

**Rent Assessment Panel for Scotland**  
**Annual Conference**  
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**The repairing standard: new law?**

**1. Introduction**

- 1.1 Chapter 4 of part 1 of the Housing (Scotland) Act 2006 is concerned with the repairing standard and is expected to come into force next year. The repairing standard will apply to any tenancy of a house let for human habitation unless excepted by section 12. The excepted tenancies are Scottish secure tenancies, short Scottish secure tenancies, tenancies of houses on land subject to an agricultural tenancy, crofting tenancies and small holdings. Only registered social landlords, local authorities and water and sewage authorities can offer SSTs and short SSTs. Those landlords, since 2002, have had their own repairing code in section 27 and schedule 4 to the Housing (Scotland) Act 2001. Those landlords however, in a limited number of cases, offer non-Scottish secure tenancies (generally common law tenancies or licences/occupancy agreements).
- 1.2 The new repairing standard applies only to tenancies. Thus, the common law with regard to definition of tenancies, and the need to ascertain the nature of the right in question (especially with so called occupancy agreements) will remain in some cases.
- 1.3 At present, the law with regard to repairing and maintenance of private rented houses is found in three main sources.
- 1.4 First, schedule 10 to the housing (Scotland) Act 1987 (“hereafter “schedule 10”) applies to any contract for letting of a house for human habitation subject to certain exceptions. The schedule implies statutory conditions relating to repair into the tenancy agreements for such houses. In short, the obligations are as follows:
  - the house is at the commencement of the tenancy in all respects reasonably fit for human habitation;
  - the house will be kept by the landlord during the tenancy in all respects reasonably fit for human habitation;

(in both cases, having regard to the building regulations when assessing that standard)

- to keep in repair the structure and the exterior of the house;
- to keep in repair and proper working order the installations in the house for the supply of water gas and electricity, sanitation, space heating and hot water.

- 1.5 There are certain exceptions to the application of these implied terms. For example, where the lease is for a period of three years or more, the parties may agree that the tenant is to put the house into a habitable condition. Another example is that the parties may make an application to the Sheriff for an order modifying the repairing obligations. Another exception exists where the landlord cannot carry out the repairs because it lacks the necessary access rights over another part of the building in which the house is located. There is particular provision made for repairs to the common parts. Finally, the landlord is not required to carry out repairs for which the tenant is liable because the tenant has failed to behave in a tenant-like fashion; or which are due to an Act of God or are repairs to property which the tenant is entitled to remove from the house.
- 1.6 The second source of obligations as to repair is the common law. The common law implies certain obligations into the lease between the parties. These common law obligations will be implied even where for whatever reason, the statute does not apply. The usual rule is that the common law obligations are implied unless expressly excluded by the express terms of the contract of lease. At common law, the landlord has a duty to inspect the subjects at the commencement of the tenancy to ensure that the subjects are habitable and then to keep the subjects in a habitable and watertight condition during the course of the tenancy. At common law, the tenant is obliged to act in a tenant-like fashion. This includes the obligation to keep the subjects at the tenancy aired and fired and to take reasonable care of the subjects of the tenancy. At common law, where the landlord materially fails in its repair obligations, the tenant is entitled *inter alia* to withhold rent in order to compel performance.
- 1.7 The third source of repair obligations, formally speaking, are the express terms of the agreement between the parties. Thus, the parties may agree that one or other is expressly liable to carry out particular repairs or maintenance. So long as that agreement does not contravene schedule 10, such an agreement is binding on the parties. In practice however, in the majority of cases, the tenancy agreement adds little by way of express

terms to the terms implied by statute but may often seek to exclude the remedy of withholding of rent and associated remedies.

- 1.8 There is no up-to-date comprehensive authoritative text of the law of disrepair in residential tenancies. Some useful sources of commentary on the law (one of them English) , to be used with greater or lesser amounts of caution are as follows: *Rankine* (1916), *Law of Leases in Scotland*; *Stair Memorial Encyclopaedia*, Vol. 13; *Paton and Cameron* (1967), *Landlord and Tenant*; *Robson and Halliday* (1998) *Residential Tenancies*; *Brown and McIntosh* (1987) *Dampness and The Law, Shelter*; *Knafler* (1997), *Remedies for Disrepair*, Sweet and Maxwell and my own detailed commentary to part 6 (repairs) of the Model Scottish Secure Tenancy Agreement, found on the Scottish Executive website.
- 1.9 The 2006 Act repeals schedule 10 of the 1987 Act. It sets up the repairing standard which may be considered to be a self-contained repairing code applicable to the private sector. A copy of it is attached as an appendix to this paper for ease of reference. The Act makes no alteration to the common law. The question that arises is: to what extent will the new law make any substantive change to the existing law?

## 2. The repairing standard: content

2.1 Section 13 of the 2006 Act defines the repairing standard as follows:

1) A house meets the repairing standard if-

- (a) the house is wind and water tight and in all other respects reasonably fit for human habitation,
- (b) the structure and exterior of the house (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order,
- (c) the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order,
- (d) any fixtures, fittings and appliances provided by the landlord under the tenancy are in a reasonable state of repair and in proper working order,
- (e) any furnishings provided by the landlord under the tenancy are capable of being used safely for the purpose for which they

are designed, and

(f) the house has satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire

- 2.2 It can be immediately seen that the first three conditions are very similar to the present law. The reference to wind and watertight is to the common law condition (which is wind and watertight against ordinary encroachment of the elements: see *Wolfson -v- Forrester* 1910 SC 675; *Rankine* p242) which is now placed on a statutory footing. Most of the text of the first three conditions is taken from schedule 10 including the general habitation test. This is thought to be the same as the common law test: see *Murray v Edinburgh District Council* 1981 SLT 253 and c.f. *Summers v Salford Corporation* 1943 AC 243 (HL)). Given the similarity of the text and the derivation, case law on the statutory predecessors of these new provisions will be of assistance in the interpretation of the 2006 Act provisions.
- 2.3 The second part of the first condition, in setting the standard by reference to reasonableness of habitation, rather than “repair” opens the door to a requirement that works may be required to the house which may not ordinarily (or as a matter of law) be properly termed “repair” (e.g. addition of insulation: *Gunn -v- Glasgow District Council* 1992 SCLR 1018 and see *Neilson v Scottish Homes* 1998 HousLR 56). In this, Scots law is quite different from English law where there is no equivalent common law obligation (see e.g. *Quick -v- Taff Ely Borough Council* [1985] 3 All ER 321). It is the common law formulation of this requirement which has been founded on by tenants seeking a remedy in respect of condensation dampness, the cause of which typically cannot be said to be due to disrepair. See for example *Fyfe -v- Scottish Homes* 1995 SCLR 209, *McCarthy -v- Glasgow District Council* (1988) SCOLAG 121; *Guy -v- Strathkelvin District Council* 1997 SCOLAG 30; 1997 HousLR 14; *McArdle v Glasgow City Council* 1989 SCLR 19; *Quinn v Monklands District Council* 1995 SCLR 393; *Gunn -v- Glasgow District Council* 1992 SCLR (N) 1018, 1997 HousLR 3). The leading case on the obligation to keep the house in all respects reasonably fit for human habitation is *Summers -v- Salford Corporation* [1943] AC 283 HL, at least where personal injury questions are concerned.
- 2.4 As for “structure and exterior” it has been held that a window is part of the structure, but the glass which was inserted into it was not. This was because the structure of a house is that part of it which gives the house

stability shape and identity as a house. The essentials were the foundations, walls and roof. Windows did not contribute to the stability shape nor identity of a building. However, the glass was part of the exterior since the exterior was the part of the house which lay between what was outside the house and what was inside the house. It was the part of the house which you could see if you looked at it from the outside: see *Hastie v Edinburgh District Council* 1981 SLT (Sh. Ct.) 61. Under the equivalent English legislation, the Court of Appeal has held that the structure and exterior extends to door frames, windowsills and lintels: *Quick v Taff Ely Borough Council* [1985] 3 All ER 321.

- 2.5 As for the installations in the house, the present legislation specifically excludes appliances for the use of the utilities (with the exception of sinks, baths and sanitary conveniences). Under the new legislation, that exclusion is absent. Instead, paragraph (d) brings in a new obligation that the landlord keep all fixtures fittings and appliances provided by it in a reasonable state of repair and in proper working order. There is no equivalent comprehensive statutory provision to this effect at the moment. Thus, at present, the only basis for such obligation would either be an express agreement in the contract of lease or an implied term in the contract to that effect.
- 2.6 The terms fixtures and fittings are commonly used in a conveyancing context. In deciding whether an item is a fixture (that is, affixed to the heritage so that it passes on sale) or a fitting (that is, a movable item which does not pass with the sale of the heritage) one has to have regard to a number of factors and not simply ask the question whether the article has been physically attached to the land: see *Scottish Discount Company Ltd v Blin* 1986 SLT 123 and *Jamieson v Welsh* (1900) 3 F 176. However, in the context of this legislation, since the landlord is liable to keep fixtures, fittings and appliances in a reasonable state of repair and then proper working order, it probably matters little how one categorises any given item as long as it has been provided by the landlord (with one exception: see below).
- 2.7 The fifth condition relates to the furnishings provided by the landlord. Again, there is at present no equivalent statutory obligation although there may be an obligation expressed or implied from the contract of lease. The term "furnishings" is to be given its ordinary everyday meaning. The Shorter OED defines the term thus: "*furniture and other (decorative) accessories (as curtains, carpets, etc.) for a room, house etc.*". "Furniture" is defined as being "*the moveable (functional) articles in a room, house etc.*" It should be observed that the obligation as regards furnishings

is concerned only with safety and not the state of repair or working order as such.

- 2.8 The final condition relates to smoke alarms and the like. Again, there is no statutory obligation in the private sector, except in the case of HMOs, to have such devices provided. It is unclear whether the provision extends beyond the mere provision of smoke alarms and extends to an obligation to keep the smoke alarms in working order. There is no express obligation to do so unlike the second third and fourth repairing standards. Neither is it clear, even if the landlord has a duty to keep the smoke alarm in working order, whether this extends to replacement of batteries. However, section 13(5) provides that: *“in determining whether a house meets the standard of repair mentioned in subsection (1)(f), regard is to be had to any building regulations and any guidance issued by the Scottish Ministers on provision for detecting fires and for giving warning in the event of fire or suspected fire”*.

### 3. The repairing standard: assessment of whether standard met

- 3.1 Section 13(2) provides that: *“in determining whether a house meets the standard of repair mentioned in subsection (1)(a), regard is to be had to the extent (if any) to which the house, by reason of disrepair or sanitary defects, falls short of the provisions of any building regulations.”*
- 3.2 This provision mirrors the provision of schedule 10(1)(4) except that under that Act, the reference to the building regulations was only in relation to the requirement to keep the subjects in all respects reasonably fit for human habitation. The case law relating to that provision in schedule 10 held that that the intention of that provision was to provide a kind of benchmark or standard against which one could measure whether the conditions in their house were reasonably habitable. However, that requirement did not import a requirement that are landlord carry out works to the house to bring the house up to the standard of the building regulations at any time, even when the building regulations are amended. See *Fyfe -v- Scottish Homes* 1995 SCLR 209 and *Guy v Strathkelvin Council* 1997 HousLR 14 (condensation dampness cases).
- 3.3 Section 13(3) provides as follows: *“In determining whether a house meets the standard of repair mentioned in subsection (1)(b), regard is to be had to a) the age, character and prospective life of the house, and b) the locality in which the house is situated”*.
- 3.4 Again, this provision mirrors schedule 10 (see paragraph 3 (3)). However, under schedule 10, this provision only applied to the implied repairs

provision and not the reasonable habitability condition. As with schedule 10, the point of the provision is to provide a means of assessing whether the condition of a particular house does, or does not, meet the required standard. Thus, the required standard is not an absolute standard but may vary from house to house and from locality to locality.

#### 4. When is the standard to be met?

- 4.1 Section 14(1) provides that the landlord must ensure that the house meets the repairing standard both at the start of the tenancy and at all times during the tenancy. The obligation “to ensure” is a strict one. So far as the obligation at the start of the tenancy is concerned, this mirrors the common law obligation (e.g. *Mellon -v- Henderson* 1913 SC 1207, *Johnstone -v- Glasgow District Council* 1980 SLT 50, *Hughes Tutrix -v- Glasgow District Council* 1982 SLT (Sh Ct) 70; see *Erskine, Institutes*, II, 6, 39 and 43 and *Rankine* p241-2). There is an obligation amounting to warrandice that the subjects meet the common law test. It appears that the same condition is reflected in the statute. At common law, that obligation implies a duty on the landlord to inspect: see *Hughes Tutrix*. That obligation to inspect is found now in section 19.
- 4.2 So far as the obligation during the course of the tenancy is concerned, the strictness of the obligation “to ensure” is substantially modified by section 14(3). That provides that the landlord’s duty only applies where the tenant notifies the landlord, or the landlord otherwise becomes aware (‘constructive notice’), that work requires to be carried out for the purposes of complying with the repairing standard. In so providing, the statute effectively incorporates the common law (*Rankine*, p240, *Paton and Cameron*, p132, *Shields -v- Dalziel* (1887) 24 R 849, *Gunn -v- NCB* 1982 SLT 526; c.f. English cases where the rule is the same: *McGreal -v- Wake* (1984) 128 SJ 116, *Golden Casket (Greenock) -v- BRS (Pickfords)* 1972 SLT 146; c.f. *O’Brien v Robinson* [1973] AC 912; [1973] 2 WLR 393; (HL)). Furthermore, in terms of section 14(4) the obligation on the landlord is, in effect, to carry out the work required within a reasonable time. Again, this reflects the common law: see cases cited above. Note that the statute expressly refers to “work” rather than repair. This also reflects the common law position which is that the landlord obligation is not dependent on proof of ‘disrepair’.
- 4.3 The reasonableness of that time will depend on all the circumstances including the seriousness of the disrepair (e.g. *Scottish Heritable Security -v- Granger* (1881) 8 R 459, *Gunn -v- NCB supra*, *Bolan -v- Glasgow District*

*Council* (1984) SHLR 40 *McGreal -v- Wake* (1984) 128 SJ 116; *Shields -v- Dalziel* (1987) 24 R 849), the effect on the tenant, the effect on the building, the complexity of the works, the ease with which it is possible to specify what needs to be done, the landlord's own internal or published policy, policies of other, similar landlords, expert evidence (from, say, plumbers, architects, housing professionals) including possibly the existence of a planned modernisation programme.

- 4.4 However, where the fault was present at the commencement of the tenancy, there is no such reasonable period of time since the landlord guarantees that the house is tenantable at the start of the tenancy
- 4.5 It should be noted that the right of a tenant to complain to the private rented housing panel and committee is restricted to allegations that the landlord has failed in its obligations under section 14(1)(b) only: section 22(1). Thus, even though the tenant has the right to provision of a house which complies with the repairing standard from the first moment of the tenancy, if the house is not so compliant, the tenant has no right to complain to the panel. The tenant could however then treat the defect as one which is continuing, notify the landlord, wait a reasonable time for the repairs to be done and if they are not then done, make a complaint to the panel.

## 5. Exceptions to the landlord's repairing duty

- 5.1 Section 15 deals with, in effect, the common parts of the building in which the house, or flat, is located. The effect of that section is that the landlord's duty to keep in repair the structure and exterior of the house includes those parts of the building in which the flat or house is located, if the landlord has any kind of obligation arising from a real burden or other obligation to maintain that part of the building, whether alone or in combination with others. However, the repairing obligation is only enforceable where the tenant can show that any part of the building which the tenant is entitled to use is adversely affected by the disrepair or failure to keep in proper working order. In practice, this provision it is intended to deal with disrepair to the structure and exterior of their house which affects the common parts of a tenement which the tenant is entitled to use. This provision is similar in content to schedule 10(3)(1B).
- 5.2 Section 16(4) also deals with the common parts. It provides that: "*A landlord is not to be treated as having failed to comply with the duty imposed by section 14(1) where the purported failure occurred only because the landlord lacked necessary rights (of access or otherwise) despite having taken reasonable*

*steps for the purposes of acquiring those rights.*" In other words, if the landlord is unable to carry out the repairs because it cannot gain access to land or premises which is necessary to do the repairs, it will not be in breach, providing that it can show that it has taken reasonable steps. What are reasonable steps will of course depend on the circumstances. This provision mirrors schedule 10(3)(3A). There is no case that I am aware of on the interpretation of this provision.

- 5.3 Section 16(1) provides that the landlord does not require to carry out any work which the tenant is required by the terms of the tenancy to carry out. However, such a condition may only be imposed if the lease was for a period of 3 years at least and is not determinable within that period: section 16(2). This mirrors schedule 10(1)(2) except that there, the exception only applies to the reasonable habitability condition.
- 5.4 Section 16(1)(b) provides that a landlord is not required to carry out work for which the tenant is liable by virtue of the tenant's liability to use the house in a proper manner. In other words, where the need for the repair has arisen because the tenant is in breach of his obligations to use the house in a proper manner, the landlord is not obliged to repair.
- 5.5 This reflects the common law and is also found in schedule 10 (3) (2). The tenant must act in a "tenant-like" fashion: see *Warren -v- Keen* [1954] 1 QB 15, an English case that is thought would be followed in Scotland. The tenant is liable thus for damage caused by his/her wilful or negligent behaviour (*Hardie -v- Black* (1768) Mor. 10133), that of his sub-tenants and servants (*Sutherland -v- Robertson* (1736) Mor. 13979; *McLellan -v- Ker* (1797) Mor. 10134) and family and guests (*Warren -v- Keen*). It follows that the tenant is not liable to the landlord for damage caused other than wilfully or negligently by him/her self, family, co-residents and visitors. At common law the tenant has a duty to remain in possession of the house so it does not suffer from being unoccupied *Rankine*: p233-236. See also *Smith -v-Henderson* (1847) 24 R 1102. It follows from this that the house must be kept aired and fired so as to prevent damp. *Mickel -v-McCoard* 1913 SC 896: the tenant's duty of care extends, in freezing weather, to either draining down the water system or informing the landlord of his/her absence. Where the tenant, those residing in the house (including family) or visitors have failed to act with reasonable care, the tenant is liable for any damage (*Sutherland -v- Robertson*) even if s/he was not personally negligent. At common law, a tenant must not invert possession, that is, use the subjects for a purpose other than that for which they were let; here, as a dwelling house. (See generally for example Paton & Cameron, *Landlord and Tenant*, (2<sup>nd</sup> ed.) 1967, p137).

The effect of the statutory predecessor of section 16(1)(b) [schedule 10(3)(2)] is that the tenant is *not* liable for damage caused wilfully by third parties: *Hastie -v- Edinburgh District Council* 1981 SLT (Sh Ct) 61 and 92 (window broken by vandals).

- 5.6 A further exception is created by section 16(1)(c) which provides that the landlord is not required to rebuild all or to reinstate the house in the event of destruction or damage by “fire...storm, flood or other inevitable accident” that is to say, an Act of God. Again, that reflects the previous statutory provision (Schedule 10(2)(b)).
- 5.7 Another exception is that the landlord, understandably, is not required, in terms of section 16 (1) (d) to repair or maintain anything that the tenant is entitled to remove from the house. Thus, if the tenant has introduced a new fixture to the house, that then becomes part of the heritage and the tenant is not entitled to remove it from the house (for example a new kitchen or bathroom: assuming that he obtained permission). However, it also follows from this that the landlord does have an obligation to maintain and repair that fixture. The landlord however would have no obligation to repair or maintain a fitting brought in by the tenant (for example a stand alone cooker).

## 6. The repairing standard: other provisions

- 6.1 Sections 17 and 18 contain comprehensive prohibitions on the landlord and tenant contracting out of the repairing standard obligations except with the consent of the sheriff.
- 6.2 Section 28 provides that the landlord must, on or before the start of the tenancy provide the tenant with written information about the effect of chapter 4 in relation to the tenancy. The Scottish Ministers may issue guidance on the form and content of information and the way in which it should be provided. No such Guidance has been issued at the date of writing.

## 7. Conclusions

- 7.1 The majority of the content of the repairing standard is not new. The content has predecessors in the 1987 Act and in the common law.
- 7.2 In effect, what chapter 4 does is to bring into one place, in a codified fashion, the common law and the statutory provisions relating to repair and maintenance, together with certain modifications and some important new additions, particularly in relation to fittings, furnishings

and fire safety. That in itself it is a valuable exercise in that it makes the law clearer and more accessible for landlords and tenants, as well as those who are required to advise- or adjudicate.

- 7.3 Since the law is for the most part not entirely new, the case law on its predecessors may well be of assistance to those seeking to interpret chapter 4 of part one of the 2006 Act. However, although the case law is likely to be helpful, caution must be exercised given that there are certain significant differences. Furthermore, the application of English case law should be approached with a great degree of caution given the differences between English and Scots law on the law of repair both common law and statutory. Nonetheless, even English case law may be of great assistance in at least some cases.
- 7.4 Since the common law is not expressly altered or abolished by the Act, it remains in force in so far as any tenancy may not be covered by chapter 4 and in so far as there may be any gaps in the restatement of the law in chapter 4. However, the jurisdiction of the panel of course extends only to the repairing standard and its provisions in chapter 4 and not to any extraneous matters.
- 7.5 The provision for the first time of a straightforward tribunal mechanism to deal with complaints of disrepair is an important step forward. The current mechanism is one which in practice does not provide an adequate means for redress in the experience of many if not most tenants. Providing a ready mechanism to address repair issues not only improves access to justice, but is likely to contribute to the raising of standards in the private rented housing sector, a development which must be in the overall interests of both tenants and landlords.

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## Appendix

**CHAPTER 4  
Part 1 of the  
Housing  
(Scotland) Act  
2006**

### THE REPAIRING STANDARD

#### *Landlord's duty to repair and maintain*

#### **12 Tenancies to which repairing standard duty applies**

(1) This Chapter applies to any tenancy of a house let for human habitation unless it is-

- (a) a Scottish secure tenancy or a short Scottish secure tenancy,
- (b) a tenancy of a house retained or purchased by a local authority under section 121 of the 1987 Act for use as housing accommodation,
- (c) a tenancy of a house which is-
  - (i) on land comprised in a lease constituting-
    - (A) a 1991 Act tenancy (within the meaning of the Agricultural Holdings (Scotland) Act 2003 (asp 11)),
    - (B) a short limited duration tenancy (within the meaning of that Act), or
    - (C) a limited duration tenancy (within the meaning of that Act), and
  - (ii) occupied by the tenant of the relevant lease,
- (d) a tenancy of a house on a croft (within the meaning of the Crofters (Scotland) Act 1993 (c.44)), or
- (e) a tenancy of a house on a holding situated outwith the crofting counties (within the meaning of that Act of 1993) to which any provision of the Small Landholders (Scotland) Acts 1886 to 1931 applies.

(2) A reference in this Chapter to a tenancy refers only to a tenancy to which this Chapter applies.

#### **13 The repairing standard**

(1) A house meets the repairing standard if-

- (a) the house is wind and water tight and in all other respects reasonably fit for human habitation,
- (b) the structure and exterior of the house (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order,
- (c) the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order,

(d) any fixtures, fittings and appliances provided by the landlord under the tenancy are in a reasonable state of repair and in proper working order,

(e) any furnishings provided by the landlord under the tenancy are capable of being used safely for the purpose for which they are designed, and

(f) the house has satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire.

(2) In determining whether a house meets the standard of repair mentioned in subsection (1)(a), regard is to be had to the extent (if any) to which the house, by reason of disrepair or sanitary defects, falls short of the provisions of any building regulations.

(3) In determining whether a house meets the standard of repair mentioned in subsection (1)(b), regard is to be had to-

(a) the age, character and prospective life of the house, and

(b) the locality in which the house is situated.

(4) The reference in subsection (1)(c) to installations in a house includes reference to installations outwith the house which, directly or indirectly, serve the house and which the owner is responsible for maintaining (solely or in common with others) by virtue of ownership, any real burden or otherwise.

(5) In determining whether a house meets the standard of repair mentioned in subsection (1)(f), regard is to be had to any building regulations and any guidance issued by the Scottish Ministers on provision for detecting fires and for giving warning in the event of fire or suspected fire.

#### **14 Landlord's duty to repair and maintain**

(1) The landlord in a tenancy must ensure that the house meets the repairing standard-

(a) at the start of the tenancy, and

(b) at all times during the tenancy.

(2) The duty imposed by subsection (1) includes a duty to make good any damage caused by carrying out any work for the purposes of complying with the duty in that subsection.

(3) The duty imposed by subsection (1)(b) applies only where-

(a) the tenant notifies the landlord, or

(b) the landlord otherwise becomes aware,

that work requires to be carried out for the purposes of complying with it.

(4) The landlord complies with the duty imposed by subsection (1)(b) only if any work which requires to be carried out for the purposes of complying with that duty is completed within a reasonable time of the landlord being notified by the tenant, or otherwise becoming aware, that the work is required.

#### **15 Application of duty in relation to flats etc.**

(1) Where a house forms part only of any premises, the reference in section 13(1)(b) to the house includes reference to any part of those premises which the owner of the house is responsible for maintaining (solely or in common with others) by virtue of ownership, any real burden or otherwise.

(2) Nothing in subsection (1) requires the landlord to carry out any work unless any part of the premises, or anything in the premises, which the tenant is entitled to use is adversely affected by the disrepair or failure to keep in proper working order.

## **16 Exceptions to landlord's repairing duty**

(1) The duty imposed by section 14(1) does not require-

(a) any work to be carried out which the tenant is required by the terms of the tenancy to carry out,

(b) any work to be carried out for which the tenant-

(i) is liable by virtue of the tenant's duty to use the house in a proper manner, or

(ii) would be so liable but for any express undertaking on the landlord's part,

(c) the house to be rebuilt or reinstated in the event of destruction or damage by fire or by storm, flood or other inevitable accident, or

(d) the repair or maintenance of anything that the tenant is entitled to remove from the house.

(2) The exception made by subsection (1)(a) applies only if the tenancy concerned is-

(a) for a period of not less than 3 years, and

(b) not determinable at the option of either party within 3 years of the start of the tenancy.

(3) Where the terms of a tenancy are not agreed until after the tenancy starts, the tenancy is, for the purposes of subsection (2), to be treated as starting on the date of agreement.

(4) A landlord is not to be treated as having failed to comply with the duty imposed by section 14(1) where the purported failure occurred only because the landlord lacked necessary rights (of access or otherwise) despite having taken reasonable steps for the purposes of acquiring those rights.

## **17 Prohibition on contracting out**

(1) The terms of a tenancy and of any other agreement between the landlord and the tenant are of no effect in so far as they purport to-

(a) require the tenant to carry out, or to pay for or contribute towards the cost of, any work which the landlord requires to ensure be carried out for the purposes of complying with the duty imposed by section 14(1),

(b) exclude or limit that duty, or

(c) provide for termination of the tenancy, or impose on the tenant any penalty, disability or obligation, in the event of the tenant enforcing compliance by the landlord of that duty.

(2) This section is subject to any contrary provision made by order under section 18.

## **18 Contracting out with consent of sheriff**

(1) The sheriff may, on the application of the landlord or the tenant, by order exclude or modify the application to the tenancy of any of the provisions of sections 14, 15 and 17.

(2) An order under subsection (1) may be made only if-

- (a) the other party under the tenancy consents, and
- (b) the sheriff, having regard to the terms of the tenancy and to all the circumstances, considers that it is reasonable to do so.

## **19 Pre-tenancy inspection**

The landlord must-

- (a) inspect the house before the tenancy starts for the purpose of identifying any work necessary to comply with the duty imposed by section 14(1)(a), and
- (b) notify the tenant of any such work.

## **20 Tenant's right to information about landlord's duty**

(1) The landlord must, on or before the start of a tenancy, provide the tenant with written information about the effect of this Chapter in relation to the tenancy.

(2) The Scottish Ministers may issue guidance to such persons as they think fit about the form and content of information to be provided under subsection (1) and the manner in which the information should be provided.

(3) Any landlord to whom such guidance is issued must have regard to it.

(4) The Scottish Ministers may vary or revoke any such guidance.

### *Enforcement of repairing standard*

## **21 Naming of panel and re-naming of committees**

(1) The panel constituted under Schedule 4 of the Rent (Scotland) Act 1984 (c.58) is to be known as the private rented housing panel.

(2) Rent assessment committees constituted in accordance with that Schedule are to be known as private rented housing committees.

(3) The panel, the president of the panel and those committees are-

(a) to continue to exercise the functions conferred on them by virtue of Part 5 of the Rent (Scotland) Act 1984 (c.58) and Part 2 of the Housing (Scotland) Act 1988 (c.43), and

(b) in addition, to exercise the functions conferred on them by this Act.

(4) It is for the president to monitor the exercise by those committees of the functions conferred on them by this Act.

(5) Those committees must comply with any direction, and have regard to any guidance, given by the president in connection with the exercise of those functions.

(6) But the president may not give any such direction in relation to a particular case.

(7) Directions or guidance given under subsection (5) may be varied or revoked at any time.

(8) The president's functions under this Act may, where the president is absent or incapacitated, be exercised by the vice-president of the panel.

(9) Any reference to the panel or to any of those committees in any enactment or instrument is to be construed in accordance with subsection (1) or, as the case may be, (2).

## **22 Application to private rented housing panel**

(1) A tenant may apply to the private rented housing panel for determination of whether the landlord has failed to comply with the duty imposed by section 14(1)(b).

(2) An application under subsection (1) must set out the tenant's reasons for considering that the landlord has failed to comply with that duty.

(3) No such application may be made unless the tenant has notified the landlord that work requires to be carried out for the purpose of complying with that duty.

(4) No such application may be made where the landlord is-

(a) a local authority landlord (within the meaning of the Housing (Scotland) Act 2001 (asp 10)),

(b) a registered social landlord (being a body registered in the register maintained under section 57 of that Act),

(c) Scottish Homes, or

(d) Scottish Water.

(5) Schedule 2 makes further provision about the procedure for making and determining an application under this section.

(6) Paragraph (c) of subsection (4) is to cease to have effect on the date specified in an order made under section 87(1) (power to dissolve Scottish Homes) of the

Housing (Scotland) Act 2001 (asp 10).

### **23 Referral to private rented housing committee**

- (1) The president of the private rented housing panel must decide whether to-
  - (a) refer an application under section 22(1) to a private rented housing committee, or
  - (b) reject the application.
- (2) The president may reject an application only if the president considers-
  - (a) that it is vexatious or frivolous,
  - (b) where the tenant has previously made an identical or substantially similar application in relation to the same house, that there has not been a reasonable period of time between the applications, or
  - (c) that the dispute to which the application relates has been resolved.
- (3) The president must make a decision under subsection (1)-
  - (a) within 14 days of the panel's receipt of the application concerned, or
  - (b) where the president considers-
    - (i) that the decision cannot be made without further information, or
    - (ii) that there is a reasonable prospect of the dispute being resolved by the parties,
 by such later date as the president considers reasonable.
- (4) The president must, as soon as practicable after rejecting an application give notice of the rejection-
  - (a) to the tenant, and
  - (b) where the president is aware of the name and address of a person who acts for the tenant in relation to the application, to that person.
- (5) Such a notice must-
  - (a) set out the reasons for the rejection, and
  - (b) explain the procedure for appealing against it.

### **24 Determination by private rented housing committee**

- (1) The private rented housing committee to which a tenant's application under section 22(1) is referred must decide whether the landlord has complied with the duty imposed by section 14(1)(b).
- (2) Where the committee decide that the landlord has failed to comply with that duty, they must by order (a "repairing standard enforcement order") require the landlord to carry out such work as is necessary for the purposes of ensuring-
  - (a) that the house concerned meets the repairing standard, and
  - (b) that any damage caused by the carrying out of any work in pursuance

of that duty or the order is made good.

(3) A repairing standard enforcement order must specify the period within which the work required by the order must be completed.

(4) The period so specified must be the period beginning with the date from which the order has effect within which the committee reasonably consider that the work required can be completed (but must not, in any case, be a period of less than 21 days).

(5) A repairing standard enforcement order may specify particular steps which the committee require the landlord to take in complying with the order.

(6) Where the committee are prevented by reason only of section 16(4) from deciding that a landlord has failed to comply with the duty imposed by section 14(1)(b), the committee must serve notice on the local authority stating that they consider the landlord to be unable to comply with that duty.

(7) Where the sheriff has made an order under section 18(1) in relation to a tenancy-

(a) the committee must, when determining whether the landlord has failed to comply with the duty imposed by section 14(1)(b), treat sections 14, 15 and 17 as having been modified or excluded in the manner described in the sheriff's order,

(b) a repairing standard enforcement order may not require the carrying out of any work which the duty imposed by section 14(1)(b) does not, because of that modification or exclusion, require to be carried out.

## **25 Variation and revocation of repairing standard enforcement orders**

(1) The private rented housing committee which made a repairing standard enforcement order may, at any time-

(a) vary the order in such manner as they consider reasonable, or

(b) where they consider that the work required by the order is no longer necessary, revoke it.

(2) Where subsection (3) applies, the committee must vary the repairing standard enforcement order in question-

(a) so as to extend, or further extend, the period within which the work required by the order must be completed, and

(b) in such other manner as they think fit.

(3) This subsection applies where-

(a) the committee consider, on the submission of the landlord or otherwise, that the work required by a repairing standard enforcement order has not been, or will not be, completed during the period within which the order requires the work to be completed, and

(b) the committee-

(i) consider that satisfactory progress has been made in carrying

out the work required, or

(ii) have received a written undertaking from the landlord stating that the work required will be completed by a later date which the committee consider satisfactory.

(4) References in this Act (including this section) to a repairing standard enforcement order or to work required by such an order are, where the order has been varied under this section, to be treated as references to the order as so varied or, as the case may be, to work required by the order as so varied.

## **26 Effect of failure to comply with repairing standard enforcement order**

(1) It is for the private rented housing committee to decide whether a landlord has complied with a repairing standard enforcement order made by the committee.

(2) Where the committee decide that a landlord has failed to comply with the repairing standard enforcement order, the committee must-

- (a) serve notice of the failure on the local authority, and
- (b) decide whether to make a rent relief order.

(3) The committee may not decide that a landlord has failed to comply with a repairing standard enforcement order-

- (a) unless the period within which the order requires the work to be completed has ended, or
- (b) if the committee are satisfied, on the submission of the landlord or otherwise-
  - (i) that the landlord is unable to comply with the order because of a lack of necessary rights (of access or otherwise) despite having taken reasonable steps for the purposes of acquiring those rights, or
  - (ii) that the work required by the order is likely to endanger any person.

(4) Where the committee are prevented by reason only of subsection (3)(b) from deciding that a landlord has failed to comply with a repairing standard enforcement order, the committee must serve notice on the local authority stating that they consider the landlord to be unable to comply with the repairing standard enforcement order.

## **27 Rent relief orders**

(1) A rent relief order is an order by a private rented housing committee which reduces any rent payable under the tenancy in question by such amount (not exceeding 90% of the rent which would, but for the order, be payable) as may be specified in the order.

(2) A private rented housing committee may make a rent relief order only where they have decided that a landlord has failed to comply with a repairing standard enforcement order which has effect in relation to the house concerned.

(3) A rent relief order does not affect the terms or validity of the tenancy to

which it relates (otherwise than by reducing the rent payable under the tenancy).

(4) The committee may decide to revoke a rent relief order at any time; and the committee must decide to do so if-

(a) the repairing standard enforcement order to which the rent relief order relates is revoked, or

(b) a certificate is granted under section 60 in relation to the work required by that repairing standard enforcement order.

(5) The revocation of a rent relief order does not make a tenant liable to pay any rent which the tenant would, but for the rent relief order, have been liable to pay under the tenancy while the rent relief order had effect.

## **28 The repairing standard: offences**

(1) A landlord who, without reasonable excuse, fails to comply with a repairing standard enforcement order commits an offence.

(2) For the purposes of subsection (1), a landlord has reasonable excuse for failing to comply with a repairing standard enforcement order if-

(a) the landlord is unable to comply with the order because of a lack of necessary rights (of access or otherwise) despite having taken reasonable steps for the purposes of acquiring those rights, or

(b) the work required by the order is likely to endanger any person.

(3) Subsection (2) does not affect the generality of the defence of reasonable excuse.

(4) A landlord cannot be guilty of an offence under subsection (1) unless the private rented housing committee which made the repairing standard enforcement order in question has decided that the landlord has failed to comply with it (but such a decision does not establish a presumption that the landlord has committed an offence under subsection (1)).

(5) A landlord commits an offence if the landlord enters into a tenancy or occupancy arrangement in relation to a house at any time during which a repairing standard enforcement order has effect in relation to the house.

(6) A landlord does not commit an offence under subsection (5) if the private rented housing committee which made the order has consented to the landlord entering into the tenancy or occupancy arrangement.

(7) A landlord who is guilty of an offence under subsection (1) or (5) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

## **29 Annual report**

(1) The president of the private rented housing panel must, in respect of each reporting year, prepare a written report on the exercise of functions by the president, by the panel and by private rented housing committees during that year.

(2) Each such report must report the frequency with which applications to the panel (whether valid or invalid within the terms of section 22) include complaints about the landlord's management of the tenancy.

(3) The president must submit each such report to the Scottish Ministers as soon as practicable after the end of the reporting year to which it relates.

(4) The Scottish Ministers must lay before the Scottish Parliament a copy of each such report submitted to them.

(5) A reporting year for the purposes of this section is-

(a) the period beginning with the day on which this section comes into force and ending with 31 December next following that date, and

(b) each successive calendar year.