

CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) ACT 2022

EXPLANATORY NOTES

THE ACT: OVERVIEW

Part 4: Tenancies

Removal of mandatory eviction grounds

Section 43: Private residential tenancies: discretionary eviction grounds

156. This section puts on a permanent footing the temporary changes made by paragraph 1 of schedule 1 of the Coronavirus (Scotland) Act 2020. It amends the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Tenancies Act”) which governs private residential tenancies. The result of this section is that all eviction grounds for such tenancies will become discretionary eviction grounds on a permanent basis.
157. The vast majority of tenancies which have been granted in the private rented sector since the 2016 Tenancies Act came fully into force are private residential tenancies. It is not possible to opt out of the private residential tenancy regime, although there are some tenancies which will not meet the necessary criteria to fall within it. For example, to be a private residential tenancy, the tenant must at some point have occupied the property as their only or main home. In addition, some property types or letting arrangements are excluded, such as designated student accommodation, living with a resident landlord or social housing (see schedule 1 of the 2016 Tenancies Act for a full list of excluded tenancies). Nevertheless, in most cases, the rules on eviction from privately let properties will be governed by the rules in schedule 3 of the 2016 Tenancies Act (read alongside Part 5 of that Act).
158. Prior to the temporary modifications made by the Coronavirus (Scotland) Act 2020, some eviction grounds for private residential tenancies were mandatory and some were discretionary. An eviction ground is referred to as “mandatory” in these notes where, if the First-tier Tribunal finds that the required elements of the landlord’s specified eviction ground apply in a particular case, it is obliged to issue an order evicting the tenant (subject to any other prerequisites being satisfied, such as any notice requirements having been fulfilled). An eviction ground is referred to as “discretionary” in these notes where, upon deciding that the specified eviction ground applies, the Tribunal is simply empowered (rather than required) to issue an eviction order and has to consider whether it would be reasonable to do so.
159. The eviction grounds which are changed from mandatory to discretionary on a permanent basis under this section are as follows—
 - the landlord intends to sell the property (paragraph 1 of schedule 3 of the 2016 Tenancies Act),
 - the property is to be sold by the lender under a heritable security (paragraph 2 of schedule 3),

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- the landlord intends to refurbish and it would be impracticable for the tenant to continue to occupy the property throughout those works (paragraph 3 of schedule 3),
 - the landlord intends to live in the property as their only or main home (paragraph 4 of schedule 3),
 - the landlord intends to use the property for a non-residential purpose (paragraph 6 of schedule 3),
 - the tenancy was granted as part of the tenant’s ongoing or proposed employment by the landlord but the tenant is no longer, or did not become, such an employee (paragraph 8 of schedule 3),
 - the tenant is not occupying the property as their only or main home, and nor is any person with a lawful sub-tenancy of the property (paragraph 10 of schedule 3),
 - the tenant has been convicted of a relevant crime (being one either relating to the property or one which occurred in the vicinity of it and which is punishable by imprisonment) (paragraph 13 of schedule 3).
160. In addition, there are two eviction grounds which, prior to the temporary changes made by the Coronavirus (Scotland) Act 2020, could be either discretionary or mandatory depending on the precise circumstances in which eviction was being sought. Both of those eviction grounds are modified by this section so that there will, on a permanent basis, now only be a discretionary eviction ground available. Those grounds are as follows—
- the property is held for use in connection with a religious purpose and is required for that purpose (paragraph 7 of schedule 3),
 - the tenant has been in rent arrears for at least three consecutive months (paragraph 12 of schedule 3).
161. All of these eviction grounds will be dealt with in the same way as those eviction grounds which have always been discretionary under the 2016 Tenancies Act (such as the landlord’s close family member intending to live in the property, or the tenant having breached the tenancy agreement in some way unrelated to rent arrears).
162. Although there is a reference in subsection (3)(k) of this section to the eviction ground of anti-social behaviour, it should be noted that this has always been a discretionary eviction ground. Since enactment, paragraph 14(2) of schedule 3 of the 2016 Tenancies Act has provided that the Tribunal “may”, rather than “must”, issue an eviction order where eviction is sought on the basis of anti-social behaviour. Paragraph (k) simply adds in, for the sake of consistency, that if ordering eviction on this ground then the Tribunal must be satisfied that it is reasonable to do so.

Section 44: Assured tenancies: discretionary eviction grounds

163. This section puts on a permanent footing the temporary changes made by paragraph 3 of schedule 1 of the Coronavirus (Scotland) Act 2020. It amends the Housing (Scotland) Act 1988 (“the 1988 Act”) which governs assured tenancies, including short assured tenancies. The result of this section is that all eviction grounds for such tenancies will become discretionary eviction grounds on a permanent basis, in a similar fashion to the change made by section 43 in respect of private residential tenancies.
164. Prior to the 2016 Tenancies Act, most tenancies were assured tenancies. As with private residential tenancies, it was not possible to opt out of the assured tenancy regime, although there were some tenancies which did not meet the necessary criteria to fall within it. For example, to be an assured tenancy, the tenant had to be a person occupying the property as their only or main home. In addition, schedule 4 of the 1988 Act lists

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various property types or letting arrangements which cannot be assured tenancies, such as certain student lets, a tenant living with a resident landlord or social housing. The private residential tenancy replaced the assured tenancy and since the 2016 Tenancies Act came fully into force, it has not been possible to grant a new assured tenancy (see schedule 5 of that Act). However, existing assured tenancies were allowed to continue (although the parties could opt to convert them if they wished).

165. As with private residential tenancies, prior to the temporary modifications made by the Coronavirus (Scotland) Act 2020, some eviction grounds for assured tenancies were mandatory and some were discretionary. A commonly used type of assured tenancy was the short assured tenancy, which, unlike other assured tenancies, could be terminated under section 33 of the 1988 Act simply on the basis of having reached its previously agreed end date. However, the majority of eviction grounds (referred to in the 1988 Act as “grounds for possession”) are set out in schedule 5 of the 1988 Act and apply to all types of assured tenancy.
166. The eviction grounds which change from mandatory to discretionary on a permanent basis under this section can be broadly summarised as follows—
- the property was let under a short assured tenancy, the tenancy has reached its end date, and tacit relocation is not operating (section 33 of the 1988 Act),
 - the property was previously occupied by the landlord and is now needed for the landlord or their spouse/civil partner as their only or main home (ground 1 in schedule 5 of the 1988 Act),
 - the property is to be sold by the lender under a heritable security (ground 2 in schedule 5),
 - the property was let for 8 months or less, and was let as a holiday home within the year preceding the tenancy (ground 3 in schedule 5),
 - the property was let for a year or less, and was let as student accommodation within the year preceding the tenancy (ground 4 in schedule 5),
 - the property is held for use in connection with a religious purpose and is required for that purpose (ground 5 in schedule 5),
 - the landlord intends to demolish or carry out substantial work to the property and cannot reasonably carry out the work without the tenant giving up possession (ground 6 in schedule 5),
 - the tenancy was inherited and proceedings for recovery of possession were commenced within a year of the former tenant’s death (ground 7 in schedule 5),
167. These eviction grounds will be dealt with in the same way as those eviction grounds which have always been discretionary under the 1988 Act (such as the tenant having been convicted of relevant anti-social behaviour, having been persistently late in paying rent, or having breached the tenancy agreement in some other way).
168. In addition, one eviction ground is repealed on the basis that it is now superfluous. Ground 8 in schedule 5 allowed eviction on the basis of rent arrears provided that, both at the date of serving notice of proceedings and at the date the proceedings begin, the arrears amounted to at least three months’ rent. However, Ground 12 in schedule 5 allows eviction on the basis of rent arrears without the arrears having to be of a particular amount (although they must still exist both at the date of serving notice of proceedings and at the date the proceedings begin). While previously the more serious rent arrears ground served a purpose because it gave rise to a mandatory, rather than discretionary, case for eviction, that will no longer apply. As such, ground 8 no longer serves any purpose as any eviction that would otherwise have been sought under it can be sought under ground 12 instead.

Section 45: Tenancies under the Rent (Scotland) Act 1984: discretionary eviction grounds

169. This section puts on a permanent footing the temporary changes made by paragraph 5 of schedule 1 of the Coronavirus (Scotland) Act 2020. It amends the Rent (Scotland) Act 1984 (“the 1984 Act”). The result of this section is that all eviction grounds for tenancies under that Act will become discretionary eviction grounds on a permanent basis, in a similar fashion to the changes made by sections 43 and 44 in respect of private residential tenancies and assured tenancies.
170. The 1984 Act tenancy regime of “regulated tenancies” pre-dated the introduction of assured tenancies. Again, this was effectively a type of “wrapper” imposing certain rules which automatically applied to tenancies which met the criteria set out in the legislation. Part 1 of the 1984 Act sets out various property types or letting arrangements which are excluded from the regime, such as certain student lets, a tenant living with a resident landlord or social housing. New tenancies under the 1984 Act were phased out under sections 42 to 46 of the 1988 Act. There are therefore likely to be exceedingly few tenancies (if any) still operating under this legislative regime.
171. As with private residential tenancies and assured tenancies, prior to the temporary modifications made by the Coronavirus (Scotland) Act 2020, some eviction grounds for tenancies under the 1984 Act were mandatory and some were discretionary. The grounds for granting an eviction order (referred to in the 1984 Act as an “order for possession”) are set out primarily in schedule 2 of the 1984 Act.
172. The eviction grounds which change from mandatory to discretionary on a permanent basis under this section can be broadly summarised as follows:
- the property was previously occupied by the landlord and it is now needed for the landlord or their family member, or is to be sold by the lender under a heritable security or is required following the landlord’s death (case 11 in schedule 2 of the 1984 Act),
 - the property was acquired with the intention of being used as a retirement home and the landlord has now retired and requires it, or it is to be sold by the lender under a heritable security or is required following the landlord’s death (case 12 in schedule 2),
 - the property was let for 8 months or less, and was let as a holiday home within the year preceding the tenancy (case 13 schedule 2),
 - the property was let for a year or less, and was let as student accommodation within the year preceding the tenancy (case 14 in schedule 2),
 - the property was let under a short tenancy and the short tenancy has ended (case 15 in schedule 2),
 - the property is held for use in connection with a religious purpose and is required for that purpose (case 16 in schedule 2),
 - the property has been used in connection with agricultural work and various other related criteria are met (cases 17 to 19 in schedule 2),
 - the property is tailored to meet special needs, the tenant does not have such needs and the property is required for a person who has such needs (case 20 in schedule 2),
 - the landlord is in the armed forces and requires the property as a residence or it is to be sold by the lender under a heritable security or is required following the landlord’s death (case 21 in schedule 2).
173. These eviction grounds will be dealt with in the same way as those eviction grounds which have always been discretionary under the 1984 Act (such as the tenant having

been convicted of relevant anti-social behaviour, being in rent arrears, or having breached the tenancy agreement in some other way).

Pre-action protocol in respect of evictions relating to rent arrears

Section 46: Private residential tenancies: pre-action protocol

174. This section puts on a permanent footing the temporary changes made by paragraph 5 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020. It amends the 2016 Tenancies Act to allow for the implementation, on a permanent basis, of a pre-action protocol which will apply in relation to any attempt by a landlord to end a private residential tenancy on the ground of rent arrears.
175. The section gives the Scottish Ministers a regulation-making power (subject to the affirmative procedure) to stipulate a pre-action protocol which will apply in such cases. While compliance with this protocol will not be compulsory, the First-tier Tribunal will be required, when considering whether it is reasonable to grant an application for an eviction order on the ground of rent arrears, to take into account the extent to which the landlord has complied with the protocol.
176. As the change is to be a permanent one, any pre-action protocol that is imposed will apply regardless of why the rent arrears have arisen, so it will not matter whether or not they arose during the period of the coronavirus pandemic. This contrasts with the Coronavirus (Scotland) (No.2) Act 2020 where the legislation required there to be a link.
177. The terms which have been imposed using the comparable power under the Coronavirus (Scotland) (No.2) Act 2020 are set out in the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 ([SSI 2020 No. 304](#)). These regulations require the Tribunal to consider matters such as whether the landlord has provided the tenant with clear information on how to access advice on their rent arrears, whether the landlord has made reasonable efforts to agree a reasonable payment plan, and whether the landlord has given reasonable consideration to the steps taken by the tenant and the tenant's circumstances.

Section 47: Assured tenancies: pre-action protocol

178. This section puts on a permanent footing, subject to a minor modification, the temporary changes made by paragraph 4 of schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020. It amends the 1988 Act to allow for the implementation, on a permanent basis, of a pre-action protocol which will apply in relation to any attempt by a landlord to end an assured tenancy (including a short assured tenancy) on a ground relating to rent arrears.
179. The section gives the Scottish Ministers the same regulation-making power (subject to the affirmative procedure) in respect of assured tenancies that they are given in relation to private residential tenancies under section 46.
180. The 1988 Act contains more than one eviction ground relating to rent arrears. Grounds 8 and 12 require there to be arrears on a particular date, whereas ground 11 can apply where the rent has persistently been paid late regardless of whether or not it is in arrears on a particular date. However, ground 8, which required the arrears to be of a specified amount, is now being repealed under section 44 (as any eviction that would otherwise have been sought under it can be sought under ground 12 instead, given that there is now no distinction in terms of Tribunal discretion). While the Coronavirus (Scotland) (No.2) Act 2020 applied the ability to put in place a pre-action protocol only to cases where the arrears met the threshold for ground 8, it is now applied to all of the rent-related grounds remaining in the 1988 Act.

Saving and transitional provision

Section 48: Tenancies: saving provision

181. This section makes saving provision to deal with notices that are served before 1 October 2022 (i.e. before the date of commencement of Part 4). This will affect eviction proceedings that are raised in relation to those notices even if the eviction proceedings themselves are only raised on or after 1 October 2022.
182. In all such cases, sections 43 to 47 of this Act will not apply. Instead, the law as modified by the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020 will continue in effect, despite the expiry of Part 1 of those Acts. Similarly, the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 will also continue to apply.
183. The result is that the existing temporary law on evictions will continue to apply to all pre-commencement eviction notices and all eviction proceedings raised in relation to those notices.
184. In most places, the provision made by this Act is the same as the existing temporary law. However, as set out above, some minor changes are made by this Act: for example, the pre-action protocol in section 47 applies to all rent arrears eviction grounds under the 1988 Act, not just one of them. Section 48 therefore ensures that if a notice is served by a landlord on the basis of the current law, the position that applies to the parties involved does not change.

Section 49: Tenancies: transitional provision

185. This section makes transitional provision to ensure that there is no gap between the revocation of the current pre-action requirements and the implementation of this Act's replacement pre-action protocol, particularly in light of the relatively early dates for expiry of the current law and commencement of the new law.
186. The avoidance of any gap is achieved by subsections (1) and (2). These subsections continue in force the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 and deem them to have been made under the powers inserted by sections 46 and 47 of this Act. Subsection (3) deals with any references in the pre-action requirements which need to be updated in order for that document to be read as being the pre-action protocol which is provided for under this Act. Subsection (4) then essentially ensures that this section applies only to post-commencement eviction notices and connected eviction proceedings. To the extent that the regulations are continued in force by section 48, they should be read without any of these changes (because the existing law is continued in force without any changes for the cases covered by section 48, and therefore no changes to the regulations are required in that context).
187. The pre-action protocol under this Act will therefore (at least initially) contain the same provisions as the current pre-action requirements specified under the Coronavirus (Scotland) (No.2) Act 2020. The regulations will be able to be revoked at a later date, and new regulations made under the powers created by this Act.