

HOUSING (SCOTLAND) ACT 2014

EXPLANATORY NOTES

THE STRUCTURE AND A SUMMARY OF THE ACT

Part Four – Letting Agents

89. [Part 4](#) of the Act makes provision to further regulate the letting agent industry in Scotland. The purpose of this part of the Act is to help improve letting agent levels of service and professionalism, by strengthening the regulation of the industry.
90. This involves the creation of a mandatory register of letting agents in Scotland, with an associated ‘fit and proper person test’; and the creation of a statutory code of practice to which all letting agents must adhere. The Act also enables the First-tier Tribunal (“FTT”) (which is to be established under the Tribunals (Scotland) Act 2014) to make a range of enforcement orders to provide redress for tenants and landlords in cases where a letting agent fails to comply with that code of practice.

Inclusion in the register

91. [Section 29](#) requires the Scottish Ministers to create and maintain a national register, containing an entry for each letting agent. This will include the name and address of each person entered in the register, and any other information relating to that person the Scottish Ministers may specify in regulations. The register will be available to the public.
92. [Section 30](#) provides that a letting agent may apply to be entered on the register, sets out the information that must be supplied as part of such an application, and makes provision for an application fee to be charged and gives the Scottish Ministers a power to determine this fee. The section should be read alongside section 44 which makes it an offence to operate as a letting agent without being entered on the register.
93. Subsection (2)(a) to (f) of section 30 sets out the information that an application must contain. These provide for what information is required depending on whether an applicant is a sole trader, a partnership, a company or a body with some other legal status. Where the applicant is not a natural person, subsection (2)(d) and (e) require certain details also to be supplied in relation to individual persons within the organisation who hold a senior or controlling position. When determining (under section 32) whether the applicant is a fit and proper person to be a registered letting agent, the Scottish Ministers may take into account information relating to these named individuals. Subsection (2)(a) to (f) should be read alongside section 31, which makes it an offence to knowingly provide false information or fail to supply the required information.
94. [Section 32](#) provides that the Scottish Ministers must determine an application which is made under section 30 and sets out aspects of the process they must follow. If they determine that the applicant, and any other person required to be identified in an application by virtue of section 30, is a fit and proper person to carry out letting agency work, and that the applicant meets any training requirements prescribed by the Scottish Ministers in regulations subject to the negative procedure, subsection (2) provides that

they must enter the applicant on the register. Subsection (3) provides that the regulations about training may prescribe further details of the training requirement - such as who should obtain it and when. If the Scottish Ministers determine that the applicant is not a fit and proper person then subsection (5) provides that they must refuse to enter the applicant in the register. These provisions should be read alongside section 34 which sets out the matters that must be considered in determining if a person is a fit and proper person to carry out letting agency work. Subsection (6) provides that where the Scottish Ministers are considering refusal of an application, they must give notice of this to the applicant, including providing reasons, and allow the applicant to make representations. Subsection (8)(d) requires the Scottish Ministers to provide reasons for a decision to refuse an application or a renewal of an existing provision.

95. [Section 33](#) provides a time limit by which the Scottish Ministers must make a decision on applications of 12 months from receipt of the application for registration or renewal. The Scottish Ministers will have the power to apply to the First-tier Tribunal (FTT), before the expiry of the 12 months, for a decision to extend this period. The length of the extension period will be at the discretion of the FTT. There will be tacit approval to the letting agent register if the Scottish Ministers have not made a decision within 12 months of an application being made (or longer period if the Tribunal has extended the period). The effect of tacit approval is that an applicant is treated for all purposes as a registered letting agent (subject to the modifications in subsection (10)). Letting agents registered in these circumstances will have a registration period of 12 months before being required to reapply.
96. [Section 34](#) sets out the material that the Scottish Ministers must take into account when deciding if a person is fit and proper to be entered on the register, which includes the Scottish Ministers having regard to all of the circumstances of the case. Subsection (2) relates to particular criminal convictions and contraventions of the law that must be considered. Subsection (3) excludes material relating to spent convictions from the material to be considered. Subsection (4) lists matters to be considered that are related to compliance with the letting agent code of practice and any associated enforcement orders. Subsection (5) provides a power for the Scottish Ministers to modify the list of convictions and contraventions at subsections (2) and (4) by order subject to the affirmative procedure.
97. [Section 35](#) provides that the Scottish Ministers may have regard to information which would be included in a criminal conviction certificate within the meaning of section 112 of the Police Act 1997 where they have reasonable grounds to suspect that the information already provided to them under section 34(2) of the Act is false or has become inaccurate.

Duties of registered letting agents

98. [Section 36](#) requires the Scottish Ministers to allocate a number to each registered letting agent. Registered letting agents must take all reasonable steps to ensure that the number is included in documents sent to landlords or tenants (prospective or current), advertisements and communications, and any other material that the Scottish Ministers may specify by order. Subsection (3) defines “advertisement” and “communication”.
99. [Section 37](#) places a duty on the registered letting agent to notify the Scottish Ministers in writing, as soon as practicable, if any of the information supplied in the application has become inaccurate due to a change in circumstances. Subsection (3) requires that any notification must be accompanied by such fee as the Scottish Ministers may determine by regulations, and subsection (3) provides a power for the Scottish Ministers to set that fee. Subsection (4) makes it an offence to fail to comply with this duty to inform.

Removal from the register

100. [Section 38](#) provides that, unless a new application is made under section 30, the Scottish Ministers must remove a registered letting agent from the register after three years from the date of registration.
101. [Section 39](#) provides that the Scottish Ministers may remove a registered letting agent from the register without waiting for the expiry of the three-year registration period if they consider the agent, or any other person who is required to be identified in an application by virtue of section 30, is not, or is no longer, or never was, a fit and proper person to carry out letting agency work or if the agent does not meet the training requirements prescribed under section 32(2)(c). Subsections (2) to (4) set out aspects of the process that the Scottish Ministers must follow before removing the person, including giving notice to the agent informing the agent of the right to make representations to the Scottish Ministers. There is also a requirement under subsection (4)(a) for the Scottish Ministers to provide their reasons for deciding to remove an agent from the register.
102. [Section 40](#) provides for a letting agent to apply to the Scottish Ministers to be removed from the register. The Scottish Ministers have a duty to do so if they are satisfied that the letting agent is no longer operating and it is otherwise appropriate to do so. The Scottish Ministers should also inform the agent of their decision, and provide reasons where they decide to refuse. Where the Scottish Ministers remove an agent from the register they are to inform the agent of the date of removal.

Appeals

103. [Section 41](#) provides for appeals to the FTT against decisions of the Scottish Ministers in relation to refusal of a registration application or removal from the register. Subsection (2) sets out the time period (21 days) for an appeal to be made following notification of the decision.

Consequences of refusal or removal

104. [Section 42](#) provides that where a person has been refused registration, or had the registration revoked, the Scottish Ministers must publicise this fact by noting it in the register. The note must remain on the register for a period of 12 months, unless the person is subsequently entered on the register within that time, in which case the note must be removed (subsections (4) and (5)).
105. [Section 43](#) relates to situations where a person has been removed from the register or has been refused entry to the register. It provides that such a person cannot recover any costs relating to carrying out letting agency work after having been refused entry to the register or removed from the register, and after the relevant appeal period has expired (where applicable). However, subsection (3) provides that costs incurred before the relevant date may be recovered where the agent has been removed from the register by reason of the current registration expiring and no further application having been received. Subsection (4) also requires the Scottish Ministers to publish as soon as practicable after the relevant date, in such manner as they think fit, a notice of the agent's refusal or removal and of the fact that no costs are recoverable from the date of refusal or removal.

Offences where no registration

106. [Section 44](#) makes it an offence to carry out letting agency work unless registered. Subsection (2) provides that a person is not committing an offence during the period of 21 days following the date of notification of refusal or removal from the register and during the period of the appeal process up until the appeal is decided or abandoned. Subsection (4) sets out the relevant sanctions and provides on summary conviction for a prison term not exceeding six months or a fine not exceeding £50,000, or both.

107. [Section 45](#) makes it an offence to use a number purporting to be a letting agent registration number without being a registered letting agent. Subsection (2) again provides that the offence will only be committed following 21 days of notification of refusal or removal from the register or following any appeal having been decided or abandoned.

Code of practice

108. [Section 46](#) provides for the establishment of a letting agent code of practice. It gives a power to the Scottish Ministers, by regulations to create a code which sets out the standards of practice; the handling of tenants' and landlords' money and the professional indemnity arrangements which are required of persons who carry out letting agency work (which is defined at section 61). Before finalising the code, the Scottish Ministers must carry out consultation on a draft of it. The regulations will be subject to the affirmative procedure for the first version of the Code; and any future complete replacement of the Code. Section 101(4) requires draft regulations setting out the first code must be laid before the Scottish Parliament within 18 months after this Act receives Royal Assent. Revisions to the Code would be subject to the negative procedure.
109. [Section 47](#) provides that where the terms of an agreement between the letting agent and either a landlord or tenant purport to exclude or limit any duty of the letting agent under the code or impose any penalty, disability or obligation in the event of a person enforcing compliance by the agent, the terms will have no effect.

Letting agent enforcement orders

110. [Section 48](#) provides that the route of redress where alleged breaches of the code of practice will be determined will be the FTT. Subsection (1) provides that a tenant or landlord or the Scottish Ministers may apply to the FTT for such a determination regarding a relevant letting agent. A "relevant" letting agent is defined at subsection (2). The purpose of this section is to make it clear the circumstances in which a tenant or landlord or the Scottish Ministers can raise a case with the FTT.
111. Subsection (3) provides that a landlord, tenant or the Scottish Ministers applying to have a case heard at the FTT under subsection (1) must specify why they believe the code has been breached by the letting agent. Subsection (4) provides that, before applying to the FTT, a tenant or landlord or the Scottish Ministers must tell the letting agent about the alleged breach of the code and subsection (5) provides that the FTT may reject the application if the letting agent has not been allowed a reasonable opportunity to rectify the matter.
112. Subsection (6) provides that the FTT must decide regarding an application made under subsection (1) whether a letting agent has complied with the code of practice. Subsections (7) and (8) relate to a letting agent enforcement order which must be issued if the letting agent has failed to comply with the code, and set out what the order may consist of.
113. [Section 49](#) provides that the FTT may vary or revoke an enforcement order made under section 48.
114. [Section 50](#) provides steps that may be taken by the FTT to establish if a letting agent enforcement order has been complied with. Subsection (2) provides that the FTT must notify the Scottish Ministers if it determines there has been a failure to comply. This allows the Scottish Ministers to take the matter into account for registration considerations under section 34.
115. [Section 51](#) makes it an offence to fail to comply with a letting agent enforcement order.

Monitoring of compliance

116. [Section 52](#) gives the Scottish Ministers the power to require such documents and information as they may reasonably require from any person carrying out letting agency work (which will include from staff) where the letting agency is a company. For example, information could be requested from company directors, the company owner and its staff. The information is to be obtainable for the purposes of enabling the Scottish Ministers to exercise any of their functions under Part 4 of the Act. This power covers Ministerial requests for information about compliance with the code of practice or the registration requirements. It does not enable the disclosure of information if such disclosure would be contrary to any enactment or rule of law.
117. [Section 53](#) provides powers for the Scottish Ministers to authorise persons to carry out an inspection of premises which appear to be being used for the purpose of carrying out letting agency work. An authorised person has various powers which can be carried out at an inspection.
118. [Section 54](#) outlines the circumstances where a sheriff, justice of the peace or stipendiary magistrate may issue a warrant to enable an authorised person to enter premises, by force if necessary, for the purpose of carrying out an inspection. In granting a warrant, the sheriff, justice of the peace or stipendiary magistrate will have to be satisfied that there are reasonable grounds for entering the premises and that one of the grounds for obtaining a warrant set out in subsection (2)(b) are met.
119. [Section 55](#) provides a right for the person entering any premises to take such other persons and such equipment as the person considers necessary. The power of entry can only be exercised at a reasonable time and the occupier of the premises must be given at least 24 hours' notice, unless giving such notice would defeat the object of the proposed inspection. A person carrying out an inspection must, if required to do so, produce written evidence of the person's authorisation to exercise that right. If the premises are unoccupied or the occupier is temporarily absent, the person authorised to enter must leave the premises as effectively secured against trespassers as the person found them. A statement must be left on the premises giving particulars of what has been taken, and stating that the person has taken possession of it.
120. [Section 56](#) creates offences relating to the powers to obtain information and carry out inspections at sections 52 and 53. Subsection (1) makes it an offence to fail or refuse to provide information to the Scottish Ministers or an inspector without reasonable excuse or to make a false or misleading statement in a material particular. Subsection (2) provides that it is to be an offence for someone to intentionally obstruct a person in the exercise of a power of entry. It is also an offence to fail to provide information to an inspector or to fail to give an inspector such facilities and assistance as the inspector thinks necessary. Subsection (3) provides that a person committing an offence under subsection (1) or (2) is to be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

General

121. [Section 57](#) provides a power for the Scottish Ministers to transfer, by regulations subject to the negative procedure, other, existing types of cases relating to letting agents which are currently within the jurisdiction of the sheriff court to the FTT.
122. [Section 58](#) sets out, where offences are committed by bodies corporate, who within that body is considered to have committed the offence and be liable to be proceeded against.
123. [Section 59](#) allows the Scottish Ministers to delegate their functions under Part 4 to another person or body (other than the powers to make orders or regulations).
124. [Section 60](#) makes some consequential modifications to the 2004 Act relating to landlord registration.

125. Sections 61 and 62 provide definitions of various terms used within this Part. In particular, section 61, subsections (3) and (4), allows the Scottish Ministers by order to exempt specified bodies or certain types of schemes from the regulatory regime for letting agents, as well as allowing a modification of the general definition of “letting agency work”. An order exempting bodies or schemes would be subject to the negative procedure, whereas an order modifying the meaning of “letting agency work” would be subject to the affirmative procedure.