is an assured tenancy, a regulated tenancy or a Scottish secure tenancy. Otherwise, the length of notice required from a tenant depends on the kind of tenancy that they have and the agreement reached between the parties. In the private sector, the tenancy agreement will usually specify how much notice is required and in most cases this will be one month. A tenant with an assured tenancy or a short assured tenancy with a fixed term of more than 3 months must give the landlord at least 40 days' notice.

Where the tenancy is a fixed term tenancy the tenant may leave on the expiration date (the "ish"), but notice is required to the landlord as otherwise the tenancy will be renewed automatically via the process of tacit relocation. He is not allowed to terminate the tenancy unilaterally prior to the expiry date (the "ish") and any such action may cause the tenant to be liable in damages to the landlord and the tenant may be required to continue to pay rent for the duration of the term.⁸⁰⁰ The parties are at liberty to include a provision for early termination, a "break clause" for the benefit of the tenant in which case care is needed to comply with the terms of the notice, however this is more typical of commercial rather than residential leases.

⁷⁹⁸ Sheriff Courts (Scotland) Act 1907 ss 34-38; McAllister, *Scottish Law of Leases*, para. 10.28 ff.

⁷⁹⁹ Rent (Scotland) Act 1984, s 112

⁸⁰⁰ In *Salaried Staff London Loan Co. v. Swears and Wells* 1985 SLT 326 a tenant repudiated the lease without the landlords consent and was liable for damages. However, in addition the landlord was entitled to enforce all of the tenant's obligations, including the payment of rent.

- **May the tenant terminate the agreement before the agreed date of termination (in case of contracts limited in time); if yes: does the landlord then have a right to compensation (or be allowed to impose sanctions such as penalty payments)?**

Parties are free to include an early termination or break clause. In the event that parties fail to include an early termination clause, they remain free to come to a mutual agreement which allows for termination prior to expiry of the term provided that a valid notice period is given.⁸⁰¹ Where the tenancy is a fixed term tenancy the tenant is not allowed to terminate unilaterally the tenancy and any such action may cause the tenant to be liable in damages to the landlord and he may be required to continue to pay rent for the duration of the term. However, the tenant may terminate the tenancy where the landlord has breached his obligations. Where the tenant wishes to leave the tenancy upon expiry of the term, he must give notice to the landlord of at least 28 days. In the event that the tenant is seeking to bring about a termination due a breach of obligation by the landlord, the tenant must first notify the landlord of the failure in writing and give the landlord the opportunity to remedy the failure in a reasonable time. The landlord does not have a right to compensation where an early termination has been brought about in a manner which complies with the statutory notice requirements. It is only when the tenant deviates from the required procedure that a landlord may claim compensation.

- **Are there preconditions such as proposing another tenant to the landlord?**

Tenancies in the residential sector would rarely provide for the tenant to propose a replacement tenant for one who leaves but there is nothing to prevent a tenant finding a replacement he wants to assign to. This might be appropriate where a flat is taken by a group of students to avoid the problem that a notice by one joint tenant would end the tenancy of all the others. However, such clauses are rare and in general the landlord will find a replacement tenant without the previous tenant's assistance.

⁸⁰¹ See section 6.6 above.

- **Notice by the landlord**
 - **Ordinary vs. extraordinary notice in open-ended or time-limited contracts; definition of ordinary vs. extraordinary (= normally related to fundamental breaches of the contract, e.g. in cases of massive rent arrears or strong antisocial behaviour)**
 - **Statutory restrictions on notice:**
 - **for specific types of dwellings, e.g. public dwellings; rental dwellings recently converted into condominiums etc.**
 - **in favour of certain tenants (old, ill, at risk of homelessness)**
 - **for certain periods**

The effect of a notice of termination depends very much on the sectoral allocation of the tenancy, the key division being between short assured tenancies and tenancies with full security - fully assured tenancies in the private sector and Scottish secure tenancies in the social sector. There is also a residual category of tenancies falling outside security regimes.

(A) Termination of a short assured tenancy

A short assured tenancy requires a fixed contractual grant for a term of six months or more. The landlord will be able to terminate the tenancy at the end of the fixed term subject to three basic requirements.⁸⁰² One is that the contractual term of the tenant has reached its ish.⁸⁰³ Second, any contractual regrant or tacit relocation must have ended. When the fixed period ends, the lease may state how it will continue (for example subject to monthly renewal) or it may be subject to tacit relocation (for example a tenancy for a year might roll over for another year), so the landlord will need to give sufficient notice to terminate these contractual rights.⁸⁰⁴ Third, the landlord must give a statutory notice, which must be of two months duration and to expire on or after the ish.⁸⁰⁵ At the expiration of the notice the landlord may raise a possession action in the Sheriff Court and the Sheriff must make an order for possession. This ends the tenancy.⁸⁰⁶

The landlord can also terminate a short assured tenancy during any contractual period using most of the misconduct grounds for possession against an assured tenant, provided the tenancy allows this.⁸⁰⁷

(B) Termination of an assured tenancy for tenant misconduct

Termination of a (fully) assured tenancy is quite different because security of tenure accrues when contractual protection ends: a tenant who remains in possession of the house after the lease has been terminated will have a statutory tenancy of the

⁸⁰² Housing (Scotland) Act 1988 s. 33, clarified by Private Rented Housing (Scotland) Act 2011 s. 34; McAllister, *Scottish Law of Leases*, para. 17.65.

⁸⁰³ It is apparently possible to include a break clause to bring the tenancy to end short of the six month minimum period: *Wishaw and District Housing Association v. Neary* 2004 SC 463.

⁸⁰⁴ Service of a s.33 notice before the ish will be sufficient: *Calmac Developments v. Murdoch* 2012 GWD 27-565.

⁸⁰⁵ The tenancy agreement may require longer than two months.

⁸⁰⁶ Housing (Scotland) Act 1988, s. 33(4).

⁸⁰⁷ These are set out below; grounds 9, 10, 15 and 17 are not available.

house⁸⁰⁸ and he can only be removed if the landlord obtains a court order from the Sheriff based on one or more of the statutory grounds.⁸⁰⁹

In total there are seventeen grounds of possession of which all the grounds 2 and 8⁸¹⁰-17 are discretionary grounds and 1-7 are mandatory. Of these the mandatory ground 8 and the discretionary grounds 11-16 are based on the misconduct of the tenant. All of these misconduct grounds are available once the contractual term has ended and the tenancy has become statutory. At this stage when the statutory tenancy is in operation, any provision of the tenancy allowing for its termination is no longer effective.⁸¹¹ Some of the grounds (1 and 11-16) may also be used during the contractual period of the lease where the lease provides for this;⁸¹² in this situation the statutory ground functions like an irritancy provision but the contractual provision must not deviate from the statutory grounds.⁸¹³

The tenant must be given notice of the proceedings for possession and this notice⁸¹⁴ must state the relevant ground as well as giving any relevant information.⁸¹⁵ In relation to grounds 1,2,5,6,7,9 and 17 two months notice is required and in all other cases the period of notice is two weeks.⁸¹⁶ The Sheriff also has power to dispense with notice in some situations.⁸¹⁷ Therefore when a landlord is seeking to terminate a contractual tenancy he must serve two notices, a notice to quit which will bring the term of the lease to an end and will prevent tacit relocation and a second notice informing the tenant of the landlord's intention to raise proceedings for recovery of possession. Where a sub-tenancy is in operation then termination by the head landlord of the tenancy will cause the sub-tenant to take the place of the head tenant.⁸¹⁸

Misconduct grounds for possession against assured tenant

Mandatory	Possession must be ordered once the ground is established
Ground 8	Three months' rent arrears Where three months' rent is outstanding at the date of service of the notice then the landlord may rely on ground 8 to recover possession of the dwelling. ⁸¹⁹
Discretionary	The Sheriff is not to grant an order for possession unless he considers it reasonable to do so. In this

⁸⁰⁸ Housing (Scotland) Act 1988, s. 16(1); McAllister, *Scottish Law of Leases*, para. 17.28ff.

⁸⁰⁹ Housing (Scotland) Act 1988 sch. 5.

⁸¹⁰ Ground 8 is discretionary in cases where the rent arrears have been caused by a delay or failure in payment of housing benefit.

⁸¹¹ Housing (Scotland) Act 1988 s. 16(1)(b)(ii).

⁸¹² Housing (Scotland) Act 1988 s. 18(6)(c)

⁸¹³ *Royal Bank of Scotland v. Boyle* 1999 H.L.R. 63.

⁸¹⁴ Assured Tenancies (Forms) (Scotland) Regulations 1988, SI 1988/2109, as amended by SI 1993/648.

⁸¹⁵ Housing (Scotland) Act 1988 s. 19(2).

⁸¹⁶ Housing (Scotland) Act 1988 s. 19(4).

⁸¹⁷ Housing (Scotland) Act 1988 s. 19(1).

⁸¹⁸ Housing (Scotland) Act 1988 s. 28.

⁸¹⁹ The Sheriff is given a discretion where the arrears are a consequence of delay or failure in the payment of housing benefit the sheriff has discretion to refuse possession: Housing (Scotland) Act 1988 s. 18 as amended by Homelessness etc. (Scotland) Act 2003 s. 12.

	manner the sheriff has discretion to delay an order of possession or to adjourn proceedings etc.
Ground 11	Rent persistently late Where the tenant has persistently delayed paying rent then the landlord may seek an order for possession on ground 11. The landlord may rely on this ground regardless of whether or not any rent is in arrears on the date on which proceedings for possession are begun. ⁸²⁰
Ground 12	Rent arrears Ground 12 provides that a landlord may seek an order for possession in the event of rent arrears which remain unpaid on the date on which the proceedings for possession are begun and the tenant was in arrears at the date of the service of the notice. ⁸²¹
Ground 13	Breach of obligation The landlord may seek an order for possession on ground 13 where any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed.
Ground 14	Deterioration of dwelling Where the condition of the dwelling or common parts of the building has deteriorated because of the neglect of the dwelling then the landlord may rely on ground 14.
Ground 15	Anti-social behaviour Where the tenant, or a person lodging with the tenant or visiting the dwelling has been convicted of using or allowing the house to be used for immoral or illegal purposes; or an offence punishable by imprisonment committed in, or in the locality of, the house; or has acted in an anti-social manner, then the landlord may rely on ground 15 in order to seek an order for possession.
Ground 16	Deterioration of furniture Where there has been deterioration in the condition of any furniture due to ill-treatment by the tenant or person lodging with the tenant then the landlord may seek an order for possession on ground 16.

(C) Termination of an assured tenancy for management reasons

There are a number of grounds for possession which are available either because the security regime is inherently limited or to facilitate proper management of the property.

In many ways the situation is the same as just described. When the (fully) assured tenancy ends a statutory tenancy arises which can only be ended if the landlord obtains a court order from the Sheriff based on one or more of the statutory

⁸²⁰ The Sheriff should take into account any delay etc. in the payment of housing benefit, as above.

⁸²¹ The Sheriff should take into account any delay etc. in the payment of housing benefit, as above.

grounds.⁸²² Of the grounds here discussed ground numbers 2 or 8 of the mandatory grounds, or any of the discretionary grounds other than grounds 9, 10, 15 or 17 may be used during the contractual period of the lease where the lease so provides.⁸²³ The tenant must be given notice of the proceedings for possession and this notice⁸²⁴ must state the relevant ground as well as giving any relevant information.⁸²⁵ The exact period of notice depends upon the ground being used:⁸²⁶

grounds 1,2,5,6,7,9 and 17 two months;

grounds 3,4, 8, 10 two weeks.

The court may dispense with notice in some situations.

Management grounds

Mandatory

Where the landlord can establish that any of the grounds for possession from 1 to 8 exists then the sheriff must give back possession to the landlord.⁸²⁷

As such these grounds are termed mandatory grounds of possession. Where grounds 1 – 5 are raised the tenant must have been given written notice setting out that possession might be required under the ground at issue, this is the 'usual notice requirement' however with grounds 1 and 2 the sheriff has discretion to dispense with the notice requirement where it is reasonable to do so

Ground 1

Occupancy required by landlord

In the event that the landlord requires the dwelling for personal or familial use then he may require possession by ground 1. While the landlord is required to give notice to the tenant that possession might be recovered under this ground at the beginning of the tenancy the sheriff has discretion to dispense with this requirement where it is reasonable to do so.

Ground 2

Mortgage default

Should the landlord default on a loan which had as its security the dwelling of the tenancy and the creditor is entitled to sell the house as part of the security arrangement then ground 2 may be relied upon to recover possession. While the landlord is required to give notice to the tenant that possession might be recovered under this ground at the beginning of the tenancy the sheriff has discretion to dispense with this requirement where it is

⁸²² Housing (Scotland) Act 1988 s. 16(1), sch. 5; McAllister, *Scottish Law of Leases*, para. 17.36ff.

⁸²³ McAllister, *Scottish Law of Leases*, para. 17.31.

⁸²⁴ Assured Tenancies (Forms) (Scotland) Regulations 1988, as amended by SI 1993/648.

⁸²⁵ Housing (Scotland) Act 1988 s. 19(2).

⁸²⁶ Housing (Scotland) Act 1988 s. 19(4).

⁸²⁷ Housing (Scotland) Act 1988 s. 18(3).

	reasonable to do so.
Ground 3	Holiday let Where the dwelling is let, as and out of season holiday let for a term of less than 8 months. Under this ground the landlord must give notice to the tenant prior to commencement of the tenancy that possession might be recovered under this ground.
Ground 4	Student accommodation In the event that a landlord wants to recover possession of a dwelling which is let as student accommodation he may rely on ground 4 to do so. In order to rely on this ground, the dwelling must be let for a period not exceeding 12 months and the usual notice requirement applies.
Ground 5	Ecclesiastical lets Where the landlord requires possession of the dwelling in order to allow the dwelling to be the subject of an ecclesiastical let, i.e. for occupation by a minister or a full-time lay missionary of any religious denomination as a residence from which to perform the duties of his office, then he may use ground 5 to recover possession of the dwelling, however the usual notice requirement applies.
Ground 6	Substantial redevelopment Where the landlord requires possession of the dwelling in order to carry out substantial redevelopment works on the house then he may use ground 6 to acquire possession of the dwelling with the usual notice requirement applying.
Ground 7	Inherited tenancy In the event that the tenant has inherited the tenancy from a former tenant but the landlord wishes to recover possession of the dwelling he may rely on ground 7 to secure possession. ⁸²⁸ However, proceedings for the recovery of possession must begin within 12 months of the death of the former tenant or, if the sheriff directs after the date on which the landlord became aware of the death. Even where the new tenant pays rent to the landlord, no new tenancy will be inferred unless the landlord agrees to this in writing.
Discretionary	The Sheriff is not to grant an order for possession unless he considers it reasonable to do so. In this manner the sheriff has discretion to delay an order of possession or to adjourn proceedings etc.
Ground 9	Suitable alternative accommodation Where suitable alternative accommodation is

⁸²⁸ There is of course an exception to this where the tenant's partner has a right to inherit – see earlier.

Ground 10	<p>available for the tenant or will be available for him when the order for possession takes effect, the landlord may rely on ground 9 to recover possession of the dwelling.</p> <p>Tenant's notice to quit</p> <p>Where the tenant has given a notice to quit which has expired with the tenant remaining in possession of the dwelling then the landlord may seek an order for possession on ground 10. However, the landlord's proceedings must begin within six months of the expiry of the notice to quit and the tenant must not be entitled to possession of the house by virtue of a new tenancy.</p>
Ground 17	<p>Former employee tenancy</p> <p>Where the house was let to the tenant in consequence of his employment by the landlord and the tenant has ceased to be in that employment then the landlord may seek an order for possession on ground 17.</p>

It must be remembered that there are a number of tenancies excluded from the assured tenancy regime⁸²⁹ and for those contractual principles apply. So for example a holiday letting is not an assured tenancy and an out of season holiday let is an assured tenancy which can be ended under a mandatory ground.

(D) Termination of Rent Act tenancies

Protected tenancies enjoy the benefits conferred by the Rent (Scotland) Act 1984 and while the grounds for termination of a regulated or protected tenancy resemble the grounds under the assured tenancies regime, they operate in a manner which makes it more difficult for the landlord to gain an order of possession. For instance, rent arrears are a discretionary ground under the protected tenancy and there is also no ground of persistent late payment or where three months' rent is outstanding. The grounds for recovery of possession by the landlord⁸³⁰ are divided into mandatory and discretionary grounds of possession.

Discretionary grounds of possession: where a discretionary ground has been shown to exist the court is not compelled to make an order of possession rather they will only do so where making such an order is reasonable and either there is suitable alternative accommodation available⁸³¹ or there exist one or more of the grounds set out in Part 1 of Schedule 2. In all cases concerning discretionary grounds for possession the court has power to adjourn proceedings. The discretionary grounds for possession of dwellings let on or subject to protected or statutory tenancies are:

1. rent arrears or other breach;
2. nuisance;
3. deterioration of house;
4. deterioration of furniture;

⁸²⁹ Housing (Scotland) Act 1988 sch. 1.

⁸³⁰ Rent (Scotland) 1984 sch. 2.

⁸³¹ Rent (Scotland) Act 1984 sch. 2 Part IV.

5. tenant's notice to quit;
6. unauthorized assignment or subletting;
7. house reasonably required for landlord's employee;
8. house reasonably required for occupancy by the landlord or a member of his family;
9. subletting at an excessive rent; and
10. overcrowding.

Mandatory grounds of possession: where a mandatory ground is established the court is compelled to make an order of possession. In all cases except case 20, the landlord is required to give the tenant notice at the outset of the tenancy that the landlord may require possession the ground at issue. However in cases 11, 12 and 21 the court has discretion to dispense with the notice requirement. The mandatory grounds of possession of dwellings let on or subject to protected or statutory tenancies are:

11. Where the owner, and former occupier of the dwelling, requires it as a residence;
12. requirement by the owner of the dwelling as a retirement residence;
13. off-season lets of holiday property for terms of not more than 8 months;
14. student lets of student accommodation for terms of not more than one year⁸³²;
15. short tenancies;
16. ecclesiastical lets;
- 17-19. requirement to accommodate agricultural workers;
20. Requirement of adapted dwelling by a person with special needs; and
21. Requirement for owner who was a member of the armed forces.

(E) Termination of Scottish Secure Tenancies

A tenant holding under a Scottish secure tenancy has a statutory right to stay in the dwelling in excess of the contractual term stated in the lease agreement. While the landlord's right to terminate a Scottish secure tenancy is strictly limited, the tenant enjoys a general right to terminate⁸³³ the tenancy at any time provided they give the landlord four weeks' notice.⁸³⁴ A Scottish secure tenancy may end on the death of the tenant provided that there is no relative to succeed the tenancy.⁸³⁵ Aside from this, a Scottish secure tenancy can only be terminated in a limited number of circumstances. These include termination by agreement, termination following abandonment, where the landlord obtains a court order for recovery of possession or if the tenancy is converted to a short Scottish secure tenancy.⁸³⁶ When seeking to terminate the tenancy the landlord must give the tenant written notice⁸³⁷ setting out the ground of termination as well as the date from which the landlord may bring proceedings for recovery of possession. A minimum notice period of four weeks is

⁸³² These are lets of student accommodation to people who are *not* students at times when students do not require it (e.g during vacations).

⁸³³ A joint tenant can bring their interest to an end with 4 weeks' notice to the landlord and each of the other joint tenants, s. 12(1)(f).

⁸³⁴ Housing (Scotland) Act 2001 s.13; McAllister, *Scottish Law of Leases*, para. 18.105 ff.

⁸³⁵ Housing (Scotland) Act 2001 s.12(1)(c).

⁸³⁶ Housing (Scotland) Act, s. 12.

⁸³⁷ Housing (Scotland) Act 2001 s. 14(4); Scottish Secure Tenancies (Proceedings for Possession) (Form of Notice) Regulations 2012.

required and the date set in the notice cannot be earlier than the date on which the tenancy would have been brought to an end by a notice to quit had it not been a Scottish secure tenancy.⁸³⁸ In addition, the landlord is required to serve notice on any qualifying occupier.⁸³⁹ Before serving this notice the landlord is required to make such inquiries as may be necessary to establish so far as is reasonably practicable whether there are any qualifying occupiers of the house and, if so, their identities.⁸⁴⁰ Where a qualifying occupier applies to the court to be 'sisted' as a party to proceedings for recovery of possession, the court must grant the application. A notice will cease to have effect if it is not used within six months or if the landlord has withdrawn it before then.⁸⁴¹

Special provisions apply to action on the basis of rent arrears, the commonest action raised. There is considerable case law about how sheriffs should exercise their discretion.⁸⁴² Changes were made in August 2012. Where a suspended possession order is made on the basis of rent arrears the tenancy ends only if possession is obtained and the order should include a period of time for which the order has effect.⁸⁴³ The landlord must follow a pre-action procedure before raising the action:⁸⁴⁴ the tenant should be given full information and advice and must attempt to agree a plan for future payments. Proceedings should not be raised while the tenant is applying for housing benefit⁸⁴⁵ or taking other reasonable steps to clear arrears. The landlord must confirm compliance before raising proceedings.⁸⁴⁶

Scottish Secure Tenancy – Grounds for recovery of possession

Misconduct grounds

Discretionary It must be reasonable to order possession

Ground 1 Rent arrears or other breach
Where there are outstanding rent arrears or the tenant has broken any other obligation then the landlord may apply for an order for possession on ground 1.

Ground 2 Crime

⁸³⁸ Housing (Scotland) Act 2001 s. 14(2) and (4). Where no date is stated see *West Lothian Council v. Reape* 2002 Hous LR 58 (40 days' notice required).

⁸³⁹ Housing (Scotland) Act 2001, s. 14(3). This includes a family member over 16, a sub tenant, a lodger (etc) who occupies the dwelling as their as home; see: *Edinburgh City Council v. Porter* 2004 Hous LR 46; *North Lanarkshire Council v. Kenmure* 2004 Hous LR 50; *Stirling Council v. Neal* 2006 SLT 51.

⁸⁴⁰ Housing (Scotland) Act 2001, s.14(3).

⁸⁴¹ Housing (Scotland) Act 2001, s.14(5).

⁸⁴² *Edinburgh City Council v. Forbes* 2000 Hous LR 61; *Stirling Council v. Magor* 2002 Hous LR 64; *Angus Housing Association v. Fraser* 2004 Hous LR 83; *Glasgow Housing Association v. Li* 2010 Hous LR 31; *Campbell v. Glasgow Housing Association* [2011] CSOH 55; *East Lothian Council v. Duffy* 2012 SLT (Sh. Ct) 113.

⁸⁴³ Housing (Scotland) Act 2001 s. 16(5A), (5B), inserted by Housing (Scotland) Act 2010 s. 153; Scottish Secure Tenancies (Repossession Orders)(Maximum Period) Order 2012. Under the old law: *Grampian Housing Association v. Pyper* 2004 Hous LR 22; *Deighan v. Edinburgh City Council* 2004 Hous LR 89; *Brown v. Glasgow Housing Association* 2007 Hous LR 2, Outer House.

⁸⁴⁴ Housing (Scotland) Act 2001 s. 14A inserted by Housing (Scotland) Act 2010 s. 155.

⁸⁴⁵ Previously actions would be suspended during a housing benefit appeal: *Aberdeen City Council v. McCarthy* 2004 Hous LR 53; *Renfrewshire Council v. Hainey* 2008 Hous LR 43, Sh. Ct.

⁸⁴⁶ Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012.

- Where the tenant or a person living with, or visiting, the tenant has been convicted of using the house or allowing it to be used for immoral or illegal purposes or an offence punishable by imprisonment committed in, or in the locality of, the house the landlord may seek an order for possession on ground 2.
- Ground 3
Deterioration of house
Where the tenant, or a person living with the tenant, has caused deterioration in the condition of the dwelling or any common parts then the landlord may seek an order for possession on ground 3.
- Ground 4
Deterioration of furniture
Where the tenant, or a person living with the tenant, has caused deterioration in the condition of the furniture then the landlord may seek an order for possession on ground 4.
- Ground 5
Absence⁸⁴⁷
Where the tenant and their partner⁸⁴⁸ have been absent from the house without reasonable cause for a continuous period exceeding 6 months or have ceased to occupy the house as their principal home the landlord may apply for an order for possession on ground 5. The landlord must serve 4 weeks written notice on the tenant, if the tenant fails to reply then they may take immediate possession
- Ground 6
False statement
In the event that the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant the landlord may seek an order for possession on ground 6.
- Ground 7
Anti-social behaviour
Where the tenant or a person living with, or visiting, the tenant has acted in an anti-social manner in relation to a person residing in, visiting or otherwise engaged in lawful activity in the locality, or pursued a course of conduct amounting to harassment⁸⁴⁹ of such a person, or a course of conduct which is otherwise anti-social⁸⁵⁰ conduct⁸⁵¹ in relation to such a person, and in the circumstance it is not reasonable that the landlord should be required to make other accommodation available to the tenant the landlord may seek an order for possession on ground 7.

Management grounds

Alternative accommodation Court must be satisfied suitable alternative accommodation available

⁸⁴⁷ Provision must be made for removal of belongings: Housing (Scotland) Act 2001, s 18(4); Scottish Secure Tenancies (Abandoned Property) Order 2002. The tenant may appeal within six months on procedural grounds or where there is a good reason for the absence such as illness. See earlier section on abandonment.

⁸⁴⁸ This includes spouse and any person with whom the tenant has, for a period of at least 6 months immediately prior to the commencement of the period referred to below, been living in the house as husband and wife or in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex.

⁸⁴⁹ 'Harassment' is to be construed in accordance with Protection from Harassment Act 1997 s. 8.

⁸⁵⁰ 'Anti-social' in relation to an action or course of conduct means causing or likely to cause alarm, distress, nuisance or annoyance.

⁸⁵¹ 'Conduct' includes speech, and a course of conduct must involve at least two occasions.

- Ground 8 Nuisance
Where the tenant or any person living with the tenant has been guilty of conduct in or in the vicinity of the house which is a nuisance or annoyance, or has pursued a course of conduct amounting to harassment of a person residing in, visiting or otherwise engaged in lawful activity in the locality and in the opinion of the landlord it is appropriate in the circumstances to require the tenant to move to other accommodation, the landlord may seek an order for possession on ground 8.
- Ground 9 Overcrowded
Where the house is overcrowded then the landlord may seek an order for possession on ground 9.⁸⁵²
- Ground 10 Redevelopment
Should the landlord intend to carry out substantial construction work on the dwelling then he may apply for an order for possession on ground 10.⁸⁵³
- Ground 11 Unsuitable
Where the dwelling was specially fitted to meet the particular needs of a tenant and that tenant is no longer in occupation and the landlord requires it for occupation (whether alone or with other members of the person's family) by a person who has such special needs, the landlord may seek an order for possession on ground 11.
- Ground 12 Unsuitable
Where the dwelling forms part of a group of houses which has been designed, or which has been provided with or located near facilities, for persons with special needs and the tenants no longer have this need and the landlord requires the dwelling for other persons with such a need the landlord may apply for an order for possession on ground 12.
- Ground 13 Landlord lease terminated
Where the interest of the landlord in the house is that of a lessee under a lease and the lease has terminated or will terminate within 6 months then the landlord may seek an order for possession on ground 13.
- Ground 14 Educational
This ground applies in specified regions of Scotland where a dwelling is held as part of the local authority's education function and that dwelling is required to accommodate an educator. The landlord may apply an order for possession on ground 14.
- Special case** It must be reasonable to order possession and suitable alternative accommodation must be available
- Ground 15 Relationship breakdown
Where the landlord seeks to transfer the tenancy to the tenants spouse or partner and the two persons no longer wishes to live

⁸⁵² Housing (Scotland) Act 1987, s. 135; it is not sufficient to specify 'overcrowding' without more: *Glasgow Housing Association v. Du* 2009 Hous LR 91.

⁸⁵³ This should be carried out within a reasonable time: *Edinburgh City Council v. Middlemiss* 2007 Hous LR 70. The order may be subject to the condition that the tenant be allowed to return when the work is finished.

together, the landlord may seek an order for possession on ground 15.

Under grounds 1-7 and ground 15 the court has power to adjourn proceedings with or without imposing conditions as to the payment of outstanding rent or otherwise.⁸⁵⁴ McAllister characterizes grounds 1 – 7 as conduct grounds which are employed when the tenant is at fault. When such grounds are raised there is no requirement that other accommodation will be available to the tenant but the court must be satisfied that it is reasonable to make the order.⁸⁵⁵ In this sense the Sheriff has discretion to refuse to grant an order for possession even where the ground of termination exists should the Court consider that the landlord did not act reasonably. Throughout this stage the onus is on the landlord to show that the ground in question exists and also that it is reasonable for the tenant to be evicted even if the tenant does not defend. McAllister characterizes grounds 8 – 15 as management grounds as they may arise regardless of the actions of the tenant nevertheless there remains a good reason for him to move out. In all cases, before granting an order for possession the court must be satisfied that suitable alternative accommodation is available to the tenant.⁸⁵⁶ With respect to ground 15, it is necessary for the court to be satisfied that it is reasonable to make an order for possession and also that suitable alternative accommodation is available elsewhere.

(F) Short Scottish Secure Tenancies and their Termination

The Short Scottish Secure tenancy was introduced alongside the Scottish Secure Tenancy in order to provide a short term tenancy option to local authorities and Registered Social Landlords. In this sense the Short Scottish secure tenancy shares key features with the short assured tenancy, in particular the Short Scottish secure tenancy is for a fixed term, at the end of which the landlord has an absolute right to terminate the tenancy without the tenant having the right to extended security of tenure, the right to buy or the succession rights which are available with an ordinary Scottish secure tenancy. However, unlike a short assured tenancy, the Short Scottish secure tenancy is not generally available to the landlord and instead is only available in a situation where a temporary let is deemed to be appropriate. In order to be a Short Scottish secure tenancy a tenancy must fulfill all of the requirements for a normal Scottish secure tenancy as well as two additional requirements.⁸⁵⁷ The first of these additional requirements is that the tenancy must be for a term of not less than 6 months; however there is no limit on the duration beyond six months.⁸⁵⁸ Secondly, before the creation of the tenancy the landlord must serve a notice⁸⁵⁹ on prospective tenant which sets out that the tenancy is to be a Short Scottish secure tenancy as well as the term of the tenancy. The grounds for granting a Short Scottish secure tenancy are set out in Schedule 6 of the Housing (Scotland) Act 2001. In the first place the Short Scottish secure tenancy may be considered appropriate should the tenants have engaged in antisocial behaviour of a nature serious enough to

⁸⁵⁴ Housing (Scotland) Act 2001 s. 16(1).

⁸⁵⁵ Housing (Scotland) Act 2001 s. 16(2)(a).

⁸⁵⁶ Housing (Scotland) Act 2001 s. 16(2)(b).

⁸⁵⁷ Housing (Scotland) Act 2001 ss. 34-37; McAllister, *Scottish Law of Leases* para. 18.102 ff.

⁸⁵⁸ Notice of intention to seek possession is not a notice to quit and does not prevent tacit relocation: *Aberdeenshire Council v. Shaw* 2012 SLT (Sh. Ct) 144.

⁸⁵⁹ The form of notice should follow the Short Scottish Secure Tenancies (Notices) Regulations 2002.

warrant the landlord obtaining an order of possession within the previous 3 years.⁸⁶⁰ Where the previous tenant was a Scottish secure tenancy then the possession ground must be ground 2 or 7. The Short SST may also be considered appropriate where the tenant or a person who will live with them is subject to an anti-social behaviour order under section 19 of the Crime and Disorder Act 1998. Aside from anti-social behaviour, the Short Scottish secure tenancy may also be considered appropriate in cases where there is a need for temporary accommodation, whether for the purpose of taking up employment or pending development of the house. In addition the Short Scottish secure tenancy may be considered appropriate for short term lets to homeless persons or temporary lets to persons requiring or in receipt of housing support services. Finally, the Short Scottish secure tenancy may also be considered appropriate in cases where accommodation is used which is not owned by the landlord and the terms of the lease preclude letting under an ordinary Scottish secure tenancy.

- **after sale including public auction (*'emptio non tollit locatum'*), or inheritance of the dwelling**

As indicated above the relevance of these facts on private sector tenancies depends upon the precise kind of tenancy that exists.

- **Challenging the notice before court (or similar bodies)**

Where the landlord fails to serve a valid notice of termination then the tenancy will continue to operate. This will have a range of consequences for both parties. In particular, the principle of tacit relocation may extend the term of the tenancy. Should the landlord attempt to rely on an invalid notice of termination this may constitute an illegal eviction and the tenant may take action in the courts which may result in the tenant being awarded compensation.

- **in particular claims for extension of the contract or for granting of a period of grace under substantive or procedural law**

Generally speaking, where valid notice has been served by the landlord then the tenant must vacate the premises by the expiry of the notice period however parties are free to agree to an extension.

- **Termination for other reasons**

- **Termination as a result of execution proceedings against the landlord (in particular: repossession for default of mortgage payment)**

As set out earlier mortgage default is a ground for repossessions in relation to assured tenancies. There isn't an equivalent ground in the case of social tenancies, presumably because mortgage default would not apply in the case of a local

⁸⁶⁰ This applies where the prospective tenant was evicted for similar reasons from an assured tenancy or a secure tenancy.

authority or housing association landlord (though presumably it could in the case of another registered social landlord).

Rescind

Where the actions of either party amounts to a material breach of the contract then the wronged party may rescind the contract.

Frustration

In the event of total destruction of the lease's subject matter or where the subject matter is no longer fit for purpose that contract may be frustrated due to impossibility.

Should the subject matter of a contract of a continuing nature be destroyed then the purpose of the contract will be frustrated and both parties released from their obligations under the agreement.⁸⁶¹ Total destruction is not a prerequisite rather it is enough that the subject matter is no longer fit for purpose. In *Duff* the key factor was whether the tenants lost the beneficial use and enjoyment of the dwelling, in such a case there would be constructive total destruction.⁸⁶²

Tenant's insolvency

This is more likely to be an issue in a business lease rather than a residential one. While bankruptcy of the tenant does not automatically terminate the tenancy, its occurrence may well precipitate a termination. Upon bankruptcy the tenancy will pass to the tenant's trustee in bankruptcy who has the option to adopt the lease.⁸⁶³ Should the trustee adopt the lease then he will assume the responsibilities which the bankrupt tenant had under the lease. In the event that the trustee chooses not to adopt the lease and there is vacant possession then the landlord may claim damages for any loss, provided that he has not exercised his right of irritancy. In the case of assured tenancies, protected tenancies and Scottish Secure Tenancies the lease will not vest automatically in the trustee instead the trustee will be required to serve a notice on the tenant before any transfer can take place.⁸⁶⁴

Death

The death of a tenant may not automatically lead to a termination of a lease rather the lease will vest in the tenant's executor who may transfer it to a successor. However, where the tenancy provides that death of one of the parties will terminate the lease this is valid and also the executor may terminate the lease where the tenant's best interests cannot be disposed of according to law. Finally the landlord may terminate the lease where the executor of the deceased tenant's estate has failed to transfer it timeously to a successor.

⁸⁶¹ In a residential tenancy the destruction of the dwelling will suffice to frustrate the lease. *Duff v. Fleming* 1870 8 M 769; *Cantors Properties (Scotland) v. Swears and Wells* 1978 SC 310.

⁸⁶² Also see *Mackeson v. Boyd* 1942 SC 56, where Lord Justice-Clerk set out that 'The true test of the effect of the injury is, whether, without rebuilding, the subject was in any respect fitted for the purpose for which it was let'. In this case the requisition of a dwelling caused the tenant to lose beneficial use and enjoyment of the dwelling and therefore the lease was frustrated.

⁸⁶³ Bankruptcy (Scotland) Act 1985 s. 31. However, in practice there may be a clause to prevent such a transfer taking place.

⁸⁶⁴ Bankruptcy (Scotland) Act 1985 s. 31(9) and (10) (added by the Housing Act 1988 s. 118(2), and amended by the Housing (Scotland) Act 2001 s. 112 and sch. 10 para. 8).

- **Termination as a result of urban renewal or expropriation of the landlord. In particular:**
 - **What are the rights of tenants in urban renewal? In particular: What are the rules for rehousing in case of demolition of rental dwellings? Are tenants interested parties in public decision-making on real estate in case of urban renewal?**

Provided valid notice is served then the tenant must vacate the premise by the date required. Where the tenant is affected by the redevelopment then they may object to the changes and should they be materially affected they may be able to claim compensation from the Council. Although set out earlier it is worth reiterating that with regard to social tenancies the court will not grant the landlord possession unless satisfied that suitable alternative accommodation is available to the tenant

Table for 6.6 Termination of tenancy contracts

	Main characteristic(s) of Scottish Secure Tenancy	Main characteristic(s) of short assured tenancy
Mutual termination	May agree	May agree
Notice by tenant	Usually 4 weeks	Depends on the duration of the tenancy, minimum 28 days
Notice by landlord	Tenant has security	Tenant has no security, but must be at end of contractual grant or tacit relocation
Other reasons for termination	Number of grounds based either on management reasons or misconduct by the tenant	Number of grounds based either on management reasons or misconduct by the tenant

6.7 Enforcing tenancy contracts

- **Eviction procedure: conditions, competent courts, main procedural steps and objections**

Scottish secure tenancies, short Scottish secure tenancies, normal assured tenancies and short assured tenancies all have their own separate statutory procedures. In general however a notice of proceedings for recovery of possession will be required, in addition to a notice to quit.⁸⁶⁵

Violent profits

In the event that the tenant refuses to hand over vacant possession to the landlord after he has served valid notice the landlord may be able to claim 'violent profits' from the tenant.⁸⁶⁶ This will entitle the landlord to a monetary payment in respect of the illegal occupation.⁸⁶⁷ The exact amount will vary from area to area, in some cases the award will be double the rent while in others it may be set at an amount which represents the profit the landlord would have made by possessing or letting the property during the period of illegal occupation. Where the occupation occurs with the landlords consent then violent profits will generally not be payable. In addition should the tenant lodge a defense to an action of removing then the sheriff has discretion to require security from him for violent profits.⁸⁶⁸

- **Rules on protection ('social defences') from eviction**

Under the Rent Act 1984 all occupiers of residential property are protected against unlawful eviction. Where a tenant has been unlawfully evicted the landlord may be liable in damages. In addition the Housing (Scotland) Act 1988 makes it a criminal offence if the landlord does 'acts calculated to interfere with the peace and comfort of the residential occupier or members of his household'.⁸⁶⁹ The tenant could obtain an order to restore possession and damages for unlawful eviction

The nature of eviction means that a number of fundamental rights will be called into focus. In particular, the right to respect for private and family life under Article 8 of the ECHR and the protection of property under Article 1, Protocol 1 of the ECHR. With the passing of the Human Rights Act 1998 the rights and duties flowing from the ECHR in respect to these two rights have become part of the domestic law of the UK. As such the tenant facing eviction may plead violation of their Article 8 rights. In such a situation the Scottish courts will have to consider whether the eviction procedure complies with the Convention. This will involve an examination of the proportionality and reasonableness of the measures in light of the landlords rights under Article 1, Protocol 1. Should the eviction procedure operate disproportionately

⁸⁶⁵ See section 6.6 above.

⁸⁶⁶ This monetary award may be due from any person who occupies heritable property illegally.

⁸⁶⁷ In *Jute Industries v. Wilson & Graham*, 1955 SLT (Sh Ct) 46, violent profits had to be paid by a tenant who continued to occupy a property after his lease has been legally terminated.

⁸⁶⁸ The Scottish Law Commission has recommended abolishing violent profits and instead limiting actions to the common law claim of damages: *Recovery of Possession of Heritable Property* (Scot. Law Com., 1989).

⁸⁶⁹ Housing (Scotland) Act 1988 s. 38, inserting Rent (Scotland) Act 1984 s. 22 (2A).

or unreasonably then the Court may declare the procedure as incompatible with the ECHR with the result that the tenant may remain in possession.

- **May rules on the bankruptcy of consumers influence the enforcement of tenancy contracts?**

See above for the impact of bankruptcy on a residential tenancy.⁸⁷⁰

⁸⁷⁰ See section 6.6 above.

Table for 6.7 Enforcing tenancy contracts

	Main characteristic(s) of Scottish Secure Tenancy	Main characteristic(s) of short assured tenancy
Eviction procedure	Sheriff Court	Sheriff Court
Protection from eviction	Yes – criminal offence to evict out of court	Yes – criminal offence to evict out of court
Effects of bankruptcy	None	None

6.8 Tenancy law and procedure ‘in action’

The practical role of private rented housing can only be realistically assessed in the context of the practical functioning of the legal system in our field (‘tenancy law in action’).

What are the roles, tasks and responsibilities of associations of landlords and tenants?

There are several relevant organisations of landlords. The Scottish Association of Landlords represents the interests of all landlords and letting agents throughout Scotland. The association provides information, training and advice to members nationally, and through a local branch network, and also lobbies on behalf of landlords to government departments in Holyrood and Westminster. The Association of Residential Lettings Agents was formed in 1981 as the professional and regulatory body for letting agents and has approximately 6,000 individual members, representing 3,500 member offices across the UK. The Association of Residential Lettings Agents promotes standards in the residential letting sector of the property market. The National Landlords Association represents the interests of landlords in the private rental market at local, national and European level. The National Landlords Association provides information, assistance and support to landlords on all landlord related matters.

There are a wide range of tenant’s associations and tenant information and support services across Scotland. The Tenants Information Services provide advice, training and support services to tenants, communities and landlords. The Tenant Participation Advisory Service Scotland is the national tenant and landlord participation advisory service for Scotland which promotes good practice in tenant participation throughout Scotland for both tenants and landlords. Finally, Shelter Scotland is a housing and homelessness charity which provides information, advice and support services to households experiencing housing difficulties ranging from poor quality housing to homelessness.

What is the role of standard contracts prepared by association or other actors?

Standard form contracts are quite usual across both sectors of the rented sector in Scotland. However, it remains open to parties to vary a standard form contract. Local authorities and registered social landlords should use the Model Scottish Secure Tenancy Agreement circulated by the Scottish Executive in 2002.

How are tenancy law disputes carried out? Is tenancy law often enforced before courts by landlords and tenants and/or are - voluntary or compulsory - mechanisms of conciliation, mediation or alternative dispute resolution used?

Jurisdiction over tenancy law disputes is determined by the nature of the tenancy and also the nature of the dispute however in all cases the Scottish Courts may be called upon to determine the issue. The general civil court system comprises the Court of Session and the Sheriff Court. The Court of Session is the supreme civil

court in Scotland, based in Edinburgh. The Court of Session is both a court at first instance for initial consideration of cases and the court of appeal for most civil matters. It is only at the Court of Session that judicial review of decisions by administrative authorities can be heard. The Sheriff Court is the local court and there are 49 sheriff courts across Scotland which deal with the majority of civil cases, including eviction cases etc. Certain matters have been taken out of the hands of the civil courts and devolved to specialist tenancy bodies, of which the Private Rented Housing Panel is the prime example. The Panel provide mediation services to tenants of the private rented sector in cases relating to the landlord's repairing obligations and also certain disputes concerning the setting of rent. In the social and public rented sector the courts remain the primary dispute resolution mechanism however the Scottish Housing Regulator plays a role in ensuring landlords abide by their legal obligations. All landlords are required to register each tenancy with their local authority.

Do procedures work well and without unreasonable delays? What is the average length of procedures? Are there peculiarities for the execution of tenancy law judgments (e.g. suspensions of, or delays for, eviction)?

The Scottish Court Service has conducted satisfaction surveys with public and professional court users since 2005. This report presents the findings from the 2011 survey. With reference to overall satisfaction, 83% of respondents stated that they were either 'very' or 'fairly' satisfied the highest ever recorded level, and up from 81% in 2009. A review of the Scottish Civil Courts, conducted by Lord Justice Clerk Lord Gill in 2009,⁸⁷¹ examined the provision of civil justice by the courts in Scotland having particular regard to the issues of cost of litigation, the role of alternative dispute resolution, as well as other matters. The review found that the pressure of criminal business meant that civil cases were routinely deferred or interrupted causing unacceptable delay and expense. In the Court of Session the performance target for appeals (18 weeks) was not met in any of the years 2001/02 to 2007/2008, with waiting periods as long as 39 weeks. Indeed, the review notes that when recess and vacation periods are included the real delays are considerably longer. The review found that while in the Sheriff court the targets for waiting periods for the allocation of proofs are being met, the drafting of the court programme leads to cases being part heard over a period of weeks or months.

Are there problems of fairness and justice? Are there problems of access to courts especially for tenants? What is the situation concerning legal fees, legal aid and insurance against legal costs?

The Scottish civil courts offer ultimate resolution of tenancy disputes however there are issues concerning delay, cost and uncertainty which impact across the various tenancies. While alternative models of regulation have been introduced in the social rented sector, including the Scottish Housing Regulator - which is responsible for monitoring social landlords' performance towards meeting the Scottish Housing Quality Standard, legal costs remain a challenge to be overcome. In particular, the cost of challenging a local authority or registered social landlord in a run of the mill tenancy dispute is an obstacle for low income tenants and where an application for

⁸⁷¹ 'Report of the Scottish Civil Courts Review' (Edinburgh: Scottish Government, 2009).

judicial review is taken the costs can exceed ten thousand pounds. The issue of costs also presents difficulties in the private rented sector although the introduction of the Private Rented Housing Panel and a scheme of deposit protection has gone some way towards reducing the potential for disputes reaching the courts. A scheme of civil legal assistance is available to support persons obtaining legal advice or taking their case to court. This support may completely cover the legal costs or the applicant may have to make a contribution towards it. This support is available for claims concerning housing matters such as rent or mortgage arrears, repairs and eviction. There are two forms of support available; advice and assistance and civil legal aid. Under the former, financial assistance is provided and advice from a solicitor on any matter of Scots law, civil or criminal. In order to avail himself of this support an applicant must demonstrate a financial need which will be ascertained from the income and capital status of the applicant. Where the applicant or his partner is in receipt of income support, or Income-based jobseeker's allowance or Income-related employment and support allowance he will qualify for advice and assistance on the income threshold but he must then qualify on capital in order to receive assistance.

In addition to advice and assistance there is civil legal aid. This is a financial support for meeting legal costs including preparation work, the hearing and funding for advocates and experts if needed. A solicitor cannot represent an applicant in court under legal aid for cases relating to small claims of less than £3,000, unless the claim involves personal, injury and some actions relating to bankruptcy. In order to receive legal aid the applicant must qualify financially, have a legal basis for their case (called "probable cause") and it must be reasonable to use public funds to support the case. Depending on their financial status a party may have their legal costs met entirely or they will be required to make a contribution. Where the applicant or their partner is in receipt of income support, or Income-based jobseeker's allowance or Income-related employment and support allowance they will qualify for advice and assistance on the income threshold but they must then qualify on capital in order to receive assistance.

How about legal certainty in tenancy law? (e.g.: are there contradicting statutes, is there secondary literature usually accessible to lawyers etc?)

Tenancy law displays legal certainty to a high degree, though there is a lack of clarity in the provisions about notices to quit.

Are there 'swindler problems' on the rental market (e.g. flats not belonging to them fraudulently advertised on the internet as rental offers by swindlers)?

There is no evidence of prosecutions for Unfair Commercial Practices in this area.

Are the areas of "non-enforcement" of tenancy law (such as legal provisions having become obsolete in practice)?

Scottish tenancy law is largely based on statutes passed since 1987 and this is an area in which the Scottish Ministers and the Scottish parliament have been extremely active, so the law is up to date. If anything the problem is too much reform rather than too little.

What are the 10-20 most serious problems in tenancy law and its enforcement?

See indicative questions.

7 Analysing the effects of EU law and policies on national tenancy policies and law

7.1 EU policies and legislation affecting national housing policies

EU policies and legislation have had a significant impact on national housing policies and in many areas EU initiatives have become embedded into various national tenancy laws.⁸⁷² Aside from the fundamental freedoms, EU law has had a significant impact on housing law and policy in Scotland in a number of areas including; consumer law and policy, competition and state aid law, regulation of construction, energy saving rules, private international law including international procedural law, anti-discrimination legislation, tax law, social policy against poverty and social exclusion, and conflicts rules.

EU law and housing provision

EU law has a significant impact on new build housing, simply because the provision of housing is taking place within a single market to which internal market principles apply.

Local authorities and social landlords (mainly housing associations) are mass providers of housing with a public task, and as such their activities fall within public procurement rules. When placing construction contracts they must ensure that all contractors in Europe have an opportunity to tender for work on a fair basis. EC public procurement law coordinates procurement procedures for the award of public contracts for work, supply and service⁸⁷³ in line with principles of equal treatment, transparency and competition.⁸⁷⁴ Procurement law regulates the construction of local authority housing and also public private partnership construction arrangements; it is arguable that they also catch registered social landlords, perhaps by default.⁸⁷⁵

Work takes place within an internal market regime. This ensures that construction companies and workers can move freely around the EU. It also ensures a single market in construction materials, standardising specifications and making products cheaper as a result of free competition across the single market.⁸⁷⁶ Two other major concerns are safety and energy efficiency. Here the EU has been very active. In terms of safety, specific rules relate to lifts,⁸⁷⁷ and boilers⁸⁷⁸. In terms of energy efficiency the regulations just referred to on air-conditioners and boilers are significant here too, as are a whole raft of measures designed to tackle the huge crisis of global warming.

⁸⁷² Footnotes here give brief details of legislation; for full details refer to the table of the transposition of European legislation affecting tenancies into Scottish law at the end of point 3, below Part 3.

⁸⁷³ Directive 2004/18/EC; Public Contracts (Scotland) Regulations 2012; previous regulations in this area have been repealed.

⁸⁷⁴ P Fabien, 'Registered Social Landlords and EU Public Procurement Regulations' 2011 *SLT (News)* 173.

⁸⁷⁵ Directive 2004/18/EC, art. 34.

⁸⁷⁶ Regulation (EU) 305/2011 is now in force and with direct effect; it replaces Council Directive 89/106/EEC; Construction Products Regulations 1992, SI 1992/1620 as amended by SI 1994/3051.

⁸⁷⁷ Currently the Machinery Directive 2006/42/EC, Supply of Machinery (Safety) Regulations 2008, SI 2008/1597; but for earlier installations the Lifts Directive 95/16/EC, Lifts Regulations 1997, SI 1997/831.

⁸⁷⁸ Directive 92/42/EEC amended by Directive 93/68/EEC; Boilers (Efficiency) Regulations 1993, SI 1993/3083 as amended.

A series of directives have addressed the energy performance of new and existing buildings, including of course homes designed for rental as dwellings.⁸⁷⁹ The EU has sought to promote the use of renewable energy in buildings.⁸⁸⁰ A recent directive set energy saving targets for large buildings⁸⁸¹ and this is due for transposition now.⁸⁸² On a different tack the EU has promoted a single market in gas and electricity.⁸⁸³ Many aspects of European regulation are reflected in the Building Regulations.

EU social policy against poverty and exclusion

The aim of the European Union's social policy is to promote employment, improve living and working conditions, provide an appropriate level of social protection and develop measures to combat exclusion. The EU Programme for Employment and Social Solidarity (PROGRESS Programme) is directed toward supporting the development and coordination of EU policy in employment, social inclusion and social protection, working conditions, anti-discrimination and gender equality within EU States. PROGRESS is a key part of the Europe 2020 Strategy, which sets out a ten year growth strategy for the EU. Scotland is represented at EU level by the United Kingdom.⁸⁸⁴ The UK government have submitted a National Reform Program which details measures taken by the Scottish Government towards the Europe 2020 target. However, the Scottish Government has produced its own distinct National Reform Programme⁸⁸⁵ which is intended to complement the UK NRP, in order to help provide the Commission with more detail on the unique characteristics of and the distinct approaches being taken forward in Scotland which support delivery of the Europe 2020 ambitions. As part of this commitment there have been policies launched. In particular, one of the major housing policies targeted at reducing poverty is the Scottish government's policy commitment to eliminate fuel poverty.⁸⁸⁶

Housing statistics

Various EU laws⁸⁸⁷ have formed the basis for the introduction of the Residential Property Price Index in 2010 and given the important role of meaningful statistics in

⁸⁷⁹ Directive 2010/31/EU; Energy Performance of Buildings (Scotland) Amendment Regulations 2013, SSI No. 2013/12, amending SSI 2008/309 which has been amended on numerous occasions.

⁸⁸⁰ Directive 2009/28/EC (amending and repealing Directives 2001/77/EC and 2003/30/EC). Scotland is rich in renewables and the Renewables Obligation is renewed annually: Renewables Obligation (Scotland) Order 2002, SSI 2002/163, amended most recently by SSI 2013/116.

⁸⁸¹ Directive 2012/27/EU on energy efficiency.

⁸⁸² Enabling powers have been taken in the Pollution Prevention and Control (Designation of Energy Efficiency Directive) (Scotland) (Order) 2013, SSSI 2013/321; full transposition is due by June 2014.

⁸⁸³ Directives 2009/72/EC and 2009/73/EC; Electricity and Gas (Internal Market) Regulations 2011, SI 2011/2704.

⁸⁸⁴ See 'Europe 2020: UK National Reform Programme 2013' (London, HM Government, 2013).

⁸⁸⁵ 'Europe 2020: Scottish National Reform Programme 2012' (Edinburgh, Scottish Government, 2012).

⁸⁸⁶ *Ibid.*, page 32.

⁸⁸⁷ Council Regulation (EC) No 2495/95; Commission Regulation (EC) No 1920/2001; Regulation (EC) No 2214/96, as amended by Commission Regulation (EC) No 1749/1999; Council Regulation (EC) No 1687/98; and Recommendation 65/379/EEC, these have formed the basis for the introduction of the Residential Property Price Index.

the development of housing policy, such initiatives are likely to inform various housing policies.

7.2 EU policies and legislation affecting national tenancy laws

EU legislation has had a significant impact on peripheral aspects of national tenancy laws, but its effect is pointillistic in character as is inevitable given the Treaty provision excluding EU direct competence over property law.⁸⁸⁸ EU activity is appropriate in order to facilitate the free operation of the single internal market, and it is in this field that EU activity has a major effect on national rental markets, often, as it were, by a glancing blow.

Free movement of landlords

One important aspect of the Maastricht reforms was the freeing of capital to move across Europe, and one aspect of this would be the freedom for capital from other EEA nationals to move to Scotland to invest in the private rental stock.⁸⁸⁹ This freedom exists, but it is not clear to what extent investors from elsewhere in the EEA have in fact bought buy to let property. As explained in part 1 of this Report, Scotland is only just recovering from the housing bubble created in the years before 2007 and at present the housing market is probably unattractive to outside investors. If there was a significant inflow of workers seeking employment, this might draw in investment capital which in turn might help the housing market to recover. There are important money laundering controls to prevent money with illicit sources flooding into the Irish housing market.

Free movement of tenants

More evident are the effects of free movement of workers from other EEA countries in search of employment in Scotland. All of these are potential entrants to the rental market, in the short term to the private rented sector and in the longer term to public and social housing. In contrast to England, numbers of migrants are smaller so there is less resentment about EEA workers having the right of access to the employment market and they will enjoy equal access to the rental market.⁸⁹⁰ They will have freedom to move money into Scotland in order to make initial payments of rent and deposits. Workers from eastern Europe may find jobs that are well paid by their standards, but also rents that are high as well.

There is no restriction on the purchase of secondary homes for EEA citizens and there are no cases in which a licence to buy a house is needed. However, in certain areas of Scotland, planning controls restrict new housing to those with a local connection to the area. Scotland has no controls on renting targeted at specific nationalities, even in the most pressured areas.⁸⁹¹

Choice of tenant

⁸⁸⁸ Treaty on the Functioning of the EU art. 345; formerly Treaty of Rome art. 295. The form of this article suggests that 'property' is defined by national rules rather than having an autonomous definition. Tenancies would be viewed as part of property law throughout Great Britain and Ireland.

⁸⁸⁹ P. Sparkes, *European Land Law* (Oxford: Hart, 2007) ch. 1.

⁸⁹⁰ See section 6.2 above.

⁸⁹¹ Sparkes, *European Land Law*, ch. 2.

Anti-discrimination legislation predates the impact of EU law but has been greatly strengthened by European principles. In particular, the anti-discrimination principles of Directives issued by the Council in 2000⁸⁹² and 2004⁸⁹³ have found their way on to the statute book in a number of acts now consolidated in the Equality Act 2010. This legislation prohibits discrimination on nine ground including nationality, gender, family size, family status, marital status, disability, age or membership of the Traveller community. A landlord should not discriminate against a tenant or potential tenant on any of these grounds.

Marketing controls on rentals

(1) The conceptual status of the tenant in EU law

Clearly a crucial issue in the development of EU law in its interface with tenancy agreements is the issue of EU competence, and that turns on how a tenant is perceived conceptually. A residential tenant lies somewhere between a commercial purchaser of land (largely outside the scope of EU protection) and a consumer buying goods (fully within the scope of the internal market). Just where on that scale does a residential tenant lie? If one sees a tenant as a person acquiring a legal leasehold estate in land, a purchaser of real property, the tenant will look very much like a purchaser, a person subject largely to domestic law and needing a knowledge of domestic law in order to be safe.⁸⁹⁴ It should be emphasised that in common law systems a tenancy agreement is seen as an estate in land and so likely to fall within the scope of the exclusion from EU competence over the 'rules of property ownership.'⁸⁹⁵

However, it is also clearly possible to see a tenant as a consumer, as a contracting party, a person consuming the service of the provision of accommodation by the landlord. A residential tenant can be seen as a consumer, taking a service – making accommodation available to the tenant - from a landlord in a superior bargaining position. There is thus competence for the EU to seek to address this imbalance. It can scarcely be said that the EU has adopted a coherent view of the position of consumers of land. In general land purchase is excluded from EU legislation, and on the principle of subsidiarity this seems a subject matter ideally suited to national regulation. The position of residential tenants lacks coherence. A person seeking to rent a home appears to be an archetypal consumer and someone in need to protection, and this is doubly so where a person is moving in pursuance of his freedom of movement to seek employment and needs to rent a home in a foreign

⁸⁹² Directive 2004/113/EC (equal treatment between men and women in e.g. access to services).

⁸⁹³ Directive 2000/43/EC (equal treatment irrespective of racial or ethnic origin).

⁸⁹⁴ The terms "leasehold estate in land", "real property", and "estate in land" are English terms which are not used in Scotland (the equivalent Scottish term for real property is "heritable property").

Although leases are generally classified under law of property, their position within this category is less formal than south of the Border, and is due to certain characteristics which make it transcend a mere contract (e.g. registration of long leases, the market value of leases having a long unexpired term etc. The 20 year limit on residential leases means that many of these characteristics do not apply to residential tenancies, which makes them more (though not entirely) contractual in nature. The dichotomy identified here is therefore probably less pronounced in Scotland. The blurring between contractual and property rights is more evident in long commercial leases, which can have a market value equivalent to an outright sale, but can still be vulnerable, for example, to termination by irritancy. See McAllister, *Scottish Law of Leases*, para 1.7 et seq.

⁸⁹⁵ Treaty on the Functioning of the EU art. 345; formerly Treaty of Rome art. 295.

country. This fits naturally with the conceptualisation of the tenancy in civilian systems as a hire contract, with little differentiation of the hire of a car and the rental of a flat.⁸⁹⁶ It should also be observed that the problem of competence becomes much less of a problem the less that an occupier has a tenancy agreement and the more that his agreement approximates to a licence. There appears to be nothing to preclude EU competence over rent a room types of arrangements, though of course the issue of subsidiarity remains.

Assuming that a residential tenant can be seen as a consumer of accommodation services, consumer protection might in principle come into play, but in fact the effect is very muted and the EU position lacks coherence, but appears to have turned decisively against intervention in tenancy law.⁸⁹⁷

(2) Information rights and cooling off

The Consumer Rights Directive 2011⁸⁹⁸ has eschewed the opportunity to apply EU rules to rental agreements. Basic information rights are specified for consumers entering into sales and service contracts, as well as protections for those contracting at a distance (over the internet) and what is colloquially and inaccurately described as ‘doorstep’ selling (that is at the consumer’s home or at least away from the trader’s business premises). It also allows ‘cooling off’ periods after contracts were concluded in the latter two ways. The Directive applies to contracts of the B2C model which are either contracts for the sale of (movable) goods or contracts for the supply of services. The second limb might include the provision of residential accommodation, but, it is expressly provided that the Directive does not apply to the provision of social housing nor to the rental of accommodation for residential purposes.⁸⁹⁹ It is noteworthy that the exclusion makes no reference to the existence or non-existence of a ‘tenancy’ and therefore the lease/licence distinction is not in play; both tenancies and licences are excluded from the scope of the Directive. The relevant recital states that rental agreements are covered by domestic law, clearly therefore drawing on subsidiarity more than a lack of competence.⁹⁰⁰ The recital also states that the protections are not appropriate to rental agreements.⁹⁰¹ The withdrawal right on contracting away from business premises never applied to rental agreements, and it would indeed be rather awkward to differentiate a contract made by a landlord at the accommodation being let and a contract made at the office of the landlord’s letting agent after the landlord had shown the tenant the property itself.⁹⁰² Distance contracting for goods involves a withdrawal right, and this seems all important for things bought over the internet and therefore unseen. It would be perfectly possible to enter into a rental agreement over the internet, finding

⁸⁹⁶ This division is less clear in France: *Code Civil* Book Three (Modes of Acquiring Property), Title VIII (Contracts of Rental or Hire); and clearer in Germany: *Bürgerliches Gesetzbuch* Book Two (Obligations) Section VII (Particular Obligations) Title 3 (Lease); but it must be remembered that a lease of land is quasi-property in Germany in the sense that it binds a purchaser.

⁸⁹⁷ It should be mentioned that competence over the internal market and consumer affairs currently resides at Westminster, though further devolution to Edinburgh is likely.

⁸⁹⁸ Directive 2011/83/EU; this will be transposed by the (UK) Consumer Right Bills 2013.

⁸⁹⁹ Respectively art. 3(a) and 3(f).

⁹⁰⁰ Recital (26).

⁹⁰¹ Recital (26).

⁹⁰² Former Directive 85/577/EEC (contracting away from business premises); transposed by SI 2008/1816). Its genesis was the practice of locking timeshare punters into presentations away from the timeshare block. See Sparkes, *European Land Law*, ch. 5.

particulars online, taking a virtual tour of the accommodation and then signing an online form to take the accommodation. This might suit, say, a couple moving from eastern Europe to Scotland to take up work. The case for a cooling off period where the tenant has not seen the accommodation in person seems overwhelming. Under the previous specific rules (now repealed), distance rentals were within the ambit of EU consumer law,⁹⁰³ but they have now moved outside EU protection.

The Consumer Rights Directive will be applicable to any contract with a letting agent (since this is not directly a rental but for help in finding accommodation) and also to any contract by a landlord (private or social) to supply gas, electricity, district heating or other utilities.⁹⁰⁴

(3) Unfair marketing practice

Given that the most recent EU legislation on Consumer Rights has drawn back from involvement in residential tenancy law, it is odd to find a much wider remit in the preceding legislation on Unfair Commercial Practices. The Directive⁹⁰⁵ has been implemented by regulations which more or less copy out the terms of the Directive.⁹⁰⁶ They cover all supplies, whether of goods or of services, in a B2C format, including leases and the concept of a purchase also extends to a lease. Various types of improper sales techniques by landlords or their agents are controlled, including:

unfair marketing techniques;

aggression;

omitting necessary information contrary to the standard of professional diligence so as to have a materially distorting effect on the consumer's decision; and

misleading advertising.

The scarcity of rental accommodation makes it unlikely that landlords will need to harass potential tenants, so in the rental market unfair practices may often be by concealment and failure of disclosure of defects.

Where EU consumer law does provide some control of bad practice by landlords, procedural laws may also help with, for example obtaining an injunction against unfair commercial practices or otherwise directed towards protecting the collective interests of consumers.⁹⁰⁷

⁹⁰³ Former Directive 97/7/EC (distance contracting); was transposed by SI No. 2000/2334.

⁹⁰⁴ Directive 2011/83/EU, art. 3.

⁹⁰⁵ Directive No. 2005/29/EC; Sparkes, *European Land Law*, ch. 5. .

⁹⁰⁶ Unfair Trading Regulations 2008, SI 2008/1277.

⁹⁰⁷ Directive 2009/22/EC.

Energy saving rules

The rental market is an important arena in the battle against carbon emissions and the global warming that results. One important weapon that is available is labelling of energy efficiency so that tenants are alerted to the likely impact of the use of a flat on their energy bills. The battle so far as it is directed at landlords has already been considered. So far as tenants are concerned, four main policy strands can be detected: conferring a choice of energy supplier, provision of information about the energy efficiency of the dwelling itself, labelling of the appliances within the dwelling and promotion of low energy light bulbs.

(1) Energy supply

Central to any market, and certainly to the European internal market, is a free market in energy. Europe has set the rules for the markets in electricity⁹⁰⁸ and gas,⁹⁰⁹ tackling also consumer choice, consideration of the position of vulnerable customers, safety issues and the energy efficiency of buildings as a high priority. By allowing tenants a choice of supplier, pressure is created for lower prices.

(2) Energy labelling of dwellings

Attention has been directed towards improving the energy efficiency of new and existing buildings and these changes now inform the Building Energy Rating Certificate scheme.⁹¹⁰ Under this scheme all buildings for lease must have a Building Energy Rating certificate and this must be provided to any prospective tenants prior to entering a tenancy, in the private sector as part of the Tenant's Information Pack.⁹¹¹

(3) Labelling of appliances

EU laws have required the labelling of white goods in the kitchen and other power-hungry electrical appliances, so that tenants, like all other citizens, can make informed decisions in order to secure lower energy costs as a result of labelling of:

dishwashers;⁹¹²

electric ovens;⁹¹³

refrigerators and freezers;⁹¹⁴

televisions;⁹¹⁵

⁹⁰⁸ Directive 2009/72/EC; Electricity and Gas (Internal Market) Regulations 2011, SI 2011/2704.

⁹⁰⁹ Directive 2009/73/EC (replacing Directive 2003/55/EC); transposition as immediately above.

⁹¹⁰ Directive 2010/30/EU; European Union (Energy Labelling) Regulations 2011 (S.I. No. 366/2011); Delegated Regulation (EU) N° 874/2012; Energy Performance of Buildings (Scotland) Amendment Regulations 2013, SSI No. 2013/12, (amending SSI 2008/309 as amended by SSIs 2008/389, SSI 2012/190, SSI 2012/208 and SSI 2012/315).

⁹¹¹ See section 6.1 above.

⁹¹² Commission Directive 97/17/EC; Commission Regulation (EU) 1059/2010.

⁹¹³ Commission Directive 2002/40/EC.

⁹¹⁴ Commission Directive 94/2/EC; Commission Directive 2003/66/EC.

⁹¹⁵ Commission Regulation (EU) 1062/2010.

tumble driers;⁹¹⁶
washer-driers;⁹¹⁷ and
washing machines.⁹¹⁸

All of these labelling requirements are applied in Scotland.⁹¹⁹

(4) Light bulbs

Light bulbs consume a lot of energy collectively and it has been very important to move to low energy models; legislation to achieve this⁹²⁰ has been transposed into Scottish law.⁹²¹

Substantive EU tenancy law

At various times there have been proposals for the EU to adopt a common contract law, and these various proposals might have had unintended effects on contracts affecting land. The current proposal for a Common European Sales Law is confined to cross-border sales of goods and will not therefore affect tenancy law.⁹²² There are two pieces of EU consumer law which have a peripheral impact on the substantive law of European tenancy agreements. The first is the Unfair Terms in Consumer Contracts Directive⁹²³ which is fully implemented in UK law,⁹²⁴ the impact of which has already been considered in the substantive report.⁹²⁵ The other is the Unfair Commercial Practices Directive⁹²⁶ implemented by regulations⁹²⁷ which might have a marginal impact because it talks of unfair practices in relation to after-sales services, and which might therefore have an impact on such matters as carrying out repairs.⁹²⁸

Overall the tide has turned against the extension of EU legislation into aspects of land law.

Choice of law and forum

Tenancy law is complex and separate for each EU state, so it seems clear that the *lex situs* rule should apply to the determination of disputes, and that a site-based forum is also essential. In terms of choice of law for a Scottish tenancy, the Rome I

⁹¹⁶ Commission Regulation (EU) 392/2012.

⁹¹⁷ Commission Directive 96/60/EC.

⁹¹⁸ Commission Directive 95/12/EEC; Commission Regulation (EU) 1061/2010.

⁹¹⁹ Energy Information Regulations 2011, S.I. 2011/1524.

⁹²⁰ Directive 2010/31/EU. Delegated Regulation (EU) N° 874/2012 of 12 July 2012 supplementing Directive 2010/30/EU;

⁹²¹ Eco-design of Energy-related Products and Energy Information (Amendment) Regulations 2013, SI 2013/1232, amending SI 2010/1552.

⁹²² *A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market*, COM(2011) 636 final.

⁹²³ Directive 93/13/EEC.

⁹²⁴ Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999/2083

⁹²⁵ See section 6.3 above.

⁹²⁶ Directive 2005/29/EC.

⁹²⁷ Unfair Trading Regulations 2008, SI 2008/1277.

⁹²⁸ Sparkes, *European Land Law*, para. 5.50.

Regulation,⁹²⁹ probably does achieve the objective of ensuring that Scottish law applies to a Scottish tenancy, since any mandatory rules in a tenancy agreement will be drawn from the law of the site. Since tenancy agreements are generally drawn up for landlords, it is very unlikely that a tenant would be allowed to choose a non-Scottish law. The choice of law rules would make it theoretically possible to have a non-Scottish contract to create a Scottish tenancy, which seems very undesirable.

In terms of forum, it is obvious that tenancy disputes should be directed to Scotland, and in the private sector in future to the specialist First-tier Tribunal. The Brussels Regulation, however, determines that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of his/her nationality. It is conceivable that a worker might rent in Scotland and yet retain a domicile in their country of origin, and so this Regulation might lead to a non-site forum for a Scottish tenancy dispute.⁹³⁰ The Brussels I Regulation⁹³¹ has been transposed into Scottish law in a messy way.⁹³² It is submitted that all land disputes should have a site-based forum and should use site-based law.⁹³³

Summary

EU law has a number of indirect impacts on Scottish tenancy law through the operation of internal market rules and consumer protection principles, though its impact is patchy.

⁹²⁹ Regulation (EC) 593/2008 on the law applicable to contractual obligations - Rome I; Law Applicable to Contractual Obligations (Scotland) Regulations 2009, SSI 2009/410.

⁹³⁰ It is also possible that a family dispute might arise between a tenant from another EEA country in Scotland and the spouse or partner in that other EEA country, possibly affecting the right to occupy the Scottish home.

⁹³¹ Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁹³² Civil Jurisdiction and Judgments Act 1982 amended by Civil Jurisdiction and Judgments Order, SI 2001/3929 and on numerous other occasions

⁹³³ Sparkes *European Land Law*, ch. 4, pages 97, 104.

7.3 Table of transposition of EU legislation

SUBJECT	EUROPEAN DIRECTIVES	SCOTTISH/UNITED KINGDOM TRANSPOSITION
PUBLIC PROCUREMENT		
Public procurement	Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJEU 30.4.2004 L134/114) (Previous legislation repealed).	Public Contracts (Scotland) Regulations 2012 (SSI 2012/88, amending SSI 2006/1).
CONSTRUCTION		
Construction materials:	Regulation (EU) 305/2011 on construction materials (OJEU 4.4.2011/ L88/5) (Replaces Directive 89/106/EEC, OJEC 11.02.1989, L40/12)	Directly applicable as from 1 July 2013 (Replaces Construction Products Regulations 1992, SI 1992/1620 as amended by SI 1994/3051).
Hazardous substances	Directive 2011/65/EU of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJEU 01.07.2011, L174/88). (Replaces Directive 2002/95/EC from 2 January 2013, OJEU 13.2.2003, L139/19).	Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012 (SI 2012/3032) (Formerly SI 2006/2748 as amended by SIs 2006/1463, 2008/37, 2009/581).
Lifts	Directive 2006/42/EC on Machinery of 17 May 2006 (OJEC 9.6.2006 L157/24) (Replacing Directive 95/16/EC on lifts, OJEC 07.09.1995, L213/1).	Supply of Machinery (Safety) Regulations 2008 (SI 2008/1597) (Replacing Lifts Regulations 1997 SI 1997/831)
ENERGY EFFICIENCY - BUILDINGS		
Energy saving targets/ large buildings	Directive 2012/27/EU of 25 October 2012 on energy efficiency (OJEU 14.11.2012, L315/1). This amended Directives 2009/125/EC and 2010/30/EU and repealed Directives 2004/8/EC and 2006/32/EC.	Enabling powers in Pollution Prevention and Control (Designation of Energy Efficiency Directive) (Scotland) Order 2013 (SSI 2013/321).

Energy efficiency of new and existing buildings	Directive 2010/31/EU of 19 May 2010 on the energy performance of buildings (OJEU 18.06.2010, L153/13). (The previous directive was 2002/91/EC).	Energy Performance of Buildings (Scotland) Amendment Regulations 2013 (SSI No. 2013/12) (Amending SSI 2008/309 as amended by SSIs 2008/389, SSI 2012/190, SSI 2012/208 and SSI 2012/315).
Renewable energy use in buildings.	Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources (OJEU 5.6.2009, L140/16) Replaces Directives 2001/77/EC and 2003/30/EC	Renewables Obligation (Scotland) Order SSI 2002/163, amended annually, most recently by SSI 2013/116.
UTILITIES		
Electricity	Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity. (OJEU 14.8.2009, L211/55)	Electricity and Gas (Internal Market) Regulations 2011 (SI 2011/2704)
Natural gas.	Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (OJEU 14.8.2009, L211/94).	As above
Procurement of communication services	Directive 2009/136/EC on consumer protection in the procurement of communication services (OJEU 18.12.2009, L337/11). Amending Directives 2002/22/EC and 2002/58/EC and Regulation (EC) 2006/2004	Privacy and Communication (EC Directive) Regulations 2003 (SI 2003/2426 as amended by SI 2011/1208).
ENERGY EFFICIENCY – FITTINGS IN BUILDINGS		
Lighting	Delegated Regulation (EU) 874/2012 of 12 July 2012 supplementing Directive 2010/30/EU with regard to energy labelling of electrical lamps and luminaires (OJEU 26.9.2012, L258/1).	Eco-design of Energy-related Products and Energy Information (Amendment) Regulations 2013 (SI 2013/1232, amending SI 2010/1552).

Heating and hot water	Directive 82/885/EEC of 10 December 1982 on the performance of heat generators for space heating and the production of hot water in new or existing non-industrial buildings and on the insulation of heat and domestic hot-water distribution in new non-industrial buildings (OJEC 31.12.1982, L378/19). Amending Directive 78/170/EEC	Energy Conservation Act 1981
Boilers	Directive 92/42/EEC of 21 May 1992 on efficiency requirements for new hot-water boilers fired with liquid or gaseous fuels (OJEC 22.06.1992, L167/1). (Amended by Directive 93/68/EEC of 22 July 1993, BOE 27.03.1995 N° 73).	Boilers (Efficiency) Regulations 1993 (SI 1993/3083 as amended by SIs 1998/3083 and 2006/170).
ENERGY EFFICIENCY – APPLIANCES		
Energy labelling	Directive 2010/30/EU of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJEU 18.6.2010, L153/1)	Energy Information Regulations 2011 (SI 2011/1524).
Air conditioners	Delegated Regulation (EU) N° 626/2011 (OJEU 6.7.2011, L178/1).	As above
Dishwashers.	Commission Directive 97/17/EC (OJEC 07.05.1997, L118/1) Delegated Regulation (EU) N° 1059/2010 (OJEU 30.11.2010, L314/1).	As above.
Electric ovens	Commission Directive 2002/40/EC (OJEC 15.05.2012, L128/45).	As above
Lamps	Commission Directive 98/11/EC (OJEC 10.3.1998, L71/1).	As above
Refrigerators and freezers	Commission Directive 94/2/EC (OJEC 17.2.1994, L45/1). Delegated Regulation (EU) N° 1060/2010 (OJEU 30.11.2010, L314).	As above
Televisions	Delegated Regulation (EU) N° 1062/2010 (OJEU 30.11.2010, L314/64).	As above

Tumble driers	Delegated Regulation (EU) N° 392/2012 (OJEU 9.5.2012, L123/1).	As above
Washing machines	Commission Directive 95/12/EEC (OJEC 21.06.1955, L136/1). Delegated Regulation (EU) N° 1061/2010 (OJEU 30.10.2010, L314/47).	As above
CONSUMER PROTECTION		
Information and consumer rights.	Directive 2011/83/EU on consumer rights (OJEU 22.11.2011, L304/64). Repeals Directives 85/577/EEC (contracting away from business premises) and 97/7/EC (distance contracting).	Consumer Rights Bill 2013 (Cm 8657) Repealed SIs covered 'doorstep' selling (SI 2008/1816); distance contracts (SI No. 2000/2334).
Unfair commercial practices	Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and (OJEU 01.6.2005, L149/22) Amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) N° 2006/2004.	Unfair Trading Regulations 2008 (SI 2008/1277)
Unfair terms	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJEC 21.04.1993, L095/1). Amended by the Consumer Rights Directive 2011/83/EU (above)	Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)
HOUSING LAW		
Choice of law	Regulation (EC) 593/2008 on the law applicable to contractual obligations - Rome I (OJEU 04.07.2008, L177/6).	Law Applicable to Contractual Obligations (Scotland) Regulations 2009 SSI 2009/410
Jurisdiction	Regulation (EC) N° 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJEC 16.01.2001, L12/1).	Civil Jurisdiction and Judgments Act 1982, amended by Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, and on numerous other occasions
DISCRIMINATION		

Sex.	Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJEU 21.12.2004, L373/37).	Equality Act 2010
Racial or ethnic origin.	Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJEC 19.07.2000, L180/22).	Equality Act 2010
EEA NATIONALS		
Free movement for European citizens and their families	Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJEU 30.04.2004, L158/77) amending Regulation (EEC) 1612/68 (free movement of workers) and repealing numerous earlier Directives	Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).
Equality in granting housing, aids, subsidies, premiums or tax advantages to workers moving within the EU.	Recommendation 65/379/EEC by the Commission to the Member States on the housing of workers and their families moving within the Community (OJEC 27.07.1965 N° L 137/27).	

8 Typical national cases (with short solutions)

8.1 Entering a lease

Hans has recently moved to Scotland from Germany to train as a chef. He is currently living with friends but wants to find accommodation of his own and is keen on renting privately. However, he is concerned that entering a lease in Scotland may be substantially different than in Germany and would like some advice on how to get a lease in Scotland.

Many properties for rent in the private rented sector are advertised online via sites such as rightmove.co.uk or via the classifieds on local and regional newspapers. Interested parties may contact the advertising party, usually the landlord or letting agent (the landlord's representative) and arrange a viewing of the property. Generally, this will entail a guided viewing of the property by the landlord or letting agent where the tenant may ask questions and inspect the property. It is important that the tenant makes sure that the property is in good working order e.g. that there is no damp or inadequate ventilation. etc. The rent and other important matters are often negotiable. Where the tenant is happy with the property they may make an offer to the landlord or letting agent. In the event of an agreement the landlord will often require a security deposit, generally one month's rent, be paid. Throughout the interaction each party has various legal rights and obligations which govern key aspects of the relationship. In the event of a dispute, then regard must be had to tenancy law.

In Scotland tenancy law is not codified, but consists of a patchwork of numerous statutes amplified by case law decisions. Different rules apply depending on whether the tenancy is in the private rented or social rented sectors. In Scotland a private rented tenancy is one which is arranged between a landlord and tenant privately and which is governed by market forces whereas a social rented tenancy is generally between a local authority or registered social landlord and a tenant and this arrangement is made on the basis of meeting an unfulfilled housing need.

In practice tenants in the private rented sector will hold short assured tenancies. Under the Scottish legislation, it is necessary for the landlord to serve a warning notice before granting a short assured tenancy, so full assurance remains the default position.⁹³⁴ Service of warning notice is so beneficial to landlords, however, that few neglect this simple precaution and the Scottish private rental market is dominated by offers of short assured tenancies.

The basic legal requirements for a valid conclusion of a tenancy contract in Scotland vary according to the length of the tenancy entered into. A *short term tenancy* may be created orally with very limited formal requirements, contractual creation being based on offer and acceptance.⁹³⁵ Under the Requirements of Writing (Scotland) Act 1995 a lease for one year or less is not considered an interest in land and therefore such tenancies may be created orally.⁹³⁶ This includes a yearly tenancy, even one

⁹³⁴ Housing (Scotland) Act 1988.

⁹³⁵ Other issues arising under contract law include consensus in diem, capacity (in Scotland achieved at age 16 under the Age of Legal Capacity (Scotland) Act 1991), duress, fraud or negligence.

⁹³⁶ Requirements of Writing (Scotland) Act 1995, s. 1(7) (as amended by the Abolition of Feudal Tenure etc (Scotland) Act 2000, s 76(1) and sch 12, para 58).

which rolls over so as to last many years, and any periodic tenancy with a period of less than a year.⁹³⁷ The same is true of other occupation rights. In the case of a lease for one year or less which complies with statutory requirements but has been created orally, a party may be prevented from withdrawing from the agreement where the other party has done something in reliance of the contract and would be materially affected by such a withdrawal.⁹³⁸ Where a *lease is for more than one year* then it should be in writing,⁹³⁹ and should be signed⁹⁴⁰ by both landlord and tenant.⁹⁴¹ Attestation by a single witness is required to make the document self-proven.⁹⁴²

There are a number of elements which should be present in a lease. In the first place there must be a landlord and a tenant who are separate persons. There must be some property which is the subject of the lease and this must be identified. In addition there should be a rent arrangement present in the agreement. Where an occupancy agreement has been created without a requirement of rent then it is most likely this will be a licence and not a lease.⁹⁴³ In general practice the term of the lease should be stated however failure to state a term is not fatal and instead the law will imply a term of one year in cases where no term has been set out.⁹⁴⁴ While the agreement may be oral, in an assured tenancy a landlord is under a duty to provide a tenant with a rent book if rent is paid weekly,⁹⁴⁵ a provision which also applied to older tenancies and occupation agreements under the Rent Acts.⁹⁴⁶

Should a dispute arise between the landlord and the tenant during the tenancy the parties may have recourse to the Private Rented Housing Panel. The Panel provide mediation services to tenants of the private rented sector in cases relating to the landlord's repairing obligations and also certain disputes concerning the setting of rent.

⁹³⁷ The formality requirement applies to the first period ignoring tacit relocation; formality will be required if the tenancy itself envisages recurring periods spread over a period of more than a year, see Requirements of Writing (Scotland) Act 1995 s. 1(7).

⁹³⁸ Requirements of Writing (Scotland) Act 1995 s. 1(3). The concept of promissory estoppel is not a part of Scots law however this provision bears a similar operation.

⁹³⁹ Requirements of Writing (Scotland) Act 1995 s. 1(7). S. 14(3) applies to pre-1995 tenancies which need not concern us.

⁹⁴⁰ Signatures should appear at the end of the last page: Requirements of Writing (Scotland) Act 1995 s 7(1).

⁹⁴¹ Requirements of Writing (Scotland) Act 1995 s 2(1).

⁹⁴² Requirements of Writing (Scotland) Act 1995 s 3.

⁹⁴³ *Mann v. Houston* 1957 SLT 89.

⁹⁴⁴ *Gray v. Edinburgh University* 1962 SC 157, 1962 SLT 173. Upon expiry of the one year term, the lease will renew perfectly, without further action by the parties, by the process of tacit relocation. For more detail see section 6.6 above.

⁹⁴⁵ Housing (Scotland) Act 1988 s. 30(4); Assured Tenancies (Rent Book) (Scotland) Regulations 1988 (notices etc. to be included).

⁹⁴⁶ Rent (Scotland) Act 1984 ss. 79, 113.

8.2 Lease and licence

Louis moved to Scotland a month ago and after a couple of days searching daft.ie for lettings he finally found a suitable apartment. However he notices that the advert states that 'the property is only available for licence'. Louis wants to what is the difference between a licence and a tenancy?

It is important to draw out the distinction between a tenancy and licence agreement. In many cases the distinction may be far from straightforward. For instance in both a tenancy and a licence arrangement there may be possession of a dwelling for a period of time and in exchange for a payment or fee akin to a rent. However, the legal treatment of a tenancy and a licence agreement is vastly different as, crucially, a tenancy agreement attracts a range of statutory rights and obligations while a licence agreement is merely governed by the principles of contract law.

A licence is “a contract, falling short of a lease, whereby not the heritage itself but a right to use a particular part of it to some use is granted” which does not attract the protections attending a tenancy.⁹⁴⁷ It is arguable that this is because of a wider definition of a lease in Scots law,⁹⁴⁸ and the possibility that exclusive possession is not essential, albeit a prime indicator of a lease. In the event of a dispute as to whether an occupancy agreement is a lease or a licence the critical issue⁹⁴⁹ will be determining whether the agreement has conferred exclusive possession on the tenant and the title put on an agreement will not be determinative.⁹⁵⁰ Where the landlord retains possession rights the occupancy agreement will most likely be a licence.⁹⁵¹ The ability to control and regulate the dwelling in question is the best indicator of factual possession and this is often enough to conclude the legal status of many occupancy agreements. For instance, where there is a bed and breakfast or hotel, although the occupant is in possession of a self-contained area for a period in return for a rent the overall owner never relinquishes ultimate control over the accommodation space, that is, the power to exclude any person from the space. However, in an occupancy agreement where there is exclusive possession of a dwelling, the occupier could be said to be a tenant and consequently the principles of tenancy law would apply. Likewise, where the landlord has reserved the right to share the occupation, exclusive possession has not been granted and as such a

⁹⁴⁷ Paton and Cameron *Law of Landlord and Tenant in Scotland* p. 12. Aside from not attracting the substantial statutory protections attending a tenancy, a licence does not confer a real right on the licensee.

⁹⁴⁸ McAllister notes that, Rankine's definition of a lease included 'certain uses' as well as 'the entire control' of lands.

⁹⁴⁹ *Conway v. Glasgow City Council* 1999 SCLR 248 held that a resident sharing a two bed room in a hostel for homeless persons did not have a lease, the degree of possession enjoyed by the occupier coming nowhere near that required for a lease.. However the sheriff reserved his opinion on whether exclusive possession is necessary for a lease and acknowledged that 'the law has come increasingly to talk of exclusive possession as a necessary condition of a lease' at 255.

⁹⁵⁰ *Bradford Properties v. British Telecommunications* 1992 SLT 490. McAllister points out that the court rejected the English authority for the distinction between leases and licences and cast doubt on the Scottish authority quoted by Paton and Cameron regarding the need for exclusive possession.

⁹⁵¹ *Broomhill Motor Co v. Assessor for Glasgow* 1927 SC 447; *Chaplin v Assessor for Perth* 1947 SC 373.

tenancy will usually be held not to exist.⁹⁵² People living in hostels will therefore lack security.⁹⁵³

⁹⁵² A lease may extend to rights such as game or minerals which are divorced from rights of occupation, but this is rare in general practice and rarer still in the context of residential tenancies.

⁹⁵³ There is power (as yet unexercised) to make regulations to confer minimum rights on occupiers of rooms in hostels and other short term accommodation: Housing (Scotland) Act 2001 s. 7; similar powers existed in relation to the former Rent Acts: *Conway v. Glasgow City Council* 2001 SLT 1472.

8.3 Market rent

Six months from the beginning of a short assured tenancy Susan, the landlord, informs the William, the tenant, that there will be an increase in the rent from the following month onwards. William feels that this increase will make the property far too expensive and out of line with other rates in the area. He wants to know how rent rates are regulated in Scotland.

The private rental market was deregulated in 1988 and, for new grants made on or after 2 January 1989, market forces have determined the rent. This is particularly the case with short assured tenancies, where the landlord can always recover possession of the property and so tenants have little incentive to use statutory procedures to challenge rents. Deregulation has led to increased rents, a better quality and larger supply of property, and great pressure on the housing benefit budget.

The position is different where full security continues. When full assurance is granted (which is unusual), the initial rent will be negotiated contractually,⁹⁵⁴ but when the initial term ends the tenancy will go into a statutory extension. During this phase the landlord may serve notice to increase the rent,⁹⁵⁵ the notice specifying a proposed rent which becomes the new rent if the tenant accepts it or fails to challenge the notice of increase. However, the tenant may refer the notice to the Private Rented Housing Panel who will determine the open market rental paid by willing parties ignoring the effect of the sitting tenant and any authorised improvements he has made.⁹⁵⁶ There is also provision for increasing rents to take account of increases in council tax.⁹⁵⁷ A few Rent Act tenancies still exist, and for these few lucky tenants a system of 'fair rents' operates.⁹⁵⁸

⁹⁵⁴ This may include a rent review clause.

⁹⁵⁵ Housing (Scotland) Act 1988 s. 24; usually six months' notice is required.

⁹⁵⁶ Housing (Scotland) Act 1988 s. 25.

⁹⁵⁷ Housing (Scotland) Act 1988 s. 25A. Council tax is the responsibility of the tenant, but may be collected by the landlord; full time students are exempt but must claim this exemption from the local authority.

⁹⁵⁸ McAllister *Scottish Law of Leases* para. 17.90 ff. This remains true for any tenants of housing associations whose tenancies were granted before 1988.

8.4 Joint tenants

Mary and Elizabeth have been joint tenants of Dundee Council for two years and during this time they have been a co-habiting couple. Mary is training to become an accountant while Elizabeth works part time in a pub. Unfortunately, after weeks of arguing they have decided to separate, however, neither party is in a position to afford to move to new accommodation. As a temporary measure, Mary has moved to her parents' house but has left all of her belongings at the old house in addition she continues to call there when Elizabeth is out in order to feed her pet dogs. Both parties continue to pay equally towards the rent and they both claim the sole tenancy.

Two or more individuals renting together will be joint tenants. The common law position in Scotland⁹⁵⁹ is very controversial because one joint tenant is entitled to give notice unilaterally which has the effect of terminating the tenancy completely. This point is made clear in the Tenant's Information Pack, but may well not be understood by the parties in advance. It really requires modification in the tenancy agreement.

In the social sector, there is a possibility of a person who occupies the property as his or her principal home to seek to become a joint tenant with the landlord's permission;⁹⁶⁰ this is intended to be exceptional and to be in the uncontrolled discretion of the landlord. Here, in the social sector, one joint tenant can give notice to leave and end his interest whilst leaving on foot the tenancy in the remaining tenant or tenants.⁹⁶¹ The law is thus different from England where, under the controversial rule in *Hammersmith and Fulham Royal London Borough Council v. Monk*,⁹⁶² a social landlord can end a joint tenancy when one joint tenant gives notice, evict the other joint tenant, and regrant a tenancy of the flat to the person who has given notice; this power is usually exercised when a couple split after allegations of domestic violence. If one joint tenant leaves this will have immediate implications for housing benefit, especially in terms of space allocation.

⁹⁵⁹ *Smith v. Grayton Estates* 1960 SC 349. The rule is the same in England; see below.

⁹⁶⁰ Housing (Scotland) Act 2001 s. 11(5); *Guidance of Scottish Secure Tenancy* (SEDD 6/2002) paras 20-21.

⁹⁶¹ Housing (Scotland) Act 2001 s.13; the landlord may take unilateral action (by notice) after abandonment by one joint tenant: s.20.

⁹⁶² [1992] 1 A.C. 478, H.L. Various challenges based on trust law and human rights principles have failed.

8.5 Housing standards in the private rented sector

A tenant comes home after a night in the pub watching her favourite football team. Hearing the house phone ring inside the tenant puts pressure on the front door as she turns the key in her haste to get into the house. Unfortunately, a rickety pane of glass in the door shatters with the force she applies and the tenant's arm gets cut in the broken glass. In the past the tenant complained to the landlord that the door was unsafe and dangerous. However, such complaints went unheeded. After checking her lease the tenant has found a provision which states to the effect that the landlord has no duty as regards the condition of the subjects or their repair, save those incumbent upon him by virtue of the Housing (Scotland) 2006 Act. The tenant wants to recover damages but is unsure what effect this provision will have.

Answer

The repairing and maintenance duty relating to tenancies in the private rented sector is also a mixture of common law and statutory rights. The Housing (Scotland) Act 2006 extended the repairing standard in private sector residential tenancies.⁹⁶³ It came into force on 3 September 2007. The common law duties have been substantially reinforced by statute with the Housing (Scotland) Act 1987 imposing a range of repair and maintenance obligations on landlords.⁹⁶⁴ There is an implied condition that the house is in all respects reasonably fit for human habitation at commencement of tenancy and will be kept so throughout the tenancy. The local building regulations set the legal standard below which a house must not fall or it will be deemed unfit for human habitation. There are a number of factors which comprise the legal standard. These include the presence of sanitary defects, a lack of air space or ventilation, darkness, dampness, absence of adequate and readily accessible conveniences and inadequate paving or drainage of courts, yards or passages. Where the landlord fails to meet the duty the tenant may be able to rescind the lease or claim damages.⁹⁶⁵ The landlord is also responsible for external repairs and installations. As such the landlord must keep in repair the structure and exterior⁹⁶⁶ of house as well as any installations. Where the lease is of part of a building then the landlords obligations only extend to repairs affecting the tenants enjoyment of the leased premises or common parts.

The landlord must ensure that the dwelling meets the repairing standard at the start of the tenancy and at all times during the tenancy.⁹⁶⁷ In order to meet the repairing standard the house must be wind and watertight and in all respects reasonably fit for human habitation,⁹⁶⁸ the structure and exterior of the house (including drains, gutter and external pipes) must be in a reasonable state of repair and in proper working order.⁹⁶⁹ Any installations in the house for the supply of water, gas and electricity

⁹⁶³ Housing (Scotland) Act 2006 s. 13, Tenancies with their own statutory regimes were not covered including Scottish Secure Tenancies, agricultural tenancies crofts and small landholding tenancies.

⁹⁶⁴ Housing (Scotland) Act 1987 sch. 10.

⁹⁶⁵ *McLeod v. Alexander* 2000 Hous LR 136.

⁹⁶⁶ *Hastie v. City of Edinburgh District Council* 1981 SLT (Sh Ct) 92 it was held that exterior includes windows as such the landlord was responsible for repair of windows broken by vandals.

⁹⁶⁷ Housing (Scotland) Act 1987 s. 14(1).

⁹⁶⁸ *Ibid.*, s. 13(1) (a).

⁹⁶⁹ This was taken from the statutorily implied terms of the successor to the Housing (Scotland) Act 1962 and the Housing (Scotland) Act 1966.

and for sanitation, space heating and heating water must be in a reasonable state of repair and in proper working order. This also applies to any fixtures and fittings and appliances provided by the landlord under the tenancy. In addition, any furnishings provided by the landlord under the tenancy must be capable of being used safely for the purpose for which they are designed and finally the dwelling must be provided with fire alarms.⁹⁷⁰ Once the landlord becomes aware of a defect in the dwelling which requires repair or maintenance work he is under a duty to act within a reasonable time. Essentially this means that the time in which the landlord should carry out the repairs depends on the nature of the defect in question with more material defects requiring prompt attention. When carrying out repairs the landlord will be responsible for any damage caused and he must make good any damage caused while carrying out any work.⁹⁷¹ It is possible for a landlord to avoid the repairing obligation in certain situations. In particular where the tenant accepts responsibility for repairs in a lease with a term of three or more years in which neither party has a break clause during the first 3 years of the lease. In addition where the defect requiring maintenance work is down to the fault of the tenant the landlord will not be under a duty to carry out repairs. Furthermore, the landlord will not be liable for failure to carry out maintenance or repairs where the only reason for that failure was the tenant's refusal to grant access rights. The landlord is expressly prohibited from contracting out of the repair and maintenance obligations and any lease which purports to shift responsibility onto the tenant is prohibited.⁹⁷² There are two exceptions to this. In the first place, as set out above, in a lease for more than three years⁹⁷³ and secondly where parties gain the express consent of the sheriff for this transfer of responsibility.⁹⁷⁴

Operation of the Private Rented Housing Panel

The Private Rented Housing Panel is primarily responsible for enforcement of repair and maintenance obligations⁹⁷⁵ in the private rented sector.⁹⁷⁶ The tenant may apply to the panel for a determination that the landlord has breached his repairing duty. However, in order to make such an application the tenant must first have notified the landlord of the defect which requires attention and allowed the landlord a reasonable amount of time to carry out the maintenance or repair in question. Upon receipt of the application the panel must serve notice on both landlord and tenant as soon as is practicable, generally speaking this is usually within a number of days. This notice must set out details of application, including relevant dates such as the date by which written representations must be received or when a request for oral representations must be made. The minimum period is at least 14 days after the day on which the panel notice is served. The panel have a wide range of powers available to them when determining a dispute.

⁹⁷⁰ Housing (Scotland) Act 1987 sch 10 para. 3.

⁹⁷¹ Housing (Scotland) Act 2006 s. 14(2); this follows the Sheriff's decision in *Little v. Glasgow District Council* 1991 1 SHLR 195 at 199.

⁹⁷² Housing (Scotland) Act 2006 s17.

⁹⁷³ *Ibid.*, s. 16.

⁹⁷⁴ *Ibid.*, s. 18. The Sheriff may grant permission where both tenant and landlord agree to the transfer of responsibility and where it is reasonable to do so having regard to the tenancy and circumstances.

⁹⁷⁵ *Ibid.*, s. 22(5) and sch. 2, para. 8; Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007. There is a proposal to allow third party applications: Housing (Scotland) Bill 2013 cls 23-25.

⁹⁷⁶ Right of application is not available to a Scottish secure tenancy etc.

8.6 Deposit protection

A one year fixed term tenancy entered is due to be renewed next month. The landlord currently holds the full amount of the security deposit however he is aware that a new deposit protection scheme has been introduced in Scotland and would like to know how this will affect his obligations with regard to the tenancy in question.

In the private sector it is permissible to take a deposit of up to two months to cover rent payments, damage, cleaning bills and unpaid utility bills and indeed a security deposit is normally required of a private sector tenant at the commencement of a tenancy. It is important to agree an inventory of goods at the property and a note of any defects.⁹⁷⁷

The landlord/agent who has received the tenancy deposit must turn over the deposit to an independent third party operating a deposit protection scheme.⁹⁷⁸ The vast majority of private rented tenants are regulated by the three deposit protection schemes:

- Letting Protection Service Scotland;
- Safe deposits Scotland; and
- My deposits Scotland.

When transferring the deposit to a deposit protection scheme the landlord must provide the tenant with relevant information concerning the scheme including the amount of the deposit, relevant dates, address of the property concerned, a statement from the landlord setting out that they are registered as well as the terms under which the deposit may be kept at the end of the tenancy. Should the landlord fail to register a deposit then the tenant can apply to the sheriff court which can order the landlord to pay the tenant up to three times the amount of the deposit. The function of the deposit is to provide security for the performance of any of the occupant's obligations arising under or in connection with a tenancy or an occupancy arrangement, or the discharge of any of the occupant's liabilities which so arise.⁹⁷⁹ The usual amount of the deposit in Scotland is equivalent to one month's rent however the landlord or letting agent may require a deposit equivalent to two months' rent.⁹⁸⁰ At the end of the tenancy the landlord must apply to the tenancy deposit scheme for repayment of the deposit. Where the landlord seeks to make deductions from the deposit, he must include details of those deductions and state the amount of deposit to be returned in the application. The tenant is then contacted by the tenancy deposit scheme and given the opportunity to agree or disagree with the amount of the deposit to be returned. Where the tenant confirms the amount to be returned is correct he will receive the deposit within five working days. In the situation that the tenant does not agree with the amount of the deposit to be returned he may apply to the dispute resolution process. This involves an independent adjudicator making a decision based upon the evidence submitted during the dispute

⁹⁷⁷ Tenant's Information Pack cl. 2.7; McAllister, *Scottish Law of Leases*, para. 21.29.

⁹⁷⁸ Tenancy Deposit Schemes (Scotland) Regulations 2011, reg. 3. Information about this must be included in the Tenant's Information Pack, cl. 4.5.

⁹⁷⁹ Housing (Scotland) Act 2006 s. 120.

⁹⁸⁰ Rent (Scotland) Act 1984 s. 112.

resolution process. Should either party be unhappy with the decision of the adjudicator they may apply for a review after which the decision will be final.

8.7 Rent arrears in private sector tenancy

John, a tenant in the private rented sector, has not been able to pay rent for the last three months. Michael, his landlord, has run out of patience and decides to seek an order of possession. John wants to know how the termination procedures operate.

(G) Termination of a short assured tenancy

A short assured tenancy requires a fixed contractual grant for a term of six months or more. The landlord will be able to terminate the tenancy at the end of the fixed term subject to three basic requirements.⁹⁸¹ One is that the contractual term of the tenant has reached its ish.⁹⁸² Second, any contractual regrant or tacit relocation must have ended. When the fixed period ends, the lease may state how it will continue (for example subject to monthly renewal) or it may be subject to tacit relocation (for example a tenancy for a year might roll over for another year), so the landlord will need to give sufficient notice to terminate these contractual rights.⁹⁸³ Third, the landlord must give a statutory notice, which must be of two months duration and to expire on or after the ish.⁹⁸⁴ At the expiration of the notice the landlord may raise a possession action in the Sheriff Court and the Sheriff must make an order for possession. This ends the tenancy.⁹⁸⁵ The landlord can also terminate a short assured tenancy during any contractual period using most of the misconduct grounds for possession against an assured tenant, provided the tenancy allows this.⁹⁸⁶

(H) Termination of an assured tenancy for tenant misconduct

Termination of a (fully) assured tenancy is quite different because security of tenure accrues when contractual protection ends: a tenant who remains in possession of the house after the lease has been terminated will have a statutory tenancy of the house⁹⁸⁷ and he can only be removed if the landlord obtains a court order from the Sheriff based on the statutory grounds.⁹⁸⁸ In total there are seventeen grounds of possession of which all the grounds 1 and 9-17 are discretionary grounds and 2 – 8 are mandatory. Of these the mandatory ground 8 and the discretionary grounds 11-16 are based on the misconduct of the tenant. All of these misconduct grounds are available once the contractual term has ended and the tenancy has become statutory. At this stage when the statutory tenancy is in operation, any provision of the tenancy allowing for its termination is no longer effective.⁹⁸⁹ Some of the grounds (1 and 11-16) may also be used during the

⁹⁸¹ Housing (Scotland) Act 1988 s. 33, clarified by Private Rented Housing (Scotland) Act 2001 s. 34; McAllister, *Scottish Law of Leases*, para. 17.65.

⁹⁸² It is apparently possible to include a break clause to bring the tenancy to end short of the six month minimum period: *Wishaw and District Housing Association v. Neary* 2004 SC 463.

⁹⁸³ Service of a s.33 notice before the ish will be sufficient: *Calmac Developments v. Murdoch* 2012 GWD 27-565.

⁹⁸⁴ The tenancy agreement may require longer than two months.

⁹⁸⁵ Housing (Scotland) Act 1988, s. 33(4).

⁹⁸⁶ These are set out below; grounds 9, 10 and 17 are not available.

⁹⁸⁷ Housing (Scotland) Act 1988, s. 16(1); McAllister, *Scottish Law of Leases*, para. 17.28ff.

⁹⁸⁸ Housing (Scotland) Act 1988 sch. 5.

⁹⁸⁹ Housing (Scotland) Act 1988 s. 16(1)(b)(ii).

contractual period of the lease where the lease provides for this;⁹⁹⁰ in this situation the statutory ground functions like an irritancy provision but the contractual provision must not deviate from the statutory grounds.⁹⁹¹ Where there are three months' rent arrears this will constitute a mandatory ground of possession and therefore where three months' rent is outstanding at the date of service of the notice then the landlord may rely on ground 8 to recover possession of the dwelling.⁹⁹²

The tenant must be given notice of the proceedings for possession and this notice⁹⁹³ must state the relevant ground as well as giving any relevant information.⁹⁹⁴ In relation to the misconduct grounds the period of notice is two weeks.⁹⁹⁵ The Sheriff also has power to dispense with notice in some situations.⁹⁹⁶ Therefore when a landlord is seeking to terminate a contractual tenancy he must serve two notices, a notice to quit which will bring the term of the lease to an end and will prevent tacit relocation and a second notice informing the tenant of the landlord's intention to raise proceedings for recovery of possession. Where a sub-tenancy is in operation then termination by the head landlord of the tenancy will cause the sub-tenant to take the place of the head tenant.⁹⁹⁷

⁹⁹⁰ Housing (Scotland) Act 1988 s. 18(6)(c)

⁹⁹¹ *Royal Bank of Scotland v. Boyle* 1999 H.L.R. 63.

⁹⁹² The Sheriff is given a discretion where the arrears are a consequence of delay or failure in the payment of housing benefit: Housing (Scotland) Act 1988 s. 18 as amended by Homelessness etc. (Scotland) Act 2003 s. 12.

⁹⁹³ Assured Tenancies (Forms) (Scotland) Regulations 1988, SI 1988/2109, as amended by SI 1993/648.

⁹⁹⁴ Housing (Scotland) Act 1988 s. 19(2).

⁹⁹⁵ Housing (Scotland) Act 1988 s. 19(4).

⁹⁹⁶ Housing (Scotland) Act 1988 s. 19(1).

⁹⁹⁷ Housing (Scotland) Act 1988 s. 28.

8.8 Termination of a social rented tenancy

Elizabeth has a Scottish secure tenancy with the local authority. However, she has consistently been late paying her rent and over the year she has built up substantial rent arrears. She is worried that the local authority will be able to terminate her tenancy and wants to know whether this is possible?

Termination of Scottish Secure Tenancies

A tenant holding under a Scottish secure tenancy has a statutory right to stay in the dwelling in excess of the contractual term stated in the lease agreement. While the landlord's right to terminate a SST is strictly limited.⁹⁹⁸ When seeking to terminate the tenancy the landlord must give the tenant written notice⁹⁹⁹ setting out the ground of termination as well as the date from which the landlord may bring proceedings for recovery of possession. A minimum notice period of 4 weeks is required and the date set in the notice cannot be earlier than the date on which the tenancy would have been brought to an end by a notice to quit had it not been a SST.¹⁰⁰⁰ In addition, the landlord is required to serve notice on any qualifying occupier.¹⁰⁰¹ Before serving this notice the landlord is required to make such inquiries as may be necessary to establish so far as is reasonably practicable whether there are any qualifying occupiers of the house and, if so, their identities.¹⁰⁰² Where a qualifying occupier applies to the court to be 'sisted' as a party to proceedings for recovery of possession, the court must grant the application. A notice will cease to have effect if it is not used within 6 months or if the landlord has withdrawn it before then.¹⁰⁰³

Special provisions apply to action on the basis of rent arrears, the commonest action raised. There is considerable case law about how sheriffs should exercise their discretion.¹⁰⁰⁴ Changes were made in August 2012. Where a suspended possession order is made on the basis of rent arrears the tenancy ends only if possession is obtained and the order should include a period of time for which the order has effect.¹⁰⁰⁵ The landlord must follow a pre-action procedure before raising

⁹⁹⁸ Housing (Scotland) Act, s. 12.

⁹⁹⁹ Housing (Scotland) Act 2001, s. 14(4); Scottish Secure Tenancies (Proceedings for Possession) (Form of Notice) Regulations 2012.

¹⁰⁰⁰ Housing (Scotland) Act 2001 s. 14(2) and (4). Where no ish is stated see *West Lothian Council v. Recipe* 2002 Hous LR 58 (40 days' notice required).

¹⁰⁰¹ Housing (Scotland) Act 2001, s. 14(3). This includes a family member over 16, a sub tenant, a lodger (etc) who occupies the dwelling as their as home; see: *Edinburgh City Council v. Porter* 2004 Hous LR 46; *North Lanarkshire Council v. Kenmure* 2004 Hous LR 50; *Stirling Council v. Neal* 2006 SLT 51.

¹⁰⁰² Housing (Scotland) Act 2001, s.14(3).

¹⁰⁰³ Housing (Scotland) Act 2001, s.14(5).

¹⁰⁰⁴ *Edinburgh City Council v. Forbes* 2000 Hous LR 61; *Stirling Council v. Magor* 2002 Hous LR 64; *Angus Housing Association v. Fraser* 2004 Hous LR 83; *Glasgow Housing Association v. Li* 2010 Hous LR 31; *Campbell v. Glasgow Housing Association* [2011] CSOH 55; *East Lothian Council v. Duffy* 2012 SLT (Sh. Ct) 113.

¹⁰⁰⁵ Housing (Scotland) Act 2001 s. 16(5A), (5B), inserted by Housing (Scotland) Act 2010 s. 153; Scottish Secure Tenancies (Repossession Orders)(Maximum Period) Order 2012. Under the old law: *Grampian Housing Association v. Pyper* 2004 Hous LR 22; *Deighan v. Edinburgh City Council* 2004 Hous LR 89; *Brown v. Glasgow Housing Association* 2007 Hous LR 2, Outer House.

the action:¹⁰⁰⁶ the tenant should be given full information and advice and must attempt to agree a plan for future payments. Proceedings should not be raised while the tenant is applying for housing benefit¹⁰⁰⁷ or taking other reasonable steps to clear arrears. The landlord must confirm compliance before raising proceedings.¹⁰⁰⁸

¹⁰⁰⁶ Housing (Scotland) Act 2001 s. 14A inserted by Housing (Scotland) Act 2010 s. 155.

¹⁰⁰⁷ Previously actions would be suspended during a housing benefit appeal: *Aberdeen City Council v. McCarthy* 2004 Hous LR 53; *Renfrewshire Council v. Hainey* 2008 Hous LR 43, Sh. Ct.

¹⁰⁰⁸ Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012.

8.9 Responsibility for repair, unfair terms

Jack rents from a RSL under a Scottish secure tenancy. Recent stormy weather has caused damage to a rented property. In particular, rain water has leaked through the rotted window panes and has caused damage to walls, flooring and some of Jack's (property). The RSL has failed to carry out repairs to the property. Jack wants to know what is the legal standard which his house must meet.

There are various repairing obligations placed on both landlord and tenant in Scots law arising under the common law and statute. While the primary duty will generally lie with the landlord the tenant must be alert to the fact that he must also undertake certain obligations with regard to maintenance of the property.¹⁰⁰⁹

The key concept in both the private and the social sectors is the repairing standard, which has been the subject of recent reform with major efforts aimed at raising the legal repairing standard. In essence major repairs and structural work falls to the landlord. Prior to 2001 the same set of rules applies to all rented households, but now schedule 4 of the Housing (Scotland) Act 2001 sets out the maintenance and repairing obligations within the social housing sector while part 2 of the Housing (Scotland) Act 2006 sets out the commensurate repair and maintenance obligations for tenancies in the private rented sector. While the local authority, in their capacity as landlord, will be concerned with maintenance and repair of their own housing stock, they also are under a wider public duty to ensure that all rented housing in their operational area meets the minimum legal standard i.e. the tolerable standard,¹⁰¹⁰ are not overcrowded,¹⁰¹¹ and are not substandard.¹⁰¹² In carrying out this task the local authority have powers of inspection as well as the power to enable those properties be repaired,¹⁰¹³ closed and demolished.¹⁰¹⁴ At common law the landlord is under a number of repairing and maintenance duties. In the first place the landlord is under a duty to provide subjects that are reasonably fit for the purpose for which they are let. This is followed by a duty to carry out repairs to ensure the property is kept in a tenantable or habitable condition during the term of the lease.¹⁰¹⁵ There are several elements to the landlord's duty to maintain the dwelling in tenantable or habitable condition. These include maintaining the property in a safe condition, keeping the dwelling wind and water tight against usual weather conditions,¹⁰¹⁶ and preventing damp.¹⁰¹⁷ The landlord will not be

¹⁰⁰⁹ McAllister, *Scottish Law of Leases*, ch. 19.

¹⁰¹⁰ Housing (Scotland) Act 1987 Part IV.

¹⁰¹¹ *Ibid.*, Part VII.

¹⁰¹² *Ibid.*, Part 1.

¹⁰¹³ *Ibid.*, Part V.

¹⁰¹⁴ *Ibid.*, Part VI.

¹⁰¹⁵ This duty may even require the landlord to make improvements to the dwelling. *Marianski v. Jackson* 1872 9 SLR 80.

¹⁰¹⁶ *Wolfson v. Forrester* 1910 SC 675, 1910 1 SLT 318.

¹⁰¹⁷ *Gunn v. National Coal Board* 1982 SLT 52, a tenant was awarded damages due to a landlord's failure to prevent rising damp which caused dampness and mould in the house. Where the tenant has failed to use the heating system resulting in damp the landlord may avoid liability. Where the dwelling requires excessive heating in order to stay damp free the landlord will fail this duty. *McCarthy v. Glasgow District Council* 1988 Scolag 121 at 121.

responsible for carrying out repairs arising from damage caused by acts of God, third parties or the tenant's negligence.

The Housing (Scotland) Act 2001 applies to Scottish secure tenancies and in general while restating the common law obligation also extends the obligations set out in the Housing (Scotland) Act 1987 to social tenants.¹⁰¹⁸ The landlord has an obligation to repair a dwelling let under a Scottish secure tenancy.¹⁰¹⁹ In particular, the landlord must ensure that the dwelling is wind and watertight¹⁰²⁰ and in all other respects reasonable fit for human habitation¹⁰²¹ and the landlord must ensure that the dwelling be kept in this condition throughout the tenancy.¹⁰²² Additionally, the landlord must ensure that the dwelling does not fall below the standard set out in the building regulations due to disrepair or sanitary defect etc.¹⁰²³ Prior to letting the dwelling the landlord must inspect the house and identify any work necessary to bring it up to standard and the tenant must be notified.¹⁰²⁴ Once the landlord becomes aware of a defect in the dwelling which requires repair or maintenance work he is under a duty to act within a reasonable time. Essentially this means that the time in which the landlord should carry out the repairs depends on the nature of the defect in question with more material defects requiring prompt attention.¹⁰²⁵ When carrying out repairs the landlord will be responsible for any damage caused. In order to carry out the repairs the landlord will be required to give at least 24 hours' notice to the tenant for access. When carrying out repairs the landlord may at any reasonable time enter the house to view its state and condition or to carry out any work necessary to meet the statutory repair standard. Certain small urgent repairs, so called qualifying repairs, which might affect a tenant's health, safety or security, have to be done quickly.¹⁰²⁶ Where the landlord is unable to carry out such repairs within the time limit then the tenant may be able to claim compensation for any repairs carried out.¹⁰²⁷ However, the tenant must not do any work to the property that consists of more than internal decoration without the permission of the landlord.¹⁰²⁸

While the landlord is affixed with the general duty to carry out repairs and maintenance the tenant is also required to do their part. In particular, the tenant is under a common law obligation to keep the property "aired and fired"¹⁰²⁹, this means that the tenant must use the heating system which is provided.¹⁰³⁰ However, this

¹⁰¹⁸ Model Scottish Secure Tenancy (2002) pt 5.

¹⁰¹⁹ Housing (Scotland) Act 2001 s. 27(1).

¹⁰²⁰ *Campbell v. Aberdeen City Council* 2007 Hous LR 26.

¹⁰²¹ Housing (Scotland) Act 2001 sch 4, para 1(a). This would include eg a reasonably adequate heating system: *Buchan v. North Lanarkshire Council* 2000 Hous LR 98.

¹⁰²² *Ibid.*, sch 4, para. 1(b).

¹⁰²³ *Ibid.*, sch 4, para. 5(1) and (6). These cover items as lack of air space or ventilation, lack of lighting, dampness, absence of adequate and readily accessible water supply or of sanitary arrangements or of other conveniences, and inadequate paving or drainage of courts, yards or passages.

¹⁰²⁴ *Ibid.*, sch. 4, para. 2(b).

¹⁰²⁵ E.g. a gas leak: *MacKenzie v. Aberdeen City Council* 2002 Hous LR 88, Sh. Ct.

¹⁰²⁶ *Ibid.*, s. 27(2).

¹⁰²⁷ Scottish Secure Tenants (Right to Repair) Regulations 2002 setting out the max amount for any single qualifying repair as well as the period in which it is to be completed.

¹⁰²⁸ Housing (Scotland) Act 2001 s. 28.

¹⁰²⁹ *Boyle v. Weddell* 1870 11 M. 223.

¹⁰³⁰ *Dover District Council v Farrar* (1980) 2 Hous LR 32.

must be an efficient system and must not involve undue or excess expenditure on the tenant.¹⁰³¹

¹⁰³¹ *McArdle v Glasgow District Council* 1989 SCLR 19.

8.10 Energy efficiency, repair.

Six months after moving into a rented property the tenants find that the heating bills have been unusually high. Upon further examination of the property the tenants discover that it is very poorly insulated and that the heating unit is defective, this is contributing to the high heating costs. The tenants feel that the property is unsuitable for habitation and that they should have been informed of the energy inefficiency before entering the agreement.

Answer

Energy Efficiency

Under the Energy Performance of Buildings (Scotland) Regulations 2008, 2008 No. 309 landlords must be able to provide all prospective tenants with an Energy Performance Certificate (EPC) (Regulation 5). The Regulations derive from the Energy Performance of Buildings Directive 2002/91/EC, of the European Parliament and of the Council of 16 December 2002, which was introduced to promote the improvement of the energy performance of buildings.¹⁰³²

In furtherance of this aim, the EPC must be affixed to the property and provides information about the energy efficiency of the building and includes cost effective recommendations. The EPC must be produced by a member of an organisation which has been approved by Scottish Ministers. Once produced the EPC is valid for 10 years and as such another EPC is not necessarily required on renewal of a lease. The failure to provide an EPC could result in a fine of £500.¹⁰³³

In this case where the tenants are in continued occupation the most expedient option in effecting an improvement in the heating system would be to apply to the Private Rented Housing Panel for a Repairing Standard Repairing Order. The committee will examine the property against the standards set out in statute.

With regard to heating etc under section 13, (1)(c) of the Housing (Scotland) Act 2006 a house meets the repairing standard if the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order. The reference in subsection (1)(c) to installations in a house includes reference to installations out with the house which, directly or indirectly, serve the house and which the owner is responsible for maintaining (solely or in common with others) by virtue of ownership, any real burden or otherwise.¹⁰³⁴

Section 14 of the Housing (Scotland) Act 2006 sets out the landlords' duty to ensure that the house meets the repairing standard set out in section 13 both at the start of the tenancy and at all times during the tenancy. Additionally, the duty imposed includes a duty to make good any damage caused by carrying out any work for the purposes of complying with the duty in that subsection. The active duty during the

¹⁰³² Directive 2002/91/EC.

¹⁰³³ Energy Performance of Buildings (Scotland) Regulations 2008, 2008 No. 309, s. 17.

¹⁰³⁴ Housing (Scotland) Act 2006, s. 13, (1)(c)

currency of the tenancy only applies where the tenant notifies the landlord, or the landlord otherwise becomes aware, that work requires to be carried out for the purposes of complying with it. Furthermore, 14(4) sets out that the landlord will only meet this active duty if any work which requires to be carried out for the purposes of complying with that duty is completed within a reasonable time of the landlord being notified by the tenant, or otherwise becoming aware, that the work is required.¹⁰³⁵

It is clear that the landlord is fixed with an extensive duty of repair however section 16 sets out exceptions to the landlords repairing duty. In particular, the landlord is not responsible for any work to be carried out which the tenant is required by the terms of the tenancy to carry out (, or any work to be carried out for which the tenant is liable by virtue of the tenant's duty to use the house in a proper manner, or would be so liable but for any express undertaking on the landlord's part. Additionally, the duty does not require the house to be rebuilt or reinstated in the event of destruction or damage by fire or by storm, flood or other inevitable accident, or the repair or maintenance of anything that the tenant is entitled to remove from the house. Furthermore, the landlord will be saved from any liability for not acting where the reason for his inaction was due to a lack of necessary access rights despite having taken reasonable steps to acquire those rights.

¹⁰³⁵ Housing (Scotland) Act 2006, s. 14.

9 Tables

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¹⁰³⁶This reference is to the single volume of Scottish Housing Law Reports, published jointly by Shelter Scotland and the Legal Services Agency, which was a predecessor of Green's Housing Law Reports.

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¹⁰³⁷ *Ibid.*

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9.3 Abbreviations

asp.	Act of the Scottish Parliament
c.	Chapter of United Kingdom Statute Book
CSIH	Court of Session, Inner House
CSOH	Court of Session, Outer House
EWCA Civ	Court of Appeal for England and Wales, Civil Division
Hous LR	Housing Law Reports
HMO	House in Multiple Occupation
RSL	Registered social landlord
SI	Statutory Instrument (United Kingdom)
SLT	Scots Law Times
SSI	Scottish Statutory Instrument
Sh. Ct	Sheriff Court
UKHL	House of Lords (judicial decision)
UKSC	Supreme Court of the United Kingdom