

**Consultation on
the First-tier
Tribunal Housing
and Property
Chamber
Shelter Scotland's
response**

March 2017

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KEY POINTS

- Shelter Scotland welcomes the opportunity to comment on the draft regulations of the First-tier Tribunal Housing and Property Chamber and the provision of publicly funded legal assistance.
- Shelter Scotland's response is based on the experiences of our advice and legal services. Moreover, Shelter Scotland asked members of its Private Tenants' Forum to share their views on three of the topics that this consultation addresses: the layout of the regulations and its language, equality issues and publicly funded legal assistance.
- Shelter Scotland is concerned about the layout of the regulations and the language used, which needs to be simplified. The feedback of members of the Private Tenants' Forum further confirm these concerns. Shelter Scotland therefore suggests that the regulations are rewritten in plain English and include a more user-friendly approach to the layout.
- Shelter Scotland is also worried that decisions can be made without a hearing, including in the case of evictions, and is concerned this may disadvantage tenants. In addition, Shelter Scotland is of the opinion that all recalls should result in a hearing and that decisions made at a case management discussion must be included in the wording regarding recalls.
- The time limit regarding the submission of documents and lists of witnesses and the notice period for hearings are too short. While Shelter Scotland shares the Scottish Government's desire to limit time-consuming processes and make the Tribunal efficient as much as possible, it strongly suggests that these time periods are extended to allow the users of the Tribunal sufficient time to prepare.
- Complete statements of reasons should be provided. Shelter Scotland believes that this will help to improve the service users' understanding of the Tribunal and to build trust in the proceedings.
- The Scottish Government should review what documents tenants and landlords have to provide as part of the various applications.
- Shelter Scotland strongly opposes Rule 114, which states that a tenant cannot apply for a postponement of a hearing where the hearing relates to an application for eviction and the ground cited is rent arrears to which paragraph 12(2) of schedule 3 of the 2016 Act applies.
- More guidance is required regarding the Tribunal's obligation to ensure that users are able to understand and participate in the proceedings. This would help Tribunal users to gain a better understanding of what they can expect from the Tribunal and help the Tribunal to meet its obligations. Shelter Scotland believes that translators and sign language interpreters should be provided free of charge as part of this obligation. Moreover, equality issues further demonstrate the need for publicly funded legal assistance and a simplified layout of the regulations, which uses simple language.
- Shelter Scotland believes that Advice and Assistance and civil legal aid should be available for most cases, especially in regard to cases that possibly could lead to an eviction. This would acknowledge the considerable onus currently placed on the users of the Tribunal, the potential legal complexity of cases and the obligation of the Tribunal to secure equal access to justice. Moreover, access to publicly funded legal assistance has the potential to save costs for all involved, as users can be informed of the likely outcome and feasibility of the case, thereby possibly preventing users from taking unreasonable cases further.

INTRODUCTION

Shelter Scotland welcomes the Consultation on the Procedure of the First-tier Tribunal Housing and Property Chamber and appreciates the opportunity to be able to comment on the draft regulations and proposals on the provision of publicly funded legal assistance. In addition, Shelter Scotland strongly supports that the Tribunal will be free of charge for everyone.

The creation of the First-tier Tribunal Housing and Property Chamber through the Tribunals (Scotland) Act 2014 is part of an ongoing transformational change of both the court system and the private rented sector in Scotland. The First-tier Tribunal Housing and Property Chamber makes the first instance decisions on housing matters, while an Upper Tribunal primarily deals with appeals. The former Homeowner Housing Panel and Private Rented Housing Panel transferred to the First-tier Tribunal on 1 December 2016. The First-tier Tribunal Housing and Property Chamber will further expand its jurisdiction, especially in relation to private rented sector cases, on 1 December 2017, the date from which the proposed draft regulations will come into force.

As mentioned in the Consultation Paper, there are around 700 private rented housing cases across Scotland every year.¹ The rapid growth of the private rented sector will inevitably mean that the Tribunal will see a steady increase in the number of cases. Over the last decade, the number of households in Scotland living in the private rented sector more than doubled to the point where around 1 in 7 households currently live in the private rented sector.² The First-tier Tribunal Housing and Property Chamber will therefore determine cases that affect a large proportion of the Scottish population.

Shelter Scotland supports the two main focuses of the consultation: the actual regulations determining the proceedings of the Tribunal and if and what type of publicly funded legal assistance should be provided. The Tribunal's operational procedures need to inform people of their rights and responsibilities as users of the Tribunal. Yet, the rules also need to be as easy as possible to understand. Moreover, to ensure that tenants, landlords and letting agents have true equality before the law, they need to have equal access to the First-tier Tribunal regardless of their financial situation.

Shelter Scotland's response is informed by the daily experiences of our advice and legal services, as well as our experience as a campaigning organisation that has advocated for more rights for tenants for almost 5 decades. In order to encourage participation of potential service users of the First-tier Tribunal, Shelter Scotland asked members of its Private Tenants' Forum to complete a survey on the following topics: the layout of the regulations and its language, equality issues and publicly funded legal assistance.

¹ Scottish Government (2017), [A Consultation on Procedure of the First-tier Tribunal Housing and Property Chamber](#).

² Scottish Government (2016), [Scotland's People: Results from the 2015 Scottish Household Survey](#).

QUESTIONS ON THE DRAFT REGULATIONS

The first part of the Consultation Questions focuses on the draft regulations. Shelter Scotland is responding to these Questions in its capacity as a national housing and homelessness organisation. As such, Shelter Scotland has not responded to all Consultation Questions and instead focused on the Questions dealing with topics relevant to our service users and the people we represent.

Q.1: Do you have any comments or suggestions on the layout and ordering of the procedure common to all procedures in Part 1 from a user perspective?

Shelter Scotland consulted members of its Private Tenants' Forum on a number of topics that this Consultation examines, including the layout and ordering of Part 1. While some tenants found the layout and ordering well-presented and accessible, most respondents found it difficult to follow. Tenants mentioned that it was too long and one suggested that a "simple flow diagram with notes would be much easier and quicker to understand." Although most respondents said that they would be able to use this in a practical scenario, they also argued that they would not be able to find the section applicable to their case easily. One respondent further explained that, in order to use Part 1, they would need enough time to read it several times and find out the meanings of specific words, which would be a very time-consuming task.

In general, the respondents to our survey found the language to be too difficult to understand. They recommended that it should be "rewritten in plain English," as it currently is "full of legalese" and contains "too many fancy words." Shelter Scotland shares their concerns and is of the opinion that the language used is not easy to understand from a user perspective. The description of 'writing' in Rule 1 (Interpretation) is an example of this: "includes electronic communication which has been recorded and is consequently capable of being reproduced; and cognate expressions are to be construed accordingly." Shelter Scotland doubts that a regular user of the Tribunal will understand what "cognate expressions are to be construed accordingly" means. While this definition might not actually be relevant or important for the service user, he or she will not know whether that is the case unless he or she understands the actual wording. Shelter Scotland, hence, recommends that the Scottish Government carries out focus group exercises based around the rules to try to identify solutions to these problems and would like to see some more user-friendly language being used.

However, Shelter Scotland acknowledges that this is not an easy task. This partly has to do with the nature of the regulations, which, as a legal document using legal language, will be difficult to understand for people who have no legal or housing background. There is, then, strong justification for legal assistance, as further discussed in the section 'Questions on the Provision of Publicly Funded Legal Assistance'. This would guarantee that people, who cannot afford to or are unable to get help elsewhere, are entitled to receive publicly funded assistance.

Shelter Scotland's law service has also identified several issues regarding several rules in Part 1:

- Applications (Rule 4):
Shelter Scotland believes that further information should be provided as to where the application forms can be found. If possible, a link to an online version of the form should be provided.
- Amendment raising new issue (Rule 13):

Rule 13(1) states that any proposed amendment raising new issues of written representation by a party can only be made if the First-tier Tribunal consents to it. It is also up to the Tribunal to place conditions on such amendments as it sees fit. Shelter Scotland believes that Rule 13(1) needs to clarify whether this includes new legal issues. If new legal issues, especially linked to any ground for possession, are included, it is important that the notice periods linked to the new legal issue at hand are still respected. In such cases, it might be up to the Tribunal to have to determine that the new legal issue constitutes a new action that needs to be raised separately.

- **Withdrawal of the application (Rule 14):**
Rule 14(1)(a) states that an applicant may withdraw an application orally at a hearing, while Rule 14(2) states that a notice of withdrawal must be in writing. An applicant could find this confusing and be unsure if they have to submit a notice of withdrawal in writing even when they have withdrawn their application orally at a hearing.
- **Power to determine the proceedings without a hearing (Rule 17):**
Shelter Scotland is concerned that Rule 17 does not specify under what kind of circumstances the Tribunal may determine the proceedings without a hearing. There should also be a way to review or reconsider this decision. According to Article 6 of the European Convention on Human Rights, everyone should be entitled to “a fair and public hearing.”³
Shelter Scotland strongly believes that Rule 17 should not apply to applications for Orders for Possession. Due to the severity of potential consequences for the tenant, applications for Orders for Possession should call before the Tribunal anytime the Tribunal has the power make an Order for Possession. This would meet overriding objective (a) of dealing with a manner which is proportionate to the complexity of the issues and the resources of the parties. The Tribunal is a public authority for the purposes of the Human Rights Act 1998.⁴ Ensuring that a hearing is mandatory where an Order for Possession is in issue, would ensure compliance with Article 8, given that eviction is the most severe form of interference with this right.⁵ The law governing social tenancies requires there to be a hearing where an order for possession is sought. To remove that procedural right from private sector tenancies would potentially constitute unlawful discrimination based on the applicant’s status as a private sector tenant.
- **Lodging of documents etc. (Rule 21):**
Rule 21 dictates that documents that parties want to rely upon and any list of witnesses must be sent to the Tribunal at least 7 days before any hearing. Shelter Scotland believes that, given the short notice period for hearings (as discussed in relation to Rule 23 below), parties should be given more time than a minimum of 3 days to gather and send any document and lists of witnesses. The Summary Cause Rules, which cover recovery of possession proceedings in private rented sector cases at present, allow for a period of 28 days from the date of fixing a hearing on evidence for the lodging of list of witnesses and documents. Parties have to lodge the actual evidence no later than 14 days before a hearing.
- **Hearings (Rule 23):**
As stated in Rule 23(2), the notice period for a hearing is at least 10 working days from the date of receipt of the notice. While Shelter Scotland shares the Scottish Government’s desire to make the Tribunal as efficient as possible and to limit time-consuming processes, it believes that 10 working days is impractical and would not constitute reasonable notice. In our experience the average waiting time for advice

³ Council of Europe (1950), [European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14](#), ETS 5.

⁴ UK Government (1998), [Human Rights Act 1998](#).

⁵ European Court of Human Rights (2008), [McCann v United Kingdom \(App no. 19009/04\), Judgement](#), 47 EHRR 40; The Supreme Court (2010), [Manchester City Council v Pinnock, Judgement](#), [2010] UKSC 45; Inner House (Court of Session) (2012), [South Lanarkshire Council v McKenna, Opinion of the Court](#), [2012] CSIH 78.

appointments is weeks rather than days. Whether a party is represented or not at the hearing, they may wish to take advice on their case beforehand. They may also need advice on a separate issue, such as making an application for benefits or how to apply to the Private Rented Housing Panel. There is a greater chance of parties not attending hearings if they are unable to access the necessary advice and/or make the necessary arrangements to do so. Non-attendance will likely result in an increase in applications granted in absence, and may result in a higher volume of recalls, which would not serve the objective of avoiding delay as detailed in Rule 2. Users of the Tribunal should be given more time to adequately prepare for a hearing, especially as they are largely expected to make use of the Tribunal by themselves. Shelter Scotland therefore proposes a notice period of at least 20 working days.

- **Adjournments or postponements (Rule 26):**

Rule 26 regulates adjournments or postponements and 26(2) states that the Tribunal “may only adjourn or postpone a hearing at the request of a party if satisfied that the application cannot otherwise be justly determined.” It seems unclear if the Tribunal can adjourn or postpone a hearing even if parties have not applied for this. Shelter Scotland believes that the Tribunal should be able to do so. This would allow the Tribunal to better exercise more discretion. This would also suit the more active and inquisitorial nature of the Tribunal.
- **Recalls (Rules 28 and 16):**

Shelter Scotland suggests that Rule 28(1) is adjusted, so as to ensure that all recalls for evictions actions must result in a hearing. Moreover, the wording “because a party (or a party’s representative) did not attend” the hearing in Rule 28(1) should be changed to “and a party (or a party’s representative) did not attend.” Otherwise, this would suggest that a recall is only possible where the decision was based on a party (or a party’s representative) not attending the hearing.

In addition, Rule 28(1) currently does not account for decisions taken at a case management discussion. As stated in Rule 16(3), the Tribunal “may do anything at a case management discussion which it may do at a hearing, including making a decision.” However, Rule 28(1) only accounts for situations when “a party (or a party’s representative) did not attend the hearing.” The wording therefore needs to be changed to accommodate case management discussions.

Shelter Scotland believes that the 14-day deadline determined by Rule 28(2) for parties to apply for a recall of a decision should be extended. Parties should be able to apply for a recall up until enforcement of the decision. This would ensure that private tenants face the same conditions in this regard as social sector tenants. While Rule 28(5) allows for the Tribunal to extend this time period, it should generally be the norm that applications for recall are possible until enforcement of the decision.

Rule 28(3) should provide further information regarding how the party making the application must send a copy for the application to the other party and what kind of evidence is sufficient to prove that it has done so. Since this is part of the application requirements and if not followed correctly might result in the refusal of the recall, the regulations should be as clear and easy to understand as possible.
- **Appeals (Rules 34 and 35):**

Rule 34 currently does not but should mention the specific timescales that apply to applications for permission under section 46(3)(1) of the Tribunal Act. Furthermore, descriptions such as “section 7 (rateable value and the appropriate day) of the 1984 Act” or “section 66A (appeals in relation to section 52) of the 2006 Act” would mean very little to someone who has no housing background. The average user would easily get overwhelmed trying to determine if any of these regulations apply to him or her. While the short descriptions of the various sections of legislative acts goes some way in providing guidance to the users of the Tribunal in regard to what regulations might apply to them, Shelter Scotland believes that this information should be extended and that specific timescales should be mentioned.

In relation to Rule 35(2), Shelter Scotland believes that the wording is somewhat ambiguous. Shelter Scotland suggests that the Tribunal should first determine whether the application for permission to appeal has merit. Depending on the decision, it should then give permission to appeal, refuse the permission to appeal or change its own decision.

- Appeals and Statements of reason (Rules 25 and 36):
Rule 25 eliminates the need for complete statement of reasons in regard to setting aside, correcting and reviewing a First-tier Tribunal decision. While Shelter Scotland shares the Scottish Government's commitment to reduce bureaucracy, it is the right of Tribunal users to know the reasons that informed specific decisions, such as the outcome of a review. This will help to aid in the understanding that the Tribunal users have of the Tribunal's regulations and help to create greater transparency and trust in the Tribunal system.
Shelter Scotland therefore suggests that Rules 25 and 36(2) are amended, so that a statement of reasons must be sent to all parties.

Q.2: Do you have any comments on Part 2 (Procedure in respect of Homeowner Applications) about amendments to the existing rules for Homeowner applications?

N/A.

Q.3: Are you content with the amendments to the 2016 regulations in relation to Repairing Standard Applications in Chapter 1?

Yes.

Shelter Scotland supports the more descriptive titles for individual rules, such as "Application for determination of whether the landlord has failed to comply with the repairing standard" instead of "Application under section 22(1) of the 2006 Act." As one of the respondents to Shelter Scotland's survey pointed out, this will help users of the Tribunal to better navigate the regulations. This applies to the regulations as a whole.

Q.4: Are you content with amendments to the 2016 regulations in relation to Landlord Applications in Chapter 2?

N/A.

Q.5: Are you content with amendments to the 2016 regulations in relation to Assured Tenancy References in Chapter 3?

No.

If you are not content, please explain why?

Shelter Scotland believes that Rule 58(b)(i) should be amended. As it stands, tenants would have to provide a copy of their tenancy agreement/the written terms of the tenancy. However, tenants may have an assured tenancy based on the behaviour of themselves and their landlord (such as paying and receiving rent), despite not having a written tenancy agreement. Rule 58(b)(i) should therefore state that "a copy of the written terms of the tenancy (if any)" should be accompanied when making an assured tenancy reference.

Q.6: Are you content with amendments to the 2016 regulations in relation to regulated tenancy references in Chapter 4?

N/A.

Questions on jurisdictions due to transfer from the Sheriff Court

Q.7: Do you agree with the procedure for applications under the 1984 Act in Chapter 7?

No.

If you do not agree, please explain why?

Shelter Scotland suggests that Rules 82(b) and 85(b)(i) are amended to include the words “if any.” This would entail that someone making an application to adjust recoverable rent or an application to determine the rent limit only has to provide a copy of the tenancy agreement together with the application if such a written agreement exists.

Q.8: Do you agree with the procedure for applications under the 1988 Act in Chapter 8?

No.

If you do not agree, please explain why?

Shelter Scotland suggests that several amendments are made to Chapter 8:

- Shelter Scotland believes that landlords should have to provide further documentation, including the tenancy agreement and AT5 form, rather than just the documents specified in Rule 94(b).
- Considering Rule 96 regulates applications to provide written tenancy agreement and weekly rent book, Shelter Scotland believes that 96(b) should ask the tenant to provide “any relevant documents, including proof of paid rent” instead of “a copy of the rent book or similar document (if any).”
- Shelter Scotland further believes that Rule 96(c) should state “must be signed and dated by the tenant or a representative of the tenant” instead of stating “must be signed and dated by the landlord or a representative of the landlord.”
- Rule 98, which looks at applications for damages for unlawful eviction, should also allow for damages that are not included in section 36(6A) or (6B) of the 1988 Act.
- Moreover, the Rule 98 is not clear as to what the correct procedure would be for a common law action for damages for unlawful eviction. This should be clarified.

Q.9: Do you agree with the procedure for adaptations of rented houses applications in Chapter 9?

N/A.

Q.10: Do you agree with the procedure for tenancy deposit applications in Chapter 10?

No.

If you do not agree, please explain why?

Rule 103(b) should be amended to include the words “if any.” Tenants or former tenants making an application for an order for payment where the landlord has failed to pay the

deposit into an approved deposit scheme would then only be required to provide a copy of the tenancy agreement together with the application if such a written agreement exists.

Q.11: Do you have any other comments on the operational procedures for jurisdictions due to transfer from the Sheriff Court under Chapters 6-10?

Shelter Scotland is concerned that some of the evidence that tenants must submit as part of applications might be difficult for some tenants to provide. While the regulations acknowledge that the landlord might not be registered and therefore not have a registration number, it does not account for tenants, who might not know their landlord's name or contact details because they only ever deal with a letting agent and their landlord is not registered – meaning that they cannot look these details up online. While tenants have the right to get this information from the letting agent, they should not be adversely affected if the letting agent fails to provide such information. Moreover, a significant amount of tenants will most likely not be aware of the fact that letting agents have to provide such information when the tenants requests it in writing. As stated in The Letting Agent Code of Practice (Scotland) Regulations 2016 (Paragraph 72), the letting agent has 21 days to provide such information, thereby possibly delaying a tenant from making an application. This not only applies to Chapter 6-10 but to a wide variety of applications under Chapters 1-11 of the draft regulations.

Questions on new jurisdictions

Q.12: Do you agree with the procedure for letting agent applications in Chapter 5?

N/A.

Q.13: Do you agree with the procedure for applications under the 2016 Act?

No.

Shelter Scotland would like to use this opportunity to express its strong objections to Rule 114, which is contained in Chapter 11. According to Rule 114, “a tenant may not apply for a postponement of a hearing where the hearing related to an application for eviction and the ground, or one of the grounds, cited is rent arrears to which paragraph 12(2) of schedule 3 of the 2016 Act applies.” Paragraph 12(2) of schedule 3 of the 2016 Act states that the Tribunal must find that the eviction ground applies if at the start of the Tribunal's consideration of the application for an eviction order, the tenant has been in rent arrears of at least one month's rent and the tenant has been in rent arrears of any amount for at least three consecutive months. The rent arrears should also not be a result of a delay or failure in a relevant benefit payment.

Shelter Scotland believes that, given that the tenant risks losing his or her home, it is important that a tenant can apply for a postponement of a hearing. There are a wide variety of reasons for a tenant to apply for a postponement, including that the tenant is or will be in the hospital or on a holiday at the time of the hearing. Further, a tenant may want to ask for a postponement to obtain evidence, such as wages slips, bank statements, benefit letters or medical reports, which they have not been able to obtain in time for the hearing. Such evidence may be crucial to the fair administration of justice, as the tenant may be arguing that they are in arrears because of benefit problems (which is a defence to the rent arrears ground); or that the tenant has made payment to the rent account and can evidence this through their bank statements. In practice, historic bank statements can take in excess of two weeks to obtain and will require tenants to pay a charge to their bank. The practicalities of obtaining evidence, and independent advice to

adequately represent themselves or be represented, are not taken into account in this Rule. This Rule highlights the tension between overriding objective (e) in Rule 2 of avoiding delay, and (a) dealing with proceedings in a manner proportionate to the complexity of the issues and the resources of the parties. Where a person's home is at risk and an individual or family are facing homelessness, it is only fair and just that the Tribunal as the decision-making body has the opportunity to consider all relevant factors in full.

As mentioned above in relation to Rule 17, Shelter Scotland believes that the Tribunal should not have the power to determine the proceedings without a hearing in cases involving eviction actions. Allowing a tenant to apply for a postponement in cases related to all eviction grounds therefore should help to limit the expenditure of the Tribunal and all parties involved by giving the tenant the opportunity to apply for a postponement instead of just not showing up at the hearing.

Q.14: Are there any particular equality issues that you think we should consider in relation to the operational procedures as the Housing and Property Chamber expands in December 2017?

Rule 24, which regulates the "Duties of chairing member at a hearing," states that the chairing member must ensure that parties to any hearings understand the proceedings and can participate in them. Shelter Scotland would like to see further guarantees – in the form of further regulations – in regard to what users of the Tribunal can expect, including, for example, the provision of translators and sign language interpreters. These issues are clearly linked to the Tribunal's obligations in relation to equality issues.

The respondents to Shelter Scotland's survey supported these recommendations, especially the need for translators and interpreters, and suggested that the Tribunal should offer tailored support and ensure that, regardless of the situation, users of the First-tier Tribunal must not feel discriminated against. They also recommended that the Tribunal must take place in a wheelchair accessible venue and again emphasised the need for more simplified regulations, as discussed in relation to Question 1, in order to ensure that people regardless of their background or possible disabilities are able to make use of and participate in the proceedings as much as possible. One respondent further suggested that the Tribunal could hold briefing sessions for users of the Tribunal to go through the procedures, while another recommended holding meetings and hearings on weekends or in the evenings so that people don't have to take time off work.

Shelter Scotland would like to stress that the regulations place considerable onus on the user of the Tribunal to be able to understand their rights and responsibilities and follow the processes involved. This will be particularly difficult, and sometimes impossible, for people who have disabilities. It is therefore especially important that adequate services and help is provided for those who need it – especially as the regulations and proceedings can be very complex and deal with important issues, such as someone potentially losing their home. This was also a key concern of the respondents to Shelter Scotland's survey, who were worried about the system being in favour of those with capital. Publicly funded legal assistance plays an important role in assuring that some of these needs are met. This is further discussed in Part 2 of this consultation response, especially in relation to the rights of people with disabilities (Question 19).

QUESTIONS ON THE PROVISION OF PUBLICLY FUNDED LEGAL ASSISTANCE

To ensure that tenants, landlords and letting agents have a fair hearing and true equality before the law, everyone needs to have access to the First-tier Tribunal and be able to enforce their legitimately-held rights regardless of their financial means. Publicly funded legal assistance allows this to happen. Shelter Scotland therefore welcomes the opportunity to respond to questions that deal with such an important issue.

Q.15: Are you content that there will be no provision for publicly funded legal assistance for procedure in respect of Letting Agent Applications in Chapter 5?

No.

If you are not content, please explain why?

Rule 67 regulates applications to enforce the letting agent code of practice, which landlords or tenants may make. Shelter Scotland believes that, in order to ensure that every tenant has the possibility to make proper use of this right, publicly funded legal assistance should be provided.

In addition, Shelter Scotland would like to make the following general arguments in support of publicly funded legal assistance:

- Rule 2(1) of the draft regulations states that the “overriding objective of the First-tier Tribunal is to deal with the proceedings justly.” Rule 2(2)(a) further argues that this entails “dealing with the proceedings in a manner which is proportionate to the complexity of the issues and the resources of the parties.” In addition, as mentioned above, Article 6 of the European Convention on Human Rights guarantees everyone’s right to a fair trial.⁶ Shelter Scotland strongly believes that the complex issues of law and procedure that might be involved are only adequately recognised when publicly funded legal assistance, including representation, is provided. Such provision would acknowledge the considerable onus currently placed on the Tribunal users, the potential legal complexity of cases and the obligation of the Tribunal to secure equal access to justice.
- Moreover, the provision of publicly funded legal assistance acknowledges the potential consequences of the proceedings and the human rights issues that might be attached to this. As further discussed in the answer to Question 17, evictions, for instance, can have serious consequences and significantly impact on the wellbeing of people, especially children, and are linked to people’s rights to property and respect for personal and family life. Considering the immense impact that an eviction and possible subsequent homelessness can have on the tenant, it is vital that they have the opportunity to make the most of the proceedings. Publicly funded legal assistance, especially civil legal aid that includes representation, can help them to accomplish that.
- Both Advice and Assistance and civil legal aid may include an assessment of the legal basis for the action. An applicant might therefore be told about the prospects of their case and the likely consequences this will have for them. This will enable them to be better prepared for the likely outcome of the proceedings. In addition, when

⁶ Council of Europe (1950), *op.cit.*

people applying for publicly funded legal assistance are told that they do not have probable cause or are likely to lose, they might reconsider taking specific actions, including going ahead with a case, and thereby save the Tribunal and all parties involved significant costs and time.

- The feedback from members of Shelter Scotland's Private Tenants' Forum illustrate the importance of providing publicly funded legal assistance, including Advice and Assistance, and civil legal aid. Half of the respondents argued that both civil legal aid and Advice and Assistance should be available for all cases. One respondent emphasised that providing publicly funded legal assistance enables tenants to uphold their rights or defend themselves against illegal practice, while another argued that civil legal aid "is an absolute must" as tenants would likely not pursue any cases otherwise. This confirms Shelter Scotland's fear that, without such provisions, many tenants will find the process and regulations too complicated and difficult to understand to make use of the Tribunal or to properly defend themselves when a case against them is taken to the Tribunal.

While this applies to the Tribunal in general and is not specifically restricted to Chapter 5, Shelter Scotland would like to use this opportunity to raise its concern regarding the estimated number of future cases and costs. The Scottish Government estimates that there will be somewhere between 845 to 1,100 cases at the First-tier Tribunal every year – 195 of which will be eligible for some form of publicly-funded legal assistance at the total estimated cost of between £24,000 to £80,000.⁷ The Consultation Paper states that when "the Government introduced the Bill for the Housing Act, it estimated that the cost of legal assistance for the 700 private rented housing cases each year that would transfer from the Courts to the Tribunals would be about £25,000."⁸ If the Government estimated that £25,000 would be needed for 700 cases, it surely should expect that 845 to 1,100 cases would at least entail costs above £25,000. Shelter Scotland therefore suggests that the Scottish Government adjust its cost estimations appropriately and provides further information regarding how it estimated these figures. As it is difficult to estimate the number of cases due to the many changes currently ongoing in the private rented sector, the Scottish Government has a duty to ensure that enough funds are available. Without adequate funding, the system simply will not work and people will not have access to the support, which they are entitled to and need to secure their rights.

Q.16: Do you agree publicly funded legal assistance should be available for parties in respect of applications for Landlord Registration in Chapter 5?

N/A.

Q.17: Do you agree publicly funded legal assistance should be available for parties in respect of applications under the 1984 Act in Chapter 7? This includes applications for possession.

Yes.

If you agree, do you have a view on the type of legal assistance that should be available?

Shelter Scotland strongly suggests that both Advice and Assistance and civil legal aid should be available.

⁷ Scottish Government (2017), *op.cit.*

⁸ *Ibid.*

Besides the arguments in favour of providing publicly funded legal assistance detailed in the answer to Question 15, given that tenants might risk losing their home, it is important that those eligible for publicly funded legal assistance can access it and that this assistance includes representation. Evictions can have significant consequences for the tenants, especially when children are involved. This includes restricting the tenants' rights to property and respect for personal and family life, which are both protected by the European Convention on Human Rights.⁹ A family that is evicted from their rented accommodation, for example, might have to take their children out of their schools and move away from their support system, including friends and family members who were helping out with childcare. Their parents' stress levels will undoubtedly have an impact on the family. If the family becomes homeless, the eviction puts the children's wellbeing at risk by potentially pushing them into overcrowded, poor quality or temporary housing and seriously disrupting their lives. And if the family ends up making a homelessness application, they face the possibility of being moved around numerous times and might have to wait months or even years for a permanent home. 18 per cent of households who applied as homeless came from the private rented sector¹⁰ – meaning that the sector is slightly overrepresented in regard to homelessness applications, as households living in the private rented sector make up 14 per cent of all households across Scotland.¹¹ It is therefore vital that civil legal aid is available, so as to ensure that tenants are able to make full use of the justice system in a way that reflects the seriousness of the potential consequences that they face.

Q.18: Do you agree publicly funded legal assistance should be available for parties in respect for applications under the 1988 Act in Chapter 8? This includes applications for possession.

Yes.

If you agree, do you have a view on the type of legal assistance that should be available?

Both Advice and Assistance and civil legal aid should be available due to the same reasons outlined above in relation to Question 17.

Q.19: Do you agree publicly funded legal assistance should be available for parties in respect of applications under the 2006 Regulations Act in Chapter 9?

Yes.

If you agree, do you have a view on the type of legal assistance that should be available?

Considering that Chapter 9 regulates applications "to appeal the decision of a landlord in relation to adapting a rented house for a disabled person," Shelter Scotland strongly believes that more than the usual Advice and Assistance should be provided. In order to secure that people with disabilities can make full use of the Tribunal, representation needs to be provided as part of the publicly funded legal assistance. Under Article 9(2)(f) of the UN Convention on the Rights of Persons with Disabilities, states have the obligation to "promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information."¹² Publicly funded legal assistance should be considered to be part of such assistance. In its review of the rights of people

⁹ Council of Europe (1950), *op.cit.*

¹⁰ Scottish Government (2016), [Homelessness in Scotland: Annual Publication 2015/16](#).

¹¹ Scottish Government (2016), [Scotland's People: Results from the 2015 Scottish Household Survey](#).

¹² UN General Assembly (2007), [Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly](#). A/RES/61/106.

with disabilities in the UK, the Committee on the Rights of Persons with Disabilities commented on the exclusion of the use of legal aid in debt and housing cases (except in the case of evictions) across England and Wales and recommended that “access to justice, by providing appropriate legal advice and support, including through reasonable and procedural accommodation for persons with disabilities seeking redress and reparation for the alleged violation of their rights”¹³ should be provided. Shelter Scotland therefore calls upon the Scottish Government to guarantee the rights of people with disabilities in Scotland and recommends that legal assistance and civil legal aid is made available.

Q.20: Do you agree publicly funded legal assistance should be available for parties in respect of applications under the 2011 Act in Chapter 10?

Yes.

If you agree, do you have a view on the type of legal assistance that should be available?

Shelter Scotland believes that given the serious consequences, including removing the landlord from the landlord register and the subsequent eviction of the tenant, Advice and Assistance and civil legal aid should be made available. This would reflect the severity of the proceedings and ensure that tenants can be made aware of the possible outcomes and consequences of the proceedings, including their own eviction.

Q.21: Do you agree publicly funded legal assistance should be available for parties in respect of private residential tenancy applications in Chapter 11? This includes applications for an eviction order.

Yes.

If you agree, do you have a view on the type of legal assistance that should be available?

Chapter 11 regulates the “Procedure in respect of private residential tenancy applications,” which includes a tenant’s application to draw up the terms of a tenancy where one or several statutory terms are unlawfully displaced, as well as a landlord’s application for an eviction order.

In its response to the Scottish Government’s Consultation on Proposals for Regulations and Policy Supporting the Private Housing (Tenancies) (Scotland) Act 2016, Shelter Scotland noted that the difference between mandatory and statutory terms was confusing.¹⁴ Considering that even our advisers and solicitors were unsure about the many possible legal implications that this could have on both tenants and landlords,¹⁵ Shelter Scotland suggests that tenants should be able to access both Advice and Assistance and civil legal aid. When issues that are legally complex and not easy to understand are discussed during a hearing, it is important that parties are able to be represented by people who have the knowledge and experience to ensure that the rights of their client are adequately protected.

Moreover, Advice and Assistance and civil legal aid should be available due to the severity of evictions, as outlined in the above answer to Question 17.

¹³ United Nations Committee on the Rights of Persons with Disabilities (6 October 2016), [Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention](#). CRPD/C/15/R.2/Rev.1

¹⁴ Shelter Scotland (2016), [A New Private Tenancy Regime for Scotland: Shelter Scotland’s Consultation Response](#).

¹⁵ *Ibid.*

Shelter Scotland helps over half a million people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that, one day, no one will have to turn to us for help.

We're here so no one has to fight bad housing or homelessness on their own.

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