

*These notes relate to the Private Housing (Tenancies) (Scotland) Act 2016 (asp 19) which received Royal Assent on 22 April 2016*

# **PRIVATE HOUSING (TENANCIES) (SCOTLAND) ACT 2016**

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## **EXPLANATORY NOTES**

### **STRUCTURE AND SUMMARY OF THE ACT**

6. The Act is divided into 9 parts and 5 schedules:
- Part 1 sets out the conditions which must be met for the creation of a private residential tenancy.
  - Part 2 provides for “statutory terms”, which are to be terms of every private residential tenancy.
  - Part 3 places a duty on the landlord to provide documentation relating to the tenancy and provides a course of redress where the landlord fails to do this.
  - Part 4 lays down the procedure for rent increases, adjudication and localised caps on rent increases. Chapter 1 provides that rent increases must follow the process set out in Chapter 2 and may take place at most once every 12 months. It also prohibits premiums and requiring the payment of advance rent, as well as restricting when diligence may be carried out. Chapter 2 deals with the notice that must be given for any proposed rent increase. It also sets out the process by which proposed increases can be contested. Chapter 3 introduces measures for caps on rent increases in designated zones.
  - Part 5 provides for the circumstances under which a tenancy may be brought to an end by a landlord or tenant.
  - Part 6 deals with what happens when a tenant dies. If a sole tenant dies, it provides for certain people to succeed to the tenancy if the specified conditions are met.
  - Part 7 gives the First-tier Tribunal (“the Tribunal”) jurisdiction over disputes arising from private residential tenancies, places a duty on the Tribunal to report unregistered landlords, and allows minor errors in documents to be overlooked.
  - Part 8 contains consequential and transitional provisions.
  - Part 9 expands upon the regulation-making powers contained in the Act, defines expressions used in the Act and sets out when, or by what process, the Act’s provisions are to be brought into force.
  - Schedule 1 is connected to Part 1 – it outlines the types of tenancy which cannot be a private residential tenancy.
  - Schedule 2 is connected to Part 2 – it lists terms which are to be terms of every private residential tenancy.
  - Schedule 3 is connected to Part 5 – it lists the grounds for eviction on the basis of which a landlord can seek to end a tenancy.

- Schedules 4 and 5 are connected to Part 8 – they set out modifications to other legislation in consequence of the Act, or to effect the transition from the tenancy regimes established by previous legislation to the regime created by the Act.

## **Part 1 – Private Residential Tenancy**

### **Meaning of private residential tenancy**

7. **Section 1(1)** provides that a tenancy is a private residential tenancy where three conditions are met. These are that: the property is let to an individual as a separate dwelling; the tenant occupies all or part of it as the tenant's only or principal home; and the tenancy is not one which is excluded under schedule 1.
8. **Section 1(2)** provides that once a tenancy has become a private residential tenancy, it does not lose that status simply because the tenant is no longer occupying the property as his or her only or principal home. This provision ensures that all of the provisions of the Act remain available to the tenant and landlord to enable either one of them to terminate the tenancy, but the tenancy will continue as a private residential tenancy unless terminated.

### **Interpretation of section 1**

9. **Section 2** makes provision about the interpretation of section 1. The result of it is that:
  - a property is to be regarded as having been let to an individual (therefore meeting that aspect of the test in section 1(1)(a)) even where it has been let jointly to an individual (or more than one individual) and a non-human, legal person (e.g. a company),
  - the lease of a property with other land will be regarded as the lease of a separate dwelling (therefore meeting that aspect of the test in section 1(1)(a)) provided that the main purpose of the lease is to provide the tenant with a home,
  - where a let property lacks the core facilities required for it to be regarded as a separate dwelling but those facilities form part of the associated shared accommodation (e.g. where an individual has a tenancy of only a bedroom in a flat, but has a right to use a shared bathroom and kitchen), the let property is to be treated as being a separate dwelling nonetheless, meaning that that aspect of the test in section 1(1)(a) is met,
  - if a property is let jointly to more than one person, only one of those persons needs to occupy the property as his or her only or principal home in order for the test in section 1(1)(b) to be met.

### **Writing not required to constitute private residential tenancy**

10. Under the Requirements of Writing (Scotland) Act 1995, a written document is required to constitute certain tenancies. Section 3 displaces this rule, meaning that a private residential tenancy can arise from an oral agreement to create a tenancy.
11. Although writing is not required in order to bring a private residential tenancy into existence, once a tenancy becomes a private residential tenancy, section 10 of the Act will apply to the tenancy. Section 10 places landlords under a duty to provide written terms of the tenancy if all of the terms of the tenancy have not already been set out in writing.
12. Relatedly, paragraph 6 of schedule 4 amends the Requirements of Writing Act so that an agreement to transfer, vary or extinguish a private residential tenancy does not need to be in writing (although, by virtue of Part 5, certain notices to terminate must be in writing).

### **Extended meaning of tenancy in the Act**

13. [Section 4](#) provides that private residential tenancies are tenancies, despite the lack of an “ish” (i.e. a termination date) — at common law, a tenancy must have an ish.
14. Section 4 also provides that once a tenancy has become a private residential tenancy, it continues to be one even if it is subsequently agreed that the tenant no longer has to pay rent. At common law, a tenancy agreement must include a requirement for rent of some form or other to be paid. And for there to be a private residential tenancy, there must be an underlying tenancy. Dropping the requirement for the payment of rent from a lease would, but for section 4, mean that there would no longer be a tenancy per se and therefore the Act’s provisions would cease to apply to the arrangement.

### **Extended meaning of tenancy and related expressions in other enactments**

15. [Section 5](#) provides that references in other enactments to tenancies and to connected expressions will cover private residential tenancies, unless it appears from the context that a particular reference is not intended to cover private residential tenancies.
16. At common law it is a cardinal feature of a tenancy that it has an “ish” (i.e. a termination date). As a private residential tenancy will not have an ish, there may (but for section 5) have been doubt as to whether a reference to a “tenancy” in another Act or instrument included a private residential tenancy. Similarly, section 4 of the Act allows an arrangement to be treated as giving rise to a private residential tenancy even although no rent is payable. Such an arrangement would not be a tenancy as traditionally understood, and so references to tenancies in other enactments may not otherwise have covered private residential tenancies under which no rent is payable.

### **Power to modify [schedule 1](#)**

17. [Section 6](#) enables the Scottish Ministers to make regulations to modify [schedule 1](#) (which outlines the types of tenancies that cannot be private residential tenancies).

### **Part 2 – Tenancy Terms**

18. [Section 7](#) provides the Scottish Ministers with the power to bring forward regulations to prescribe statutory terms which will be terms of every private residential tenancy. Ministers may also by regulations provide that in some circumstances a statutory term does not apply to a tenancy (for example, regulations could provide that where a landlord and tenant agree to a more generous notice period before a tenant must allow the landlord access to inspect and repair the property, the statutory term on notice will not apply). In addition, regulations may provide that, in some or all circumstances, the effect of a statutory term may be modified by the landlord and tenant.
19. [Section 8](#) makes further provision about regulations under section 7. It provides that regulations cannot be made under section 7 unless they include the terms outlined in [schedule 2](#). But, as subsection (3) clarifies, the requirement to include the terms in [schedule 2](#) does not prevent regulations under section 7 from providing, in accordance with section 7(3), for the modification or disapplication of the terms set out in [schedule 2](#). Section 8 also requires the Scottish Ministers to consult before making regulations under section 7.
20. [Section 9](#) protects a tenant’s entitlement to use shared living accommodation (as defined in subsection (3)). It prevents whatever entitlement the tenant had to use shared living accommodation at the beginning of the private residential tenancy from being removed or diminished without the tenant’s agreement.

### **Part 3 – Tenancy Information**

#### **Landlord’s duties to provide information**

21. **Section 10** obliges a landlord to provide his or her tenant with a copy of the written terms of that person’s tenancy agreement if those terms are not already fully set out in writing. This will be relevant where a private residential tenancy has arisen from an oral agreement to create a tenancy, or where only some of the tenancy terms have been committed to writing.
22. **Section 10** does not apply if the agreement between the parties is already in writing, even if it is not in formal writing and even if it is not expressed in a single document (for example, an exchange of emails may constitute written tenancy terms).
23. Where section 10 does apply, the landlord is required to give the tenant a document setting out all of the terms of the tenancy. This document must be given to the tenant no later than the day on which the private residential tenancy commences (assuming that the tenancy becomes a private residential tenancy immediately), or, if the tenancy only later becomes a private residential tenancy, within 28 days of its becoming one. A tenancy may convert to a private residential tenancy after the tenancy’s commencement if, for example, the tenant is initially using the let property as a second home, but later occupies it as his or her only or principal home.
24. The duty of landlords under section 10 is an on-going one. So if the terms of a tenancy subsequently change and the result is that the terms of the tenancy are no longer fully set out in writing, the landlord has to provide the tenant with a further document setting out the amended terms of the tenancy within 28 days of the change taking effect.
25. **Section 11** gives the Scottish Ministers power to bring forward regulations to specify information that landlords must provide to their tenants and the timescales within which they must do so. Before making regulations under section 11, Ministers must consult persons representing the interests of tenants and landlords.
26. **Section 12** allows the Scottish Ministers to make provision specifying how landlords are to perform their duty under section 10 and any duties to provide information imposed on them by regulations under section 11.
27. **Section 13** prohibits a landlord from charging a tenant for the provision of a document setting out the tenancy’s terms (whether that document is produced under section 10 or not – and including any document amending the original terms). It also prohibits charging a tenant for information which is given in accordance with section 11. These prohibitions would apply equally where someone is acting on the landlord’s behalf (e.g. a letting agent).

#### **First-tier Tribunal’s powers**

28. **Sections 14 to 17** set out the powers of the First-tier Tribunal for Scotland to:
  - deal with a landlord’s failure to provide written terms of a tenancy as required by section 10 or to provide information as required by regulations under section 11,
  - deal with the situation where either party feels that the written terms they do have do not properly express the terms of the tenancy.
29. **Section 14(1)** provides that where a landlord is required to supply written tenancy terms to the tenant under section 10 and has failed to do so, the tenant has the ability to refer a case to the First-tier Tribunal. This may arise where the landlord has not provided any written terms, or where some but not all of the tenancy terms have been set out in writing. Before referring a case to the Tribunal, a tenant must give a landlord 28 days’ notice of his or her intention to do so, which allows an opportunity for the failing to be rectified.

30. [Section 14\(2\)](#) enables a landlord or tenant to refer a case to the Tribunal where he or she considers that the tenancy agreement appears to displace a statutory term of the tenancy in a way that is not permitted under the regulations. Once laid out in regulations, the statutory terms will apply automatically even if they are not included in a tenancy agreement. However, this provision allows the Tribunal to determine whether or not a contractual tenancy term does in fact displace a statutory term in an unallowable manner in cases where the position is not entirely clear-cut.
31. [Section 15](#) provides the Tribunal with the power to deal with an application under section 14 by drawing up a document which sets out all the terms of the tenancy, or, if there are already written terms of the tenancy, by declaring the written tenancy terms to be accurate. Any document drawn up by the Tribunal or which is the subject of a declaration as to its accuracy will constitute all the terms of that tenancy.
32. [Section 16](#) enables a tenant to apply to the Tribunal to make a payment order against a landlord who fails to provide the tenant with the necessary tenancy documentation (i.e. documentation required by virtue of section 10 or 11). Any application made in relation to a failure to draw up written terms of a tenancy is conditional upon an application to the Tribunal asking it to draw up written terms of the tenancy also being made. The right to make an application is also restricted to current tenants. Before referring a case to the Tribunal under this section, a tenant must give a landlord 28 days' notice of his or her intention to do so (allowing an opportunity for the failing to be rectified).
33. [Section 16\(2\)](#) specifies the amount that an order can require a landlord to pay the tenant in cases where the landlord does not have a reasonable excuse for his or her failure. The amount is up to a maximum of three months' rent where there is a single failure to provide either the written terms of the tenancy required under section 10 or any of the other information required under section 11. Where a landlord fails to provide both the terms of the tenancy required under section 10 and any other information required under section 11, the order can require the landlord to pay the tenant up to a maximum of six months' rent. [Section 16\(4\)](#) prevents a tenant from increasing the amount he or she can be awarded by bringing separate applications for each individual item not provided under section 11. Accordingly, there is no second opportunity to make a claim in respect of a particular failure to comply with section 11 if it could have been included in an earlier claim regarding a breach of section 11.
34. [Section 16\(5\)](#) states that if there are joint landlords, the Tribunal may make an order against all, some or only one of them. However, the total amount that a tenant may receive is the same as it would be if the tenant had a sole landlord. Conversely, where a joint tenant makes an application, the award is apportioned in accordance with [section 16\(7\)](#) so that even if the other joint tenants make separate applications later, the total amount that a landlord may be required to pay is the same as it would be if there was a sole tenant.
35. [Section 17](#) provides that the amount of notice that a tenant is required to give a landlord before making an application to the Tribunal under section 14 (application to draw up terms) or section 16 (application for a financial award) is 28 days. The 28 day period commences on the later of either the day the landlord receives the notice from the tenant or the day after any deadline date, and the period ends on the day falling 28 days after it began. For example, if the landlord receives notice from the tenant on 15 January that he or she is referring a case to the Tribunal under section 14, the notice period expires at the end of the day on 12 February. Because the tenant cannot apply to the Tribunal until after the notice period has expired, the tenant cannot actually refer his or her case to the Tribunal until 13 February.

## **Part 4 – Rent**

### ***Chapter 1 – Restrictions in relation to rent and other charges***

36. **Section 19(1)** provides that the rent payable under a private residential tenancy may not be increased more than once in a 12 month period. Accordingly, there is no restriction upon when the first increase may take place (subject to giving the necessary notice and any appeal) but there will always be a minimum of 12 months between increases. Subsection (2) provides that where a tenant has made a referral to a rent officer for rent adjudication, the 12 month period is to be regarded as commencing on the date on which the rent would have been increased had the adjudication process not been invoked (which will usually be the date specified in the landlord’s rent-increase notice, but see section 22(4)). This means that an annual cycle of rent reviews is not disrupted by a delay in an appeal being processed.
37. **Section 20** makes it an offence to charge or receive any premiums or to require the making of any loan as a condition of the grant, renewal or continuance of a private residential tenancy. Restrictions are also placed on the sums which can be charged when a tenancy is assigned. Any charge made in breach of these rules is recoverable by the tenant. A “premium” means any sum or pecuniary consideration other than the rent and a refundable deposit (not exceeding two months’ rent), and includes any fine or administration fee.
38. **Section 20** also prohibits rent being charged before the beginning of the rental period to which it relates – or, if rent is payable less frequently than once every six months, a more restrictive bespoke rule applies. The effect of the prohibition in section 20 is that, for example, a tenant who pays rent in advance on a month-to-month basis cannot be required to pay more than one month’s rent at a time, and nor can the tenant be obliged to pay the first month’s rent before the lease commences. Where a tenant has been required to pay advance rent, the sum is recoverable by the tenant provided that he or she exercises the right of recovery within two years of the payment.
39. **Section 21** provides that where a debt for a rent payment or a rent liability exists, a landlord can only take debt recovery steps (in the form of carrying out diligence) against the tenant or former tenant where the Tribunal has first given its consent. A rent liability is a liability which has arisen under section 31 as a result of the tenant’s rent being increased following a process of rent adjudication.

### ***Chapter 2 – Rent variation instigated by landlord’s notice***

#### **Process by which rent may be varied**

40. **Section 22** sets out how a landlord must notify a tenant of an increase in rent.
41. **Section 22(2)** provides that the rent-increase notice given by the landlord to the tenant must specify the rent that will be payable once the increase takes effect, the day when the increase is to take effect, and must comply with any other requirements that may be set out by the Scottish Ministers in regulations. Ministers can bring forward regulations which specify the information to be included in the rent-increase notice, the form the notice should take and the way in which the notice must be served on the tenant.
42. **Section 22(3)** provides that the rent increase will take effect on the effective date unless before that date the landlord withdraws the notice, or the tenant makes a timeous referral to a rent officer for rent adjudication.
43. **Section 22(4)** defines the ‘effective date’ as the later of either the day specified in the rent-increase notice or the day after the day on which the minimum notice period ends. This means that where a landlord fills in the rent-increase notice with the required minimum notice period in mind, the effective date will be the date specified by the landlord. However in a case where, for example, the tenant can show that the notice

was delayed in the post or where the landlord has calculated the minimum notice period incorrectly, the notice will still take effect but will do so only after the conclusion of the minimum notice period.

44. [Section 22\(5\)](#) provides that the minimum notice period is three months or whatever longer period has been agreed between the landlord and tenant. It begins running on the day the rent-increase notice is received by the tenant. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out (rebuttable) presumptions as to when a document that has been served by post or electronically is deemed to be received.
45. [Section 22\(6\)](#) provides that the reference to a period of three months in subsection (5) means either the same day three months after the month in which it began or, if the month in which the period ends has no such day, the final day of that month. For example if the start of the three month period was 4 March the last day of the three month period would be 4 June, and if the start date was 30 November the last day would be 28 or 29 February, depending on whether or not it was a leap year.
46. [Section 23](#) enables the landlord and tenant, by agreement, to change the proposed new rent and to change the date specified in the notice (although the date that the notice takes effect remains subject to the minimum notice period due to the operation of section 22(4), so an agreed change could not dispense with the minimum 3 months' notice). For example, this ability to agree a change would allow the parties to agree to a lower rent than in the notice, or allow the parties to come to a compromise whereby a higher sum is to be paid, but, as a trade-off, the effective date is postponed. Because any such agreement is dealt with by an amendment to the existing notice rather than the service of a new notice, it does not trigger the running of a new minimum notice period. Section 23(2) outlines that if a tenant and landlord had agreed to change what is in the rent-increase notice but the tenant reconsiders and subsequently refers the notice for adjudication within the permitted time period, the referral to the rent officer will proceed as if no such agreement to modify the notice had been made. This will be of relevance when the order-maker requires to know the date on which the increase would have taken effect had a referral not been made.
47. [Section 24](#) provides that within 21 days of receiving a rent-increase notice, a tenant can refer a case to a rent officer for adjudication (provided that the property is not in a rent pressure zone).
48. [Section 24\(3\)](#) requires that an application to a rent officer be in the prescribed form and accompanied by the prescribed fee (if any). The tenant must also notify the landlord in the prescribed manner that the case has been submitted for adjudication. Section 24(4) enables the Scottish Ministers to set out in regulations what the prescribed form, manner of notification and fee are.
49. On receipt of a rent adjudication referral, section 25(1) gives a rent officer the power to set the open market rent for the property. In doing so, the rent officer has the power to vary the rent upwards or downwards. The assumptions to be applied when calculating the open market rent are set out in section 32.
50. [Section 25\(2\)](#) stipulates that the date on which the new rent (as set by the rent officer) takes effect will be either the date that the rent increase had originally been due to take effect (if that date is still at least 14 days in the future), or, if it is too late for that, it will be the first rent payment date falling at least 14 days after the day on which the rent officer makes the order. However, where the rent officer's determination is made too late for it to take effect on the original rent increase date, section 31 will also operate in order to put the parties in the same financial position they would have been in had the order been made earlier.
51. [Section 25\(3\)](#) provides that when making an order, a rent officer must record the amount of rent that covers the provision of services, unless these costs are negligible.

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52. **Section 26** provides that, before issuing a final order, a rent officer must issue a provisional order which specifies the amount of rent to be paid, including any amount attributed to service costs. If a landlord or tenant is dissatisfied with the rent officer's proposal, he or she can ask the rent officer to review this before the final order is issued. Any review request must be made within 14 days of the provisional order being issued.
53. **Section 27** enables a rent officer to correct an error in an order which determines the open market rent by issuing a new order.
54. **Section 28** provides that where a rent officer has made an order, the landlord and tenant will have a final course of redress to the Tribunal, if they wish. Any appeal to the Tribunal must be submitted within 14 days of the rent officer's final decision. Submitting an appeal to the Tribunal will render the rent officer's decision ineffective.
55. On receipt of an appeal, section 29 provides that the Tribunal must make an order setting the tenant's rent at the open market rent for the property. In doing so, the Tribunal has the power to vary the current rent upwards or downwards. Subsection (2) stipulates that the effective date from which the new rent set by the Tribunal applies will be either the date the rent increase had originally been due to take effect (if the Tribunal makes its order on or before that date), or, if it is too late for that, it will be the first rent payment date falling on or after the day on which the Tribunal makes its order. However, where it is the latter date, section 31 will operate to put the parties in the same financial position they would have been in had the order been made earlier. Subsection (3) of section 29 provides that when making an order, the Tribunal must record the amount of rent that covers the provision of services, unless these costs are negligible.
56. **Section 30** provides that the Tribunal's decision is final and there is no further course of appeal to the Upper Tribunal. However, the Tribunal has the ability to review its order and correct any minor errors.
57. **Section 31** deals with what is effectively an overpayment or underpayment of rent which arises where the effective date of the rent officer's or the Tribunal's decision is later than the date that the rent increase had originally been due to take effect. Throughout the adjudication, the tenant will continue to be liable to pay the existing rent as usual. Once the new rent has been determined, any necessary backdating is dealt with as follows:
- Subsection (2) provides that if the rent is decreased as a result of the adjudication process, the landlord must pay the tenant the difference between the new rent over the relevant period and the rent that was actually paid over the relevant period. The relevant period is the period between the original rent increase date and the date on which the new rent actually takes effect. If the landlord fails to pay the tenant, the tenant can withhold rent that is due in order to recover the overpayment or can raise an action for recovery with the Tribunal.
  - Subsection (3) provides that if the rent is increased as a result of the adjudication, the tenant must pay the landlord the difference between the old rent over the relevant period and the new rent over the relevant period. Again, the relevant period is the period between the original rent increase date and the date on which the new rent actually takes effect. This subsection is concerned only with the distinct liability which arises due to the rent increase: if the tenant has failed to pay the landlord the old rent in full during the adjudication period, the amount of that shortfall is a separate liability. As far as the tenant's section 31 liability is concerned, the tenant will have 28 days within which to pay the landlord the full amount due. If the tenant fails to pay the landlord within this timescale, on day 29 the sum is treated as rent arrears for the purpose of that eviction ground and as having been rent arrears from the date that the final rent determination was made.
58. **Section 32** sets out how rent officers and the Tribunal are to determine the open market rent of a property. What constitutes "rent" is defined in section 78, and the open market rent is to be determined without reference to the current tenant (since

it is a determination of the amount that the property could be rented for on the open market). However, subsection (2) provides that when making the determination, any work voluntarily paid for or carried out by tenant will be disregarded. This means, for example, a tenant who was permitted (but not obliged) to fit a new kitchen will not have to pay more as a result of the increased rental value of the property which is attributable to the improvements that he or she has made. Conversely, any failure by the tenant to comply with the terms of the tenancy is also disregarded. For example, if the tenant has damaged the furnishings in breach of the lease, the tenant will not benefit from a reduction in rent as a result: instead, the rent will be calculated as though that breach had not occurred. In both cases, the rule applies to acts by a predecessor under the same tenancy as well, meaning that it would cover acts by a tenant who assigned the tenancy to the current tenant, or acts by a person from whom the current tenant inherited the tenancy.

59. **Section 33** sets out what happens when a tenant withdraws his or her referral to a rent officer or when a tenant or landlord withdraws his or her appeal to the Tribunal. In such circumstances, the rent officer or Tribunal must issue an order stating that the rent payable from the effective date is either the amount specified in the original rent-increase notice or any other such amount as may have been agreed between the tenant and landlord. The effective date is calculated in accordance with the section that the order is made under (i.e. section 25 where the order is made by the rent officer, or section 29 where it is made by the Tribunal). Section 31 will operate as usual in cases where the effective date falls later than the date that the rent increase had originally been due to take effect.
60. Any order made by virtue of section 33 can only be made following the expiry of any period in which the other party may still appeal, or earlier where the other party has also waived his or her right to appeal. Under this section, no provisional order is required and the order does not need to specify the amount of rent that is fairly attributable to the provision of services.

### **Information about open market rent determinations**

61. **Section 34** provides that rent officers and the Tribunal must make information available on the rents they have taken into account in determining open market rents and the rents they have determined. The Scottish Ministers have the power to specify in regulations the information to be made available, the manner in which it is to be provided and set fees which may be charged for supplying that information.

## ***Chapter 3 – Rent pressure zones***

### **Designation and effect of rent pressure zone**

62. **Section 35** provides that a local authority may make an application to the Scottish Ministers requesting that all or part of the authority's area be designated as a rent pressure zone. Subsection (2) states that an application will only be valid if it fulfils any requirements which, prior to the application being made, the Scottish Ministers told the local authorities an application must fulfil in order for it to be valid.
63. **Section 36** provides that within 18 weeks of receiving a valid application, the Scottish Ministers must lay before the Scottish Parliament either draft regulations designating a rent pressure zone or a document explaining why they have not done so.
64. **Section 37** specifies that after receiving an application from a local authority, the Scottish Ministers may bring forward regulations which would designate an area as a rent pressure zone and specify the percentage, which includes zero and fractional parts of a whole number, that should be inserted into the formula set out in section 38(1) and used when calculating the rent increase cap in that area.

65. **Section 38** provides that any rent-increase notice issued for a private residential tenancy within a rent pressure zone cannot increase the rent payable under the tenancy to more than the amount calculated in accordance with that section. The calculation produces an amount which is the current rent, increased by the consumer prices index, plus one percentage point plus the number of percentage points (if any) specified in the regulations under section 37(1)(b). In addition to that amount, the rent may also be increased by an amount set by a rent officer under sections 42 and 43 to reflect improvements made to the let property.
66. **Section 39** provides that the Scottish Ministers cannot designate an area as a rent pressure zone without receiving an application from the local authority. An area can only be designated as a rent pressure zone once on the basis of the same application and the regulations designating the zone will cease to have effect after five years unless they, or another enactment, provide that they cease to have effect sooner or unless they are revoked.
67. **Section 40** outlines the procedure for designating a rent pressure zone and requires the Scottish Ministers to consult persons representing the interests of landlords and tenants within the local authority's area prior to laying before the Scottish Parliament any draft regulations designating an area as a rent pressure zone. Alongside draft regulations designating a zone, the Scottish Ministers must also lay before the Scottish Parliament a document which sets out a summary of the consultation responses and the evidence which leads them to believe that in the proposed area: rents are rising too much; the rises are causing undue hardship to tenants; and the rises are having a detrimental effect on the local authority's broader housing system.
68. **Section 41** enables the Scottish Ministers to amend section 38, so that instead of referring to the consumer prices index it refers to some other measure of inflation.

## **Improvements to let property**

69. **Section 42** allows the rent of a let property within a rent pressure zone to be increased to reflect improvements made to the property. It specifies that only property improvements completed after the tenancy was granted, or (where applicable) since the date of the last rent review, will be considered by the rent officer. And no increase will be allowed for work paid for (in whole or part) by the tenant. Repairs, maintenance and decoration do not constitute improvements for which a rent officer can allow an increase in rent under section 42.
70. **Section 43** outlines the process that should be followed by a rent officer when considering an application under section 42. It requires rent officers to follow any guidance published by the Scottish Ministers on what constitutes an improvement and the amount that can be charged in respect of improvements. When considering an application, the rent officer must have regard to any timeous representations made by the landlord and the tenant. Section 43 also gives the Scottish Ministers the power to make regulations prescribing the form by which applications to a rent officer under section 42 are to be made.

## **Part 5 – Termination**

### ***Chapter 1 – Security of tenure***

71. **Section 44** provides that a landlord and tenant can only bring a private residential tenancy to an end in accordance with Part 5 of the Act.
72. **Section 45** ensures that a private residential tenancy is not ended when the original landlord transfers his or her interest in the let property. If, for example, the original landlord sells the let property without first obtaining vacant possession, the purchaser will automatically become the landlord under the lease. Where the landlord's interest

transfers, section 328 of the Housing (Scotland) Act 1987 requires the person to whom it has been transferred to tell the tenant.

73. **Section 46** provides that, subject to section 47, a lawful sub-tenant with a private residential tenancy will be protected from eviction where his or her landlord's tenancy has been brought to an end. The sub-tenant then becomes the tenant under a new tenancy which has the same terms as the sub-tenancy. Subsection (3) defines the concept of lawful sub-tenancy. It explains that a person is lawfully a sub-tenant if either the sub-tenancy has been granted in accordance with the terms of the granter's tenancy, or if the sub-tenancy was granted in breach of the terms of the granter's tenancy but has nevertheless been tolerated by a person who could have taken action as a result of it being granted in breach of the granter's tenancy (e.g. the granter's landlord).
74. **Section 47** provides that the sub-tenant protection provided by section 46 does not apply if the First-tier Tribunal expressly disapplies it or if the tenancy of the person who was the sub-tenant's landlord was brought to an end by an eviction order issued on the basis of one of the eviction grounds listed in subsection (2).

### **Chapter 2 – Termination by tenant**

75. **Sections 48 and 49** provide that a tenant can only bring the tenancy to an end by writing to the landlord to advise him or her of the date the tenancy will end. The tenant must give the landlord a minimum amount of notice (see discussion of section 49(3) below). Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out (rebuttable) presumptions as to when a document that has been served by post or electronically is deemed to be received. The notice given by the tenant to the landlord must be given freely, without coercion and cannot be submitted before the tenant is occupying the let property. If it can be proved that the tenant was coerced into giving notice, the notice will be void.
76. **Section 48(3)** provides that a tenancy will not come to an end if the tenant has given the landlord notice that he or she is leaving but, before the specified leaving date arrives, the tenant makes a request to the landlord to remain in the property and the landlord agrees to the tenant's request.
77. **Section 49(2)** provides that a landlord can waive the tenant's minimum notice period. The landlord's agreement to this must be in writing.
78. **Section 49(3)** sets out the minimum notice a tenant must give a landlord. It is whatever period the parties agree or, if they do not agree a period, it is 28 days. Section 49(4) provides that any agreement between the parties as to the notice period must be in writing and cannot be made before the tenancy becomes a private residential tenancy.

### **Chapter 3 – Termination at landlord's instigation**

#### **Consensual termination**

79. **Section 50** provides that where the tenant has received from the landlord a notice to leave (see section 62) and moves out without requiring the landlord to obtain an eviction order, the private residential tenancy comes to an end on the later of either the day specified in the notice to leave or the day the tenant ceases to occupy the property. Subsection (3) signposts that the tenancy can be brought to an end earlier than section 50 would do, by means of the tenant giving notice under section 48 (in which event, the landlord could accept a shorter notice period or no notice period by virtue of section 49(2)).

#### **Eviction order**

80. **Section 51** provides a power for the Tribunal to issue an eviction order against a tenant when a landlord makes an application and the Tribunal finds that one of the eviction

grounds named in schedule 3 applies. The Tribunal can only find that an eviction ground named in schedule 3 applies in the circumstances in which the schedule states that the Tribunal may or must find that the ground applies. The Tribunal cannot find that an eviction ground applies by considering only the name assigned to the ground by the first sub-paragraph of the relevant paragraph of schedule 3.

81. An eviction order brings a tenancy to an end on the date specified by the Tribunal in the order (section 51(4)).
82. [Section 52](#) makes provision about applying to the First-tier Tribunal for an eviction order, and how the Tribunal is to deal with applications.
83. Subsection (1) makes clear that any one of a number of joint landlords can apply for an eviction order.
84. Subsection (2) provides that the Tribunal will not consider an application for eviction if the landlord has not first fulfilled the requirements of sections 54 to 56 and also supplied a copy of a notice to leave with the application. But, subsection (4) goes on to give the Tribunal discretion to accept an application even although the requirement in section 54 has not been complied with.
85. Subsection (5) provides that the Tribunal cannot consider whether an eviction ground applies unless it has either been stated in the notice to leave as a ground under which the landlord is seeking eviction or, with the Tribunal's permission, been included in the application to the Tribunal.
86. [Section 53](#) provides that in a case where a sub-tenant with a private residential tenancy would have had protection from eviction and become the tenant (see paragraph 73 above), the Tribunal can, if it considers it reasonable to do so, state in the eviction order that the sub-tenant's protection is not to apply. In such cases, the Tribunal must offer the sub-tenant the opportunity to make representations to the Tribunal.

### **Restrictions on applying for eviction order**

87. [Section 54](#) provides that a landlord cannot make an application to the Tribunal for an eviction order until the expiry of the relevant notice period in relation to the notice to leave. The relevant notice periods are 28 days if the tenant has been entitled to occupy the property for six months or less, or if the repossession ground (or grounds) the landlord is using is one or more of the following: failure to occupy as only or principal home, breach of tenancy agreement; rent arrears for three or more consecutive months; relevant criminal conviction; relevant anti-social behaviour; or association with a person who has a relevant conviction or has engaged in relevant anti-social behaviour. The notice period is 84 days if the tenant has been entitled to occupy the property for over six months and the notice to leave does not rely exclusively on the eviction grounds mentioned in subsection (3)(b). The notice period is calculated from the date of the tenant's receipt of the notice. When the landlord is completing a notice which is to be served on a tenant, section 62(5) specifies the time that should be factored in for delivery for the purpose of the notice.
88. [Section 55](#) sets out that a landlord cannot apply to the Tribunal for an eviction order using a copy of a notice to leave if it has been more than six months since the expiry of the relevant notice period.
89. [Section 56](#) provides that before submitting an application to the Tribunal for an eviction order, the landlord must inform the local authority of his or her intention to apply to the Tribunal. The notice to the local authority must be given in the manner and form prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003.

## **Wrongful termination**

90. **Section 57** provides that where a tenancy has been ended by eviction order and the tenant is not satisfied that the landlord was genuinely entitled to recover possession of the property under one of the specified eviction grounds, meaning that the Tribunal was misled into issuing an eviction order, the tenant can apply to the Tribunal for a wrongful-termination order. In such cases – and in the case of section 58 wrongful termination applications – the test will be whether the landlord genuinely intended to use the property in the way that the eviction ground required (even if, for some reason, that intention has not come to fruition). For example, a landlord might evict his or her tenant because he or she wants to sell the let property. However, after a year on the open market, the property has not sold and the landlord can no longer afford to maintain the mortgage repayments on it, so is forced to withdraw the property from the open market and re-let it to a different tenant. In such a case, if required, it is likely that the landlord could present a strong case to the Tribunal to demonstrate his or her genuine intent to sell.
91. **Section 58** provides that where a tenancy has been brought to an end as a result of the tenant leaving following receipt of a notice to leave from the landlord, the former tenant can apply to the Tribunal for a wrongful-termination order on the basis that he or she was misled into leaving the property by the landlord.
92. **Section 59** provides that the compensation specified in a wrongful-termination order may not exceed six months' rent. Where a case involves joint landlords, the Tribunal can make the wrongful-termination order against all, some or only one of the landlords.
93. **Section 60** places the Tribunal under a duty to issue a copy of any wrongful- termination order to the local authority or authorities with which the landlord is registered under the Antisocial Behaviour etc. (Scotland) Act 2004. Receiving a wrongful termination order may prompt a local authority to review the landlord's existing registration.

## **Sub-tenancies**

94. **Section 61** provides that if the property is sub-let, in addition to serving a notice to leave on the tenant, a landlord may give notice to any sub-tenant, regardless of what type of tenancy the sub-tenant possesses. A sub-tenancy notice to leave is a notice which includes the notice to leave given to his or her landlord (the superior landlord's tenant) and which meets any other requirements set down by the Scottish Ministers in regulations.
95. The point of a sub-tenancy notice to leave is that it puts the sub-tenant on notice that he or she may face eviction proceedings. If the sub-tenant remains a tenant of the let property by virtue of the sub-tenant protection given by section 46, the sub-tenancy notice to leave can be treated as a notice to leave so that the landlord can proceed to eviction proceedings without having to serve another notice to leave and wait for a new notice period to expire before applying to the Tribunal for an eviction order.

## **Chapter 4 – Interpretation of Part**

96. **Section 62** sets out that the prescribed notice to leave issued by a landlord must: be in writing; specify the day on which the landlord expects to be entitled to make an application to the Tribunal for an eviction order; state the ground, or grounds, on which the landlord proposes to end the tenancy; and fulfil any other requirements set out in regulations made by the Scottish Ministers. The day specified in the notice to leave will be the day after the relevant notice period ends (see section 54).
97. **Section 63** ensures that a lender who has a security over the let property (a mortgage) and is entitled to sell the property because the owner has defaulted on his or her repayments can apply for an eviction order against a tenant of the let property in the same way as a landlord can.

98. [Section 64](#) provides that with the exception of the references to six months in section 59, any reference to a period of six months in Part 5 means either the same day six months after the month in which it began or, if the month in which the period ends has no such day, the final day of that month. For example if the start of the six month period was 4 February the last day of the six month period would be 4 August, and if the start date was 31 August the last day would be 28 or 29 February, depending on whether or not it was a leap year.

## **Part 6 – Death of the Tenant**

99. [Section 65](#) provides that a private residential tenancy comes to an end if a sole tenant dies and nobody inherits the tenancy under section 67, 68 or 69.
100. [Section 66](#) provides that a joint tenant's interest under a private residential tenancy ends on his or her death. The tenancy will continue for the remaining joint tenants.
101. [Section 67](#) provides that if a sole tenant dies, leaving behind a partner, the partner inherits the tenancy subject to certain conditions being met. The conditions are that (1) the deceased tenant did not inherit the tenancy, (2) before the tenant died the landlord was given notice in writing that the partner occupied the property, (3) the partner was living in the property as his or her only or principal home at the time of the tenant's death and, where the partner was not married or in a civil partnership with the tenant, that the partner had been occupying the property as the partner's only or principal home for at least the 12 months before the tenant's death (and as an occupant about whom written notice had been given to the landlord).
102. [Sections 68](#) and [69](#) give succession rights to family members and carers. [Section 68](#) provides that on the tenant's death, a member of the tenant's family becomes the tenant if there is no partner to succeed to the tenancy. [Section 69](#) provides that on the tenant's death, a resident carer becomes the tenant if there is no partner or family member to succeed to the tenancy. Both sections add further conditions that (1) the deceased tenant did not inherit the tenancy, (2) the family member or carer is at least 16 years of age, (3) before the tenant died the landlord was given notice in writing that the family member or carer occupied the property, (4) that person was living in the property as his or her only or principal home at the time of the tenant's death and had been doing so for at least the 12 months before the tenant's death (and as an occupant about whom written notice had been given to the landlord). For a carer to succeed, he or she must also have given up any previous home. Where there is more than one family member or carer who has a right to succeed to a tenancy, they will be given a joint tenancy.

## **Part 7 – Miscellaneous Provisions**

103. [Section 71](#) provides the Tribunal with the jurisdiction to deal with all civil disputes arising from a private residential tenancy. It gives the Tribunal the same jurisdiction that a sheriff would ordinarily have to deal with these civil cases, and it does so to the exclusion of the sheriff's jurisdiction. This section ensures that any remaining civil disputes which are not specifically mentioned in the Act but which might arise during the course of a tenancy - such as an action for payment of rent arrears - can be dealt with by the Tribunal. Criminal cases will continue to be dealt with by the criminal courts as usual.
104. [Section 72](#) sets out that where it comes to the attention of the Tribunal, as a result of proceedings before it, that a landlord is not registered under Part 8 of the Anti-social Behaviour etc. (Scotland) Act 2004 as a fit and proper person with the relevant local authority, the Tribunal will be under a duty to inform the authority. The Tribunal must tell the authority the landlord's name and address and the address of the property for which he or she is the landlord.
105. [Section 73](#) provides that any errors in specified documents do not invalidate the document if they are sufficiently minor that they do not materially alter the effect of

the document. Of necessity, there are a number of documents which the Act requires the use of at certain times. This section ensures that a common sense approach can be taken to meeting these requirements, and a party is not penalised for an obviously minor error. The protection applies equally to landlords and tenants.

## **Part 8 – Consequential and Transitional Provision**

106. **Section 74** introduces schedule 4 (which contains modifications to other enactments in consequence of the Act).
107. **Section 75** introduces schedule 5 (which makes provision about tenancies which are assured, protected, or statutory tenancies on the day that private residential tenancies come into existence).

## **Part 9 – Final Provisions**

108. **Section 76** provides that the Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with, or for giving full effect to the Act or any provision made under it.
109. **Section 77** ensures that when making regulations under the Act, Ministers have the ability to make different provision for different purposes. This section also sets out the parliamentary procedure which applies to the exercise of the regulation-making powers conferred by the Act.
110. **Section 79** provides that Part 9 comes into force on the day after Royal Assent and that the other provisions of the Act come into force on such day as the Scottish Ministers appoint by regulations. Subsection (4) provides that the regulations which bring section 1 of the Act into force can also make minor amendments to the other Acts outlined in the subsection so that the references to the day that section one comes into force can be replaced with the actual date of its commencement. Inserting the actual date will make the amended legislation easier to follow.

## **Schedule 1 – Tenancies Which Cannot Be Private Residential Tenancies**

111. **Schedule 1** outlines the types of tenancies which cannot be private residential tenancies. In broad terms, these are: tenancies where the rent is less than £6 per week; a shop; licensed premises; agricultural land; student accommodation provided by a university, other educational institution or an institutional provider of student accommodation; a holiday let; accommodation where the landlord is resident from the outset of and throughout the tenancy; police housing; military housing; social housing (including sublets and assignments); accommodation for a homeless person provided under Part II of the Housing (Scotland) Act 1987; accommodation for an offender provided under the Social Work (Scotland) Act 1968; accommodation for an asylum seeker provided under section 4 or Part VI of the Immigration and Asylum Act 1999; accommodation under the Displaced Persons (Temporary Protection) Regulations 2005; a shared ownership tenancy; a protected tenancy under the Rent (Scotland) Act 1984 (“the 1984 Act”); a tenancy to which Part VI of the 1984 Act applies; a Part VII contract under the 1984 Act; and an assured tenancy within the meaning of the 1988 Act.

## **Schedule 2 – Statutory Terms Required by Section 8**

112. **Schedule 2** outlines statutory terms which, if regulations are made under section 7, will be terms applicable to every private residential tenancy (unless and to the extent that any regulations under section 7(3) allow them to be disapplied). The terms set out in the schedule are as follows:

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- Where rent is paid in cash, a written receipt must be provided to the tenant which includes the amount paid and either confirmation of any amount outstanding or confirmation that no arrears are outstanding.
- The rent can be increased in accordance with the process set out in Chapter 2 of Part 4 (and, in line with section 18 of the Act, by this process alone).
- The tenant must tell the landlord in writing if anyone aged 16 or over (who is not a joint tenant) lives in the property with the tenant and the property is that person's only or principal home. The tenant must provide the name and that person's relationship to the tenant.
- If a landlord has been told in writing about a person occupying the let property, the tenant must tell the landlord if that person subsequently ceases to live there as the person's only or principal home.
- The tenant cannot sublet the property (or any part of it), take in a lodger, assign his or her interest in the let property (or any part of it), or otherwise part with possession of the property, without the written agreement of the landlord.
- The tenant must allow reasonable access to the let property for an authorised purpose. Authorised purposes are carrying out work on the property which the landlord is entitled or obliged to carry out, inspecting the property in order to determine what (if any) work of that nature to carry out or inspecting it in pursuance of any other inspection right the landlord may have, and valuing the let property.

Where the statutory term is invoked by the landlord, it may be used by him or her to allow access by others – for example, by tradesmen or by rent officers who are valuing the property or a particular improvement that has been made to it.

The tenant is obliged to allow reasonable access where either 48 hours' notice has been given or where access is required urgently for the purposes specified, but this would not preclude a tenant from allowing more generous rights of access if both parties want to resolve a non-urgent problem more promptly.

These access rights are not exhaustive and, as with all of the statutory terms, the fact that certain rights will be included as statutory terms does not prevent the parties from supplementing those terms, provided that the additional term does not directly conflict with (and therefore displace) the statutory term. For example, it would be open to the parties to agree a separate access right for the purpose of showing the property to prospective tenants once the current tenant has served notice to terminate the tenancy.

### ***Schedule 3 – Eviction Grounds***

113. This schedule sets out the 18 grounds under which a landlord may seek eviction. Eight of the grounds are mandatory, which means that if the Tribunal is satisfied that the ground exists, it must issue an eviction order. Of the remaining ten grounds, two have a mandatory and a discretionary strand and eight grounds are discretionary. For the discretionary grounds, if the Tribunal is satisfied that the ground exists, it will still have discretion on whether to issue an eviction order. The grounds are as follows:

#### ***Part 1: Let property required for another purpose (all of these grounds are mandatory, with the exception of ground 5 which is discretionary)***

1. The landlord intends to sell the property for market value within three months of the tenant ceasing to occupy it.
2. Property to be sold by the mortgage lender.

3. The landlord intends to refurbish and this will entail significantly disruptive works to, or in relation to, the property.
4. The landlord intends to live in the property as his or her only or principal home.
5. A member of the landlord's family intends to live in the property as his or her only or principal home.
6. The landlord intends to use the property for a purpose other than providing a person with a home.
7. The property is held for a person engaged in the work of a religious denomination as a residence from which the duties of such a person are to be performed; the property has previously been used for that purpose; and the property is required for that purpose.

***Part 2: Tenant's status (ground 8 has a mandatory and discretionary strand and ground 9 is discretionary)***

8. The tenancy was granted to an employee and the tenant is no longer an employee. (This ground is mandatory if the application for eviction was made within 12 months of the tenant ceasing to be - or failing to become - an employee and discretionary if the application is made after the 12 month period has elapsed.)
9. The tenancy was entered into on account of the tenant having an assessed need for community care and the tenant has since been assessed as no longer having such needs.

***Part 3: Tenant's conduct (some of these grounds are mandatory, others are discretionary and ground 12 has a mandatory and discretionary strand)***

10. The tenant is not occupying let property as his or her only or principal home. (Mandatory)
11. The tenant has breached the tenancy agreement – this excludes the payment of rent. (Discretionary)
12. The tenant is in rent arrears. (This ground is mandatory if, for three or more months, the tenant has been continuously in arrears of rent and on the day the Tribunal considers the case, the arrears were at least one month's rent. The Tribunal must also be satisfied that the arrears were not due to a delay or failure in the payment of a relevant benefit. This ground is discretionary if the tenant has been in arrears of rent for three or more months, and on the first day the Tribunal considers the case, the arrears are less than one month's rent and the Tribunal is satisfied that it is reasonable on this basis to issue an eviction order. In deciding whether it is reasonable to evict, the Tribunal will consider whether the tenant being in arrears is due to a delay or failure in the payment of a relevant benefit.)
13. After the tenancy has begun, the tenant is convicted of using, or allowing the use of, the let property for an immoral or illegal purpose, or is convicted of an imprisonable offence committed in or in the locality of the let property. The application must usually be made within 12 months of the tenant's conviction. (Mandatory)
14. The tenant has acted in an anti-social manner to another person and the Tribunal is satisfied that it is reasonable to issue an eviction order given the nature of the behaviour and who it was in relation to or where it occurred. The application must usually be made within 12 months of the antisocial behaviour occurring. (Discretionary)
15. The tenant is associating in the let property with a person who has a relevant conviction or who has engaged in relevant anti-social behaviour. A relevant conviction is a conviction which, if it was the tenant's, would entitle the Tribunal to issue an eviction order. Relevant anti-social behaviour means behaviour which, if engaged in by the tenant, would entitle the Tribunal to issue an eviction order. The application

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must usually be made within 12 months of the conviction or antisocial behaviour.  
(Discretionary)

***Part 4: Legal impediment to let continuing (all of these grounds are discretionary)***

16. Landlord registration has been refused or revoked by a local authority.
17. House in Multiple Occupation (HMO) license revoked by the local authority.
18. Overcrowding statutory notice in respect of the property has been served on the landlord.

***Schedule 4 – Consequential Modifications***

114. [Schedule 4](#) makes consequential modifications to other legislation as a result of the Act.

***Schedule 5 – Transition from Regimes under Earlier Enactments***

115. [Paragraphs 1](#) and [2](#) of [schedule 5](#) provide for the transition from other tenancy regimes in the private rented sector by providing that no new assured or short assured tenancy may be granted after the Act is brought into force.
116. [Paragraph 3](#) permits landlords and tenants under an assured tenancy to agree to convert the tenancy into a private residential tenancy.
117. [Paragraphs 4](#) and [5](#) provide that a person succeeding to a tenancy under the Rent (Scotland) Act 1984 or the 1988 Act will become a tenant under a private residential tenancy.