

A Consultation on Procedure of the First-tier Tribunal Housing and Property Chamber

**Analysis of responses to the
public consultation exercise**

Contents

Executive Summary	i
Introduction.....	1
Background.....	1
Profile of respondents.....	1
Analysis and reporting	2
Part One: The First-tier Tribunal Housing and Property Chamber (Procedure) (Scotland) draft regulations 2017	4
Procedure common to all proceedings	4
Questions on jurisdictions due to transfer from the Sheriff Court.....	13
Part Two: The provision of publicly funded legal assistance in the First- tier Tribunal Housing and Property Chamber.....	22
General Issues raised	32
Annex 1	33

Executive Summary

Introduction

This report presents an analysis of responses to the Scottish Government's consultation on Procedure of the First-tier Tribunal Housing and Property Chamber. The consultation sought views on:

- A single set of operational rules to apply across all jurisdictions in the Housing and Property Chamber from December 2017, intended to streamline existing procedures and to provide consistency of approach.
- The provision of publicly-funded legal assistance in certain circumstances.

The consultation opened on 6 January and closed on 31 March 2017 and 21 responses were received (20 from organisations and one from an individual member of the public).

Part One: The First-tier Tribunal Housing and Property Chamber (Procedure) (Scotland) draft regulations 2017

The first part of the consultation sought views on the draft Housing and Property Chamber Rules of Procedure 2017 (the 2017 Rules). In terms of the layout and ordering of the procedure common to all procedures in Part 1, there were some concerns that the language is difficult to understand and it was felt that more could be done to phrase the regulations in plain English.

There are some new rules introduced into Part 1 which are common to all proceedings. Comments on these new rules included that it needs to be clear under what type of circumstances the FTT may determine the proceedings without a hearing (regarding Rule 17 - Power to determine the proceedings without a hearing), and whether the FTT can adjourn or postpone a hearing even if parties have not applied for this (under Rule 26 - Adjournment or postponement). Respondents also made comments about how some of the other rules would apply under the FTT.

The consultation asked a series of questions about whether respondents were content with the amendments to the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2016 as set out in chapters 1-4. A majority of respondents were content in relation to: Repairing Standard Applications (13 out of 15 respondents who answered the relevant question); Landlord Applications (9 out of 10 respondents who answered the relevant question); Assured Tenancy References (12 out of 14 respondents who answered the relevant question); and Regulated Tenancy References (12 out of 13 respondents who answered the relevant question).

In relation to jurisdictions due to transfer from the Sheriff Court, 12 out of 14 respondents who answered the relevant question agreed with the procedure for applications under the Rent (Scotland) Act 1984 in Chapter 7, and 10 out of 14 respondents who answered the relevant question agreed with the procedure for applications under the Housing (Scotland) Act 1988 in Chapter 8. All of the 13

respondents who answered the relevant question agreed with the procedure for adaptations of rented houses applications in Chapter 9, and 11 out of 14 who answered the relevant question agreed with the procedure for tenancy deposit applications in Chapter 10.

All of the 12 respondents who answered the relevant question agreed with the procedure for letting agent applications in Chapter 5, and 10 out of 13 who answered the relevant question agreed with the procedure for applications under the Private Housing (Tenancies) (Scotland) Act 2016.

The final question on the draft regulations asked respondents if there are any particular equality issues that the Scottish Government should consider in relation to the operational procedures as the Housing and Property Chamber expands in December 2017. Comments included that equivalence of treatment of the applicant and the defendant is important. A number of the other comments considered various aspects of access to the FTT, including that out of working-hours options should be available, that the option of hearings held by phone should not inadvertently disadvantage those living in rural or remote areas and that there should be further regulations around what users of the FTT can expect, including, for example, the provision of translators and sign language interpreters.

Part Two: The provision of publicly funded legal assistance in the First-tier Tribunal Housing and Property Chamber

Part Two of the consultation focused on the availability of publicly-funded legal assistance to cases due to transfer to the FTT. The Scottish Government policy intention is for publicly-funded legal assistance in the FTT to be considered on a jurisdiction by jurisdiction basis in advance of the tribunals transferring into their respective chambers of the Tribunal. There is currently no provision for publicly-funded legal assistance in the Housing and Property Chamber.

The majority of respondents (12 out of 15 who answered the relevant question) were content that there will be no provision for publicly-funded legal assistance for procedure in respect of Letting Agent Applications but agreed with publicly-funded legal assistance being available for parties in respect of applications for Landlord Registration (9 out of 15 respondents who answered the relevant question).

The majority of respondents also agreed with publicly-funded legal assistance being available across the range of other tenancy-related applications (ranging from 10 out of 15 to 12 out of 16 respondents who answered the relevant questions). In particular, the potential seriousness of the issues covered at the FTT was noted, including that a tenant could lose their home and that a landlord or agent could lose their livelihood.

Further comments highlighted some differences of view as to the type of activity which should be publicly-funded. Some felt that that legal assistance should be provided – in other words, both Advice and Assistance and Civil Legal Aid should be available. Others suggested Advice and Assistance with Assistance by Way of Representation to be the appropriate type of assistance, sometimes noting that this option includes the safeguard of a test of reasonableness, with representation when required.

Introduction

This report presents an analysis of responses to the Scottish Government's consultation on Procedure of the First-tier Tribunal Housing and Property Chamber.

Background

The Tribunals (Scotland) Act 2014 created a new, two-tier structure for devolved tribunals in Scotland with a First-tier Tribunal (FTT) for first instance decisions and an Upper Tribunal, primarily for dealing with appeals. The Housing and Property Chamber aims to deliver benefits of specialism, consistency, and improved access to justice for both tenants and landlords in the private rented sector. It enables a less adversarial approach in comparison to the Sheriff Court. The aim is for a system that will allow most people to engage directly with the FTT, and where legal representation is not the norm.

The FTT is divided into 5 chambers, including the Housing and Property Chamber which specialises in housing matters. The former Private Rented Housing Panel and Homeowner Housing Panel became the first of the existing tribunals to move to the new FTT structure in December 2016 and, from December 2017, the FTT will start to hear more private rented sector housing cases, including cases transferred from the Sheriff Court under the Housing (Scotland) Act 2014 and disputes involving the new tenancies established by the Private Housing (Tenancies) (Scotland) Act 2016. The FTT will also hear cases relating to letting agents when the new regulatory regime set out by the Housing (Scotland) Act 2014 comes into force in January 2018.

The consultation sought views on:

- A single set of operational rules to apply across all jurisdictions in the Housing and Property Chamber from December 2017, intended to streamline existing procedures and to provide consistency of approach.
- The provision of publicly-funded legal assistance in certain circumstances.

However, the consultation paper was clear this consultation was not seeking views on the implementation of the Tribunals (Scotland) Act 2014, the Housing (Scotland) Act 2014, or the Private Housing (Tenancies) (Scotland) Act 2016.

The consultation opened on 6 January and closed on 31 March 2017.

Profile of respondents

A total of 21 responses was available for analysis. Of these, 11 were submitted through the Scottish Government's Citizen Space consultation hub with the remaining 10 responses received by email.

Respondents were asked to identify whether they were responding as an individual or on behalf of a group or organisation. Organisational respondents have been placed in one of 5 respondent types by the analysis team as follows:

- **Campaign or advice group:** Ayr Housing Aid Centre; Homeless Action Scotland, Legal Services Agency; and Shelter Scotland.
- **Local Authority:** Falkirk Council and North Lanarkshire Council.
- **Property management company:** Greenbelt Group and YourPlace.
- **Representative body:** ARLA Propertymark (Association of Residential Letting Agents); Chartered Institute of Housing Scotland (CIH Scotland); Homes for Scotland; Scottish Association of Landlords & Council of Letting Agents; Scottish Federation of Housing Associations (SFHA); Scottish Land and Estates; and Scottish Property Federation.
- **Other:** First-tier Tribunal for Scotland Housing and Property Chamber.

A breakdown of the number of responses received by respondent type is set out in Table 1 below.

Table 1: Respondents by type

Type of respondent	Number
Groups:	
<i>Campaign or Advice Group</i>	4
<i>Local Authority</i>	2
<i>Property management company</i>	2
<i>Representative Body</i>	7
<i>Tenant Group</i>	4
<i>Other</i>	1
Total Groups	20
Individuals	1
TOTAL	21

Analysis and reporting

A small number of organisational respondents did not make their submissions on the consultation questionnaire, but submitted their comments in a statement-style format. When this response contained a clear answer to one of the Yes/No questions this has been recorded. The remaining content was analysed qualitatively under the most directly relevant consultation question. Comments which did not address directly any of the consultation questions are considered in a brief final section to the report.

If the respondent gave permission to publish, their original response can be found on the Scottish Government's website at: https://consult.scotland.gov.uk/better-homes-division/procedure-first-tier-tribunal-housing/consultation/published_select_respondent.

Please note that, given their length, the original draft documents have not been reproduced within this report and readers may wish to read the report alongside the original consultation paper. The consultation paper can be accessed at: https://consult.scotland.gov.uk/better-homes-division/procedure-first-tier-tribunal-housing/supporting_documents/465491_Tribunal%20Housing_FINAL.pdf.

Part One: The First-tier Tribunal Housing and Property Chamber (Procedure) (Scotland) draft regulations 2017

The first part of the consultation sought views on the draft Housing and Property Chamber Rules of Procedure 2017 (the 2017 Rules).

Procedure common to all proceedings

Part 1 sets out, in broad chronological order, existing procedures that are common across the Chamber. The layout is intended to guide the user through the process, from the initial application through to reviews, and a final appeal process. Part 1 applies to anyone with an application lodged in the correct way, no matter what type of housing case is in dispute.

The consultation paper highlighted new rules introduced into Part 1 which are common to all proceedings. In Part 1, this will apply to: Rule 16 Case Management Discussion; Rule 17 Power to determine the proceedings without a hearing; Rule 24 Duties of Chairing Member at hearing; Rule 25 Voting for and Giving a Decision; Rule 26 Postponement; Rule 33 Clerical mistakes and accidental slips or omissions; and Rules 35 and 36 - Reviews and Appeals.

Question 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?

Eleven respondents made a comment at Question 1 which directly addressed Question 1¹. A small number of these comments were general and included giving broad support to the operational procedures (Scottish Land and Estates) and commenting that the layout is easy to follow (YourPlace). Scottish Land and Estates welcomed having Regulations which can be easily understood by all parties as part of the policy aim to create an efficient and just system.

However, Shelter Scotland (following consultation with its Private Tenants' Forum) raised some general concerns about the layout and ordering of Part 1. These included that:

- While some tenants found the layout and ordering well-presented and accessible, most found it difficult to follow. Specific concerns included that Part 1 is too long, would need to be read several times. It was suggested that a simple flow diagram with notes would be much easier and quicker to understand.
- The language is difficult to understand and, in particular, there is too much use of legal language. It was suggested that the draft Regulations be rewritten

¹ A number of respondents made general comments here that were not directly answering Question 1. These comments are considered in the final section of the report.

in plain English and that the Scottish Government should carry out focus group exercises based around the rules to aid this process.

CIH Scotland raised similar concerns. They acknowledged that the legal nature of regulations means that the language and format used can make it more difficult for people without a background in law or policy to understand. However, they suggested that more could be done to phrase the regulations in plain English. They also recommended that the Scottish Government develops a user-friendly guide or an online tool to accompany the regulations and that there should also be clear signposting to further information and advice and where people may be eligible for legal assistance.

ARLA PropertyMark suggested that information outlining where the forms can be accessed should be provided.

Chapters 1- 4 amending the 2016 rules

Other comments focused on specific rules. The comments on the new rules (as listed above), are presented first.

Rule 16 - Case management decisions: Although commenting that case management discussions seem like a good way to promote an inquisitorial approach, SFHA sought clarity as to how transparent these would be for the parties involved is required.

Ayr Housing Aid Centre had concerns about the FTT being able to do anything at a case management discussion which it can do at a hearing, including making a decision. They referred to Part 3, Chapter 11 of the draft Regulations and suggested that an eviction order granted under Rule 16 may not comply with the European Convention on Human Rights (ECHR) on a number of levels. In particular, they suggested that there should be an exception relating to a decision under Rule 16 if the application relates to Rule 110 (Application for an Eviction Order). They also suggested that there could be similar issues in relation to rules 79, 94 and 97 which also relate to orders for possession.

Rule 17 - Power to determine the proceedings without a hearing: Shelter Scotland expressed a concern that Rule 17 does not specify under what type of circumstances the FTT may determine the proceedings without a hearing. Ayr Housing Aid Centre and SFHA made a similar point, with SFHA suggesting that transparency will be important. Shelter Scotland suggested that there should also be a way to review or reconsider any decision, noting that Article 6 of the ECHR states that everyone should be entitled to “a fair and public hearing”.

Making a similar point to that made by Ayr Housing Aid Centre with regard to Rule 16, Shelter Scotland went on to suggest that Rule 17 should not apply to applications for Orders for Possession. They proposed that applications for Orders for Possession should be called before the FTT anytime the FTT has the power to make an Order for Possession, suggesting this would be proportionate to the complexity of the issues. They also suggested that ensuring that a hearing is mandatory where an Order for Possession is in issue would ensure compliance with Article 8 of the ECHR and cited various case law in support of their argument.

Rule 25 - Voting for and giving a decision: An Individual respondent queried whether if two members were sitting, and given that the chair has a casting vote, then the chair's view would prevail. They also queried whether if the chair is absent, the other party has sole right to make a ruling.

Shelter Scotland suggested that this rule eliminates the need for complete statement of reasons in regard to setting aside, correcting and reviewing a FTT decision. They felt that it is the right of FTT users to know the reasons that informed specific decisions, such as the outcome of a review. They suggested that this rule and Rule 36 - Review of a decision, are amended so that a statement of reasons must be sent to all parties.

Rule 26 - Adjournment or postponement: Shelter Scotland thought it was unclear as to whether the FTT can adjourn or postpone a hearing even if parties have not applied for this. They suggested that the FTT should be able to do so as this would better enable them to exercise discretion and would be in line with the more active and inquisitorial nature of the FTT.

Rule 35 - First-tier Tribunal's consideration of application for permission to appeal: Ayr Housing Aid Centre noted that this rule allows the FTT to consider whether to review a decision and asked whether this would be considered by a differently constituted tribunal from the chamber. They suggested that, if there is no review, then consideration should be given to granting permission to appeal to the Upper Tribunal.

Shelter Scotland suggested that the wording of 35(2) is somewhat ambiguous and that the FTT 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.

Other rules in chapters 1 - 4

A number of respondents also commented on one or more of the other rules which are not new.

Rule 4 - Applications: Shelter Scotland suggested that further information should be provided as to where the application forms can be found. Specifically, they suggested that a link to an online version of the form should be provided.

Rule 11 - Hearing two or more applications together: The Scottish Property Federation and Homes for Scotland noted that the FTT can direct two or more applications to be considered simultaneously where they relate to the same property. They suggested that it should be made clear that an application to the FTT should be made by the principal tenant, on behalf of any joint tenants or other registered occupants of a let property and that the FTT should not consider duplicate submissions relating to the same property or issue from multiple occupants of a dwelling.

Rule 12 - Amendment to a party's written representation: Ayr Housing Aid Centre made specific suggestions as how Rule 12 should be amended including that the reference to being subject to Rule 14 should read subject to Rule 13.

They also suggested that at 12(1)(b), the FTT should consider whether the amendment could have been submitted earlier under 12(1)(a), and that at 12(2)(a) they should consider whether substantial amendments should trigger an adjournment under Rule 26 - Adjournment or postponement.

Rule 13 - Amendment raising new issues: Shelter Scotland noted that any proposed amendment raising new issues of written representation can only be made if the FTT consents and that the FTT can also place conditions on such amendments as it sees fit. They sought clarification as to whether this includes new legal issues. If so, and particularly if linked to any ground for possession, they suggested it will be important that the notice periods linked to the new legal issue are respected. They suggested that in such cases, the FTT may have to determine that the new legal issue constitutes a new action that needs to be raised separately.

Ayr Housing Aid Centre also commented on the links between the current application and the new issue. Referring back to their comments on Rule 12, they proposed that the FTT should consider whether the applicant could have introduced the new issue earlier in the process.

Rule 14 - Withdrawal of the application: Shelter Scotland suggested that an applicant could find this rule confusing since 14(1)(a) states that an applicant may withdraw an application orally at a hearing, while 14(2) states that a notice of withdrawal must be in writing.

Rule 18 - Mediation: The Scottish Association of Landlords & Council of Letting Agents highlighted the value they placed on the mediation service provided by the FTT. They hoped that the service will continue to be provided by the FTT. Similarly, the First-tier Tribunal for Scotland Housing and Property Chamber suggested that the draft regulations be reworded to provide certainty that mediation can be provided by trained members of the Housing and Property Chamber. Specifically, they suggested that the same wording as exists in Section 24 of the Tribunals, Courts and Enforcement Act 2007 should be adopted². An Individual respondent asked whether there would be a list of mediators or a referral mechanism.

Rule 20 - Evidence: Ayr Housing Aid Centre suggested this Rule should be linked to Rules 13 and 14.

Rule 21 - Lodging of documents etc.: As above, Ayr Housing Aid Centre suggested this Rule should be linked to Rules 13 and 14.

An Individual respondent noted that the Rule does not indicate when the documents are to be lodged.

Shelter Scotland's concerns related to timescales – they felt that given the short notice period for hearings, parties should be given more time than a minimum of 3 days to gather and send any document and lists of witnesses. They noted that the current Summary Cause Rules 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 and that parties have to lodge the actual evidence no later than 14 days before a hearing.

² The 2007 Act can be accessed at: <http://www.legislation.gov.uk/ukpga/2007/15/contents>

Rule 22 - Documents at hearings: An Individual respondent asked whether there will be any sanction for unreasonable delay.

Rule 23 - Hearings: Shelter Scotland commented that, whilst agreeing with making the FTT as efficient as possible, they considered that 10 working days is impractical and would not constitute reasonable notice. They noted that a party may wish to take advice on their case and may also need advice on a separate issue, such as making an application for benefits. They had an associated concern that parties may be less likely to attend hearings if they are unable to access the necessary advice and/or make the necessary arrangements to do so. They proposed a notice period of at least 20 working days.

Homeless Action Scotland commented on hearings held by telephone. Their concern was that telephone hearings should not become the norm for people living in rural or remote areas for reasons of expediency for the FTT. They noted that any such approach could result in inequitable access to full FTT hearings for people living in these areas.

An Individual respondent asked whether a previously represented party can take over dealing with their case at a hearing.

Rule 28 - Recall: Shelter Scotland suggested this rule should be adjusted to ensure that all recalls for evictions actions must result in a hearing. They also suggested:

- A specific change in wording so that the rule reads “and a party (or a party’s representative) did not attend”.
- That the rule needs to be changed to accommodate case management discussions. They referenced Rule 16 as stating that the FTT “may do anything at a case management discussion which it may do at a hearing, including making a decision” but noted that Rule 28 only accounts for situations when “a party (or a party’s representative) did not attend the hearing”.
- That the 14-day deadline for parties to apply for a recall of a decision should be extended. Their proposal was that parties should be able to apply for a recall up until enforcement of the decision.
- Further information should be provided 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.

Rule 32 - Prohibition on recording of proceedings by parties: Ayr Housing Aid Centre suggested this could be linked to Rule 35 and Rule 36.

Rule 34 - Application for permission to appeal a decision for the First-tier Tribunal: Shelter Scotland suggested this rule should mention the specific timescales that apply to applications for permission under section 46(3)(1) of the Tribunals (Scotland) Act 2014.³

³ Available at: <http://www.legislation.gov.uk/asp/2014/10/enacted>

They also suggested that some of the terminology used at Rule 34 will mean little to most users who may find it difficult to determine if any of the regulations apply to them, and that the information provided should be extended and specific timescales mentioned.

Rule 37 - Expenses: Homeless Action Scotland welcomed this Rule but noted that the draft Model Tenancy Agreement⁴ contained a clause which would enable a landlord to recover all expenses awarded against them from their tenant, regardless of the ruling of the FTT. They suggested that this appears contrary to the spirit of Rule 37 and that the Model Tenancy Agreement should be changed to enable Rule 37 to be implemented as intended.

Ayr Housing Aid Centre hoped that the FTT would have issued relevant directions and taken appropriate action based on unreasonable conduct. They went on to comment that awarding expenses could be described as a fee and that this could lead unnecessarily to a range of complications.

An Individual respondent sought clarification as to whether there can be no award of expenses other than at Court of Session Rates.

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

Part 2 contains information that a homeowner will need to be able to make an application about an alleged failure of a property factor to comply with the Property Factors (Scotland) Act 2011. This Part is the same as the 2016 rules for procedures relating to property factoring and maintenance, registration matters and enforcement of a code of practice.

Only two respondents made a comment at Question 2.

Greenbelt Group was concerned that the current process is largely adversarial and does not take into account that the Property Factor and Homeowner will continue to have a relationship both during and following the determination of the Application. They suggested that mediation would be a more effective dispute resolution process given the ongoing nature of the parties' relationship. They went on to make a number of specific suggestions including that:

- A more proactive case management role could be adopted from the outset.
- The Property Factor should be informed of any application and given the opportunity to make submissions, including proposing possible dispute resolution by other means.
- Parties should be given the opportunity to inspect or uplift/borrow papers from the FTT.

⁴ Further information on the recent consultation on the Draft Model Tenancy Agreement is available from the Scottish Government's website at:

<https://consult.scotland.gov.uk/private-rented-sector-policy/regulations-and-policy-private-housing/>

- There should be a time limit for response from the other party and a time limit for a decision to be issued. They suggested that in both cases 7 days would be appropriate, but with a shorter time limit in urgent cases.
- Where there is to be a full hearing, a prior procedural hearing should be automatically assigned to actively look at potential resolution including mediation.

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

Responses by respondent type are set out in Table 2 below.

Table 2: Question 3 by respondent type

	Yes	No	Not answered	TOTAL
Groups:				
<i>Campaign or Advice Group</i>	3	-	1	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	2	2	3	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	12	2	6	20
Individuals	1	-	-	1
TOTAL	13	2	6	21

The majority of respondents who answered the question (13 out of 15 respondents) were content with the amendments to the 2016 regulations in relation to Repairing Standard Applications in Chapter 1. Only two Representative body respondents (Scottish Association of Landlords & Council of Letting Agents and the Scottish Property Federation) were not content.

In their further comment, the Scottish Association of Landlords & Council of Letting Agents suggested that the consultation is not clear about what amendments have been made.

The Scottish Property Federation's concern related to whether a Landlord has the right to access a dwelling without consent from the FTT in order to carry out obligations set out within the Model Tenancy Agreement. They suggested that the draft Regulations do not make this clear.

Two respondents who had noted that they were content also made a comment. Shelter Scotland noted their support for the descriptive titles for individual rules here and across the draft Regulations and suggested that this will help users of the FTT to better navigate the Regulations.

Ayr Housing Aid Centre suggested that Rule 48 - Parties to be notified by the First-tier Tribunal - should include '(c) Third party making application under section 22(1A) of the Act' and that this should be linked to Rule 52 – Parties to be notified by the First-tier Tribunal.

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

Responses by respondent type are set out in Table 3 below.

Table 3: Question 4 by respondent type

	Yes	No	Not answered	TOTAL
Groups:				
<i>Campaign or Advice Group</i>	2	-	2	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	2	1	4	7
<i>Tenant Group</i>	1	-	3	4
<i>Other</i>	-	-	1	1
Total Groups	8	1	11	20
Individuals	1	-	-	1
TOTAL	9	1	11	21

The majority of respondents who answered the question (9 out of 10 respondents) were content with amendments to the 2016 regulations in relation to Landlord Applications in Chapter 2. Only one Representative Body respondent (Scottish Association of Landlords & Council of Letting Agents) was not content. In their further comment, they again suggested that the consultation is not clear about what amendments have been made.

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

Responses by respondent type are set out in Table 4 below.

Table 4: Question 5 by respondent type

	Yes	No	Not answered	TOTAL
Groups:				
<i>Campaign or Advice Group</i>	2	1	1	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	2	1	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	11	2	7	20
Individuals	1	-	-	1
TOTAL	12	2	7	21

The majority of respondents who answered the question (12 out of 14 respondents) were content with amendments to the 2016 regulations in relation to Assured Tenancy References in Chapter 3. Two respondents (Scottish Association of Landlords & Council of Letting Agents and Shelter Scotland) were not content. As at previous questions, the Scottish Association of Landlords & Council of Letting Agents suggested that the consultation is not clear about what amendments have been made.

In their further comments, Shelter Scotland called for Rule 58 – Assured tenancy references to the First-tier Tribunal, to be amended. They suggested that as currently drafted, section 58(b)(i) means that tenants would have to provide a copy of their tenancy agreement but that 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. Their proposal was that Rule 58(b)(i) should state that the reference must be accompanied by “a copy of the written terms of the tenancy (if any)”.

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

Responses by respondent type are set out in Table 5 below.

Table 5: Question 6 by respondent type

	Yes	No	Not answered	TOTAL
Groups:				
<i>Campaign or Advice Group</i>	2	-	2	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	2	1	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	11	1	8	20
Individuals	1	-	-	1
TOTAL	12	1	8	21

The majority of respondents who answered the question (12 out of 13 respondents) were content with amendments to the 2016 regulations in relation to Assured Tenancy References in Chapter 4. One Representative body respondent (Scottish Association of Landlords & Council of Letting Agents) was not content. As at earlier questions this was because they felt the consultation is not clear about what amendments have been made.

Questions on jurisdictions due to transfer from the Sheriff Court

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

Responses by respondent type are set out in Table 6 below.

Table 6: Question 7 by respondent type

	Yes	No	Not answered	TOTAL
Groups:				
<i>Campaign or Advice Group</i>	2	1	1	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	2	1	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	11	2	7	20
Individuals	1	-	-	1
TOTAL	12	2	7	21

The majority of respondents who answered the question (12 out of 14 respondents) agreed with the procedure for applications under the Rent (Scotland) Act 1984 in Chapter 7. Two respondents (Scottish Association of Landlords & Council of Letting Agents and Shelter Scotland) disagreed.

Three further comments were made. One of these comments was from a respondent who had agreed at Question 7: Ayr Housing Aid Centre referred back to their comments on Rule 16, at which they noted a concern that Rule 16 may not comply with the European Convention on Human Rights (ECHR) on a number of levels and that this will be of relevance to Rule 79 – Application for possession.

The Scottish Association of Landlords & Council of Letting Agents also commented on Rule 79. They noted that 79(b)(iv) states that the application must be accompanied by evidence that suitable alternative accommodation is available, but that the 1984 Act allows possession to be awarded in some cases regardless of whether alternative accommodation is available. They therefore suggested that the section should be amended to read “evidence that suitable alternative accommodation is available (if applicable)”.

The Scottish Association of Landlords & Council of Letting Agents also sought clarification on whether claims to recover rent arrears from 1984 Act tenants will be dealt with by the FTT under the following circumstances:

- Where the landlord is also seeking possession of the property.
- Where the landlord is not seeking possession but simply wishes to recover the arrears and the amount of arrears is £5,000 or below (the simple procedure threshold).
- Where the landlord is not seeking possession but simply wishes to recover the arrears and the amount of arrears is above £5,000 (the simple procedure threshold).

In their further comment, Shelter Scotland suggested that Rule 82 - Application to adjust recoverable rent, section (b) and Rule 85 - Application to determine the rent level, section (b)1 should be amended to include the words “if any”.

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

Responses by respondent type are set out in Table 7 below.

The majority of respondents who answered the question (10 out of 14 respondents) agreed with the procedure for applications under the 1988 Act in Chapter 8. Four respondents disagreed (ARLA Propertymark, Scottish Association of Landlords & Council of Letting Agents, Shelter Scotland and YourPlace).

Table 7: Question 8 by respondent type

	Yes	No	Not answered	TOTAL
Groups:				
<i>Campaign or Advice Group</i>	2	1	1	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	-	1	1	2
<i>Representative Body</i>	1	2	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	9	4	7	20
Individuals	1	-	-	1
TOTAL	10	4	7	21

Six respondents made a further comment, two of whom had agreed at Question 8. SFHA asked if it would be worthwhile to signpost that these regulations will be superseded following the introduction of the Private Residential Tenancy. As at the previous question, Ayr Housing Aid Centre referred back to their comments on Rule 16, although this time in relation to Rule 94 – Application for order for possession.

The four respondents who had disagreed at Question 8 also commented on Rule 94. The following points were made:

- Shelter Scotland suggested 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).
- YourPlace suggested that a copy of a Notice to Quit should not be required for applications under s.18 of the 1988 Act. They noted that an AT6 will have been served under s.19 stating the Grounds for possession. The Scottish Association of Landlords & Council of Letting Agents and ARLA PropertyMark made a similar point with the Scottish Association of Landlords & Council of Letting Agents suggesting that having to issue a Notice to Quit would confuse tenants and complicate matters as, in order to be valid, it may have to be issued to expire many months after the s.19 (AT6) notice. They suggested that Rule 94(b)(ii) be amended to read “a copy of the notice to quit served by the landlord on the tenant (if applicable)”.

Shelter Scotland also commented on Rule 96 - Application to provide written tenancy agreement and weekly rent book. They suggested that:

- Rule 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)”.
- 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”.

On Rule 98 – Application for damages for unlawful eviction, Shelter Scotland suggested that it is not clear as to what the correct procedure would be for a common law action for damages for unlawful eviction. They sought clarification on this issue and also proposed that Rule 98 should also allow for damages that are not included in section 36(6A) or (6B) of the 1988 Act.

Finally, the Scottish Association of Landlords & Council of Letting Agents sought clarification on the same range of issues on recovering rent arrears as at Question 7, although this time in relation to the 1988 Act.

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

Responses by respondent type are set out in Table 8 below.

Table 8: Question 9 by respondent type

	Yes	No	Not answered	TOTAL
Groups:				
<i>Campaign or Advice Group</i>	2	-	2	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	3	-	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	12	-	8	20
Individuals	1	-	-	1
TOTAL	13	-	8	21

All of the 13 respondents who answered the question agreed with the procedure for adaptations of rented houses applications in Chapter 9. There were no further comments.

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

Responses by respondent type are set out in Table 9 below.

Table 9: Question 10 by respondent type

	Yes	No	Not answered	TOTAL
Groups:				
<i>Campaign or Advice Group</i>	2	1	1	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	2	1	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	11	2	7	20
Individuals	-	1	-	1
TOTAL	11	3	7	21

The majority of respondents who answered the question (11 out of 14) agreed with the procedure for tenancy deposit applications in Chapter 10. Three respondents (Scottish Association of Landlords & Council of Letting Agents, Shelter Scotland and an Individual respondent) disagreed. All three of these respondents went on to make a further comment.

Both the Scottish Association of Landlords & Council of Letting Agents and Shelter Scotland commented on Rule 103 – Application for order for payment where landlord has not paid the deposit into an approved scheme.

With reference to Rule 103(b), the Scottish Association of Landlords & Council of Letting Agents noted that the tenant application should be accompanied by a copy of the tenancy agreement. However, they were concerned that the tenant may not have a copy and suggested that similar wording to that in used in Rule 53(b)(i) should be used to cover this scenario⁵. Shelter Scotland had a similar concern and suggested Rule 103(b) should be amended to include the words “if any”.

Other comments made were:

- The Scottish Association of Landlords & Council of Letting Agents suggested that Rule 103 is amended to require tenants to state, and if possible evidence on their application, the date the tenancy ended. They noted that the Tenancy Deposit Schemes (Scotland) Regulations 2011⁶ require applications to be made no later than 3 months after the tenancy has ended.
- An Individual respondent asked if the intention is to replace the Summary Application procedure in all cases and, if so, whether there will be a cut off point for these procedures.

⁵ 53(b)(i) reads “the lease or the tenancy agreement or, if these are not available, as much information about the tenancy as the landlord can give”.

⁶ The 2011 Regulations can be accessed at:
<http://www.legislation.gov.uk/sdsi/2011/9780111011850/contents>

Question 11: Do you have any other comments on the operational procedures for jurisdictions due to transfer from the sheriff court under Chapters 6-10?

Four respondents made additional comments.

Greenbelt Group made a general comment about whether the intention is to mirror the process and procedures of the Sheriff Court. They reported experience of applicants submitting a high volume of sometimes inadmissible and subjective evidence, including on the day of a hearing. They felt that this does not support a constructive panel hearing and that it prejudices not only the property factor but also the outcome. Their preference would be to work to a strictly managed set of procedures and for these to be applied consistently.

Shelter Scotland's concern also focused on evidence to be submitted but, in their case, was that it may be difficult for tenants to source some of the evidence they would be required to submit. For example, they highlighted that a tenant might not know their landlord's name or contact details if they had only ever dealt with a letting agent and their landlord is not registered. They suggested that tenants should not be adversely affected if the letting agent fails to provide the necessary information. They also reported that some tenants are likely to be unaware that that letting agents have to provide such information when the tenant requests it in writing, and that this applies not only to Chapters 6-10 but to a wide variety of applications under Chapters 1-11 of the draft regulations.

Two specific comments were made:

- An Individual respondent asked what would happen about warrant dues already paid and expenses which would have been awarded if cases are transferred mid-stream.
- YourPlace suggested that the truncation of 'Note 2 to tenant' on the AT6 form means that it no longer makes sense.

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

Responses by respondent type are set out in Table 10 below.

Table 10: Question 12 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	1	-	3	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	3	-	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	11	-	9	20
Individuals	1	-	-	1
TOTAL	12	-	9	21

All 12 respondents who answered the question agreed with the procedure for letting agent applications in Chapter 5. There were no further comments.

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

Responses by respondent type are set out in Table 11 below.

Table 11: Question 13 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	1	1	2	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	2	1	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	10	2	8	20
Individuals	-	1	-	1
TOTAL	10	3	8	21

The majority of those respondents who answered the question (10 out of 13) agreed with the procedure for applications under the 2016 Act. Three respondents (Scottish Association of Landlords & Council of Letting Agents, Shelter Scotland and an Individual respondent) disagreed.

Although there was no opportunity to provide a further comment at Question 13, two respondents referred to Question 13 at another question.

The Scottish Association of Landlords & Council of Letting Agents sought clarification on the same range of issues on recovering rent arrears as at Question 7, although this time in relation to the 2016 Act.

An Individual respondent asked whether landlord applications should be covered as they are included in the 2016 Act.

Question 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?

Seven respondents made a comment, with West Strathclyde Regional Network - Region 7 noting the need to ensure legislative compliance in this area.

In line with their comments at other questions, Greenbelt Group raised concerns about lack of equivalence of treatment of the applicant and the defendant. In particular, they highlighted the resources they may need to employ and how their costs can escalate.

In terms of access to the FTT, suggestions around what the Scottish Government needs to consider were:

- Long-distance access, given that many landlords do not reside in Scotland (Individual respondent). Also, offering out of working-hours options, including allowing people to attend a hearing without needing to take time off work (Individual respondent and Shelter Scotland).
- Ensuring that the option of hearings held by phone does not inadvertently disadvantage those living in rural or remote areas. It was suggested that this should be monitored (Homeless Action Scotland).
- How it will be ensured that all parties to a hearing understand the proceedings and can participate in them. There were calls for further regulations around what users of the FTT can expect, including, for example, the provision of translators and sign language interpreters (Shelter Scotland).
- The physical accessibility of venues for FTT hearings, including ensuring that they are wheelchair accessible (SFHA and Shelter Scotland).
- Considering the needs of people with mental health difficulties (SFHA).

More generally, Shelter Scotland suggested that there will be considerable onus on the user to understand their rights and responsibilities and follow the processes. They suggested this will be particularly difficult for people who have disabilities and that it will be important to ensure that the necessary advice and support is available to them. They noted the connection to the publicly-funded legal assistance which is the focus of the remainder of this consultation.

Other comments made were that:

- The FTT should, as far as possible, appoint a diverse range of people to the FTT in order to promote inclusion. This approach could be set out in a Diversity Strategy or Statement (SFHA).
- The Scottish Government needs to clarify whether a reason will be given as to why an application has been refused because this is currently not clear from the legislation (ARLA Propertymark).

Part Two: The provision of publicly funded legal assistance in the First-tier Tribunal Housing and Property Chamber

Part Two of the consultation focused on the availability of publicly-funded legal assistance for cases due to transfer to the FTT.

Legal assistance is an umbrella term used to cover Advice and Assistance and Civil Legal Aid. Advice and Assistance is available, subject to a financial eligibility test, on any matter of Scots law for various forms of legal advice and assistance short of representation. It will not usually cover representation although in some circumstances, a solicitor may grant a type of Advice and Assistance called Assistance by Way of Representation (ABWOR) in order to represent their client in proceedings. Where it is available for civil matters, this is subject to the usual Advice and Assistance financial eligibility test but may also be subject to a test of “reasonableness” (as with Civil Legal Aid) and whether the person can participate effectively in proceedings without publicly-funded legal representation.

Civil Legal Aid can cover circumstances where an applicant’s case is going to court. It can help pay for the costs involved with this, including all legal preparation work, the gathering of any evidence necessary for their case, representation in court and so on. It is assessed and granted by the Legal Aid Board. It is available subject to three tests: whether the applicant is financially eligible; whether they have probable cause (i.e. there is a sound legal basis for the proposed action); and whether it is reasonable in the circumstances to make legal aid available (which can, where appropriate, include consideration of whether attempts have been made to resolve the dispute without litigation).

The Scottish Government policy intention is for publicly-funded legal assistance in the FTT to be considered on a jurisdiction by jurisdiction basis in advance of the tribunals transferring into their respective chambers of the Tribunal. There is currently no provision for publicly-funded legal assistance in the Housing Chamber.

Please note that a small number of respondents made broader comments about publicly-funded legal assistance and the FTT and these are considered at Question 21⁷. In particular, an extensive comment by the Legal Services Agency is summarised at Question 21. This respondent referred to this comment at a number of other questions but the analysis is presented only at Question 21.

⁷ Where a respondent cross-referenced between their comments at different questions, their comment is only included in the total number of comments at that question if it is referenced within the analysis.

Question 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?

Responses by respondent type are set out in Table 12 below.

Table 12: Question 15 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	2	2	-	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	2	1	4	7
<i>Tenant Group</i>	4	-	-	4
<i>Other</i>	-	-	1	1
Total Groups	11	3	6	20
Individuals	1	-	-	1
TOTAL	12	3	6	21

The majority of those respondents who answered the question (12 out of 15) were content that there will be no provision for publicly-funded legal assistance for procedure in respect of Letting Agent Applications in Chapter 5. Three respondents (Legal Services Agency, Scottish Association of Landlords & Council of Letting Agents and Shelter Scotland) disagreed.

Five respondents made a comment. Two of these respondents had agreed at Question 15. ARLA PropertyMark commented letting agents are businesses and should factor in these costs while SFHA noted that this approach would mirror that for Property Factors.

CIH Scotland felt it is not clear why the consultation proposes that legal assistance will not cover cases relating to letting agent registration but will cover landlord registration. They suggested that people should have access to the same levels of support whether their case involves a landlord or a letting agent.

The Scottish Association of Landlords & Council of Letting Agents noted that the possible repercussions of a case against a letting agent are serious, including possibly losing their business and being prevented from acting as a letting agent in the future. They felt that given this possibility, publicly-funded legal assistance should be available to those who meet its qualifying conditions.

Shelter Scotland focused on whether publicly-funded legal assistance should be available to tenants; their view was in order to ensure that every tenant has the possibility to make proper use of this right, publicly-funded legal assistance should be provided.

Question 16: Do you agree publicly funded legal assistance should be available for parties in respect of applications for Landlord Registration in Chapter 6?

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

Responses by respondent type are set out in Table 13 below.

Table 13: Question 16 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	2	1	1	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	4	-	3	7
<i>Tenant Group</i>	-	4	-	4
<i>Other</i>	-	-	1	1
Total Groups	9	5	6	20
Individuals	-	1	-	1
TOTAL	9	6	6	21

A small majority of those respondents who answered the question (9 out of 15) agreed publicly-funded legal assistance should be available for parties in respect of applications for Landlord Registration in Chapter 6. Six respondents (East Dunbartonshire and Lanarkshire Regional Network, Homeless Action Scotland, Regional Tenant Network Organisation, Tayside Regional Tenants Network, West Strathclyde Regional Network - Region 7, and an Individual Respondent) disagreed.

Eight respondents made a comment. Two of these respondents had disagreed, with Homeless Action Scotland stating that they did not believe it is in the public interest to subsidise legal assistance for landlords. They suggested legal costs should be part of their normal business expenditure. An Individual respondent referred to delays in obtaining publicly-funded legal assistance and extra costs being incurred by the other party.

Six respondents who had agreed made a comment, with the SFHA suggesting that legal assistance would be appropriate.

Falkirk Council considered Advice and Assistance with ABWOR to be appropriate and noted that this option includes the safeguard of a test of reasonableness, ensuring that an applicant's ability to represent themselves is considered, with representation being made available when required. They also noted that the financial eligibility test ensures only those applicants that are in need can access assistance.

North Lanarkshire Council also suggested Advice and Assistance should be available, adding that in some circumstances, for example where a person is vulnerable, then this should also include representation.

YourPlace agreed with the funding of Advice and Assistance.

Other suggestions included that:

- Publicly-funded legal assistance should be limited to single property landlords who would struggle to meet legal costs (Ayr Housing Aid Centre).
- Landlords should factor any costs associated with the application process into their business plans (ARLA Propertymark).

Question 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.

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

Responses by respondent type are set out in Table 14 below.

Table 14: Question 17 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	4	-	-	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	2	-	-	2
<i>Representative Body</i>	3	-	4	7
<i>Tenant Group</i>	-	4	-	4
<i>Other</i>	-	-	1	1
Total Groups	11	4	5	20
Individuals	1	-	-	1
TOTAL	12	4	5	21

A majority of those respondents who answered the question (12 out of 16) agreed publicly-funded legal assistance should be available for parties in respect of applications under the 1984 Act in Chapter 7, including applications for possession. Four Tenant Group respondents (East Dunbartonshire and Lanarkshire Regional Network, Regional Tenant Network Organisation, Tayside Regional Tenants Network, West Strathclyde Regional Network - Region 7) disagreed.

Thirteen respondents made a comment. Of the four Tenant Group respondents who had disagreed, three simply noted that the state should not provide funding under these circumstances (East Dunbartonshire and Lanarkshire Regional Network, Regional Tenant Network Organisation and Tayside Regional Tenants

Network). The fourth tenant group (West Strathclyde Regional Network - Region 7) suggested that a landlord should have no access to legal aid in this instance but suggested that a tenant might. ARLA Propertymark (who had not answered the question) noted their view that if publicly-funded legal assistance is made available for one party then it should be provided for both and alternatively, if it is not provided to one side, then the other party should not receive it either. They suggested this would ensure the parties are on an equal footing. They also noted that the FTT is not the traditional adversarial court model and that there is a lesser role for legal representatives in such proceedings.

Amongst those who had agreed, Homeless Action Scotland, and Shelter Scotland considered that legal assistance should be provided – in other words, both Advice and Assistance and Civil Legal Aid should be available. Ayr Housing Aid Centre felt there must be provision for at least legal aid representation.

Falkirk Council, an Individual respondent, North Lanarkshire Council and YourPlace suggested that Advice and Assistance with ABWOR to be the appropriate type of assistance, sometimes noting that this option includes the safeguard of a test of reasonableness, with representation when required and that the financial eligibility test would ensure that only those in need can access assistance. Falkirk Council suggested that their preferred approach would ensure consistency across the range of available tenancy types.

Other comments included that:

- If assistance is not available, the pressure will switch to the third sector resulting in resource issues (Ayr Housing Aid Centre).
- The award of expenses should be sufficient (Greenbelt Group).
- Delays associated with securing Civil Legal Aid can disadvantage the other party (Individual respondent).

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

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

Responses by respondent type are set out in Table 15 below.

Table 15: Question 18 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	4	-	-	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	3	-	4	7
<i>Tenant Group</i>	-	4	-	4
<i>Other</i>	-	-	1	1
Total Groups	10	4	6	20
Individuals	1	-	-	1
TOTAL	11	4	6	21

A majority of those respondents who answered the question (11 out of 15) agreed publicly-funded legal assistance should be available for parties in respect of applications under the 1988 Act in Chapter 8, including applications for possession. Four respondents (East Dunbartonshire and Lanarkshire Regional Network, Regional Tenant Network Organisation, Tayside Regional Tenants Network, West Strathclyde Regional Network - Region 7) disagreed.

Six respondents, all of whom had agreed at Question 18, made a comment. These comments sometimes reflected the issues raised at the previous question, including that, given the potential seriousness of the issues involved, there should be the possibility of publicly-funded legal assistance (Homeless Action Scotland, and Shelter Scotland).

Ayr Housing Aid Centre felt there must be provision for at least legal aid representation. An Individual respondent and YourPlace suggested that Advice and Assistance, including ABWOR would be the appropriate option. As at previous questions, North Lanarkshire Council suggested that in some circumstances, for example where a person is vulnerable, representation should be included.

Ayr Housing Aid Centre raised an issue regarding access to legal aid providers and noted that there is an important role for advice agencies who often fill the gap in provision. They suggested that a partnership approach, supported by robust quality assurance systems, has considerable merit.

Question 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?

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

Responses by respondent type are set out in Table 16 below.

Table 16: Question 19 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	3	-	1	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	3	-	4	7
<i>Tenant Group</i>	-	4	-	4
<i>Other</i>	-	-	1	1
Total Groups	9	4	7	20
Individuals	1	-	-	1
TOTAL	10	4	7	21

A majority of those respondents who answered the question (10 out of 14) agreed publicly-funded legal assistance should be available for parties in respect of applications under the 2006 Act in Chapter 9. Four respondents (East Dunbartonshire and Lanarkshire Regional Network, Regional Tenant Network Organisation, Tayside Regional Tenants Network, West Strathclyde Regional Network - Region 7) disagreed.

Seven respondents, all of whom had agreed, made a comment, with a number of these comments linked to issues of equality.

SFHA and Shelter Scotland favoured legal assistance being available, noting the potential for the tenants involved in applications under the 2006 Act in Chapter 9 to be vulnerable. Shelter Scotland noted that 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.” They suggested that publicly-funded legal assistance should be considered to be part of such assistance.

Ayr Housing Aid Centre suggested that as a minimum there should be Advice and Assistance with application.

Falkirk Council, North Lanarkshire Council and YourPlace suggested that Advice and Assistance with ABWOR would be the appropriate option, sometimes noting that this option includes the safeguard of a test of reasonableness, with representation when required. They also noted that the financial eligibility test would ensure that only those in need can access assistance.

An Individual respondent suggested that Advice and Assistance, including ABWOR would be the appropriate option but that Civil Legal Aid should be available in cases involving disability discrimination.

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

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

Responses by respondent type are set out in Table 17 below.

Table 17: Question 20 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	4	-	-	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	3	-	4	7
<i>Tenant Group</i>	-	4	-	4
<i>Other</i>	-	-	1	1
Total Groups	10	4	6	20
Individuals	-	1	-	1
TOTAL	10	5	6	21

A majority of those respondents who answered the question (10 out of 15) agreed publicly-funded legal assistance should be available for parties in respect of applications under the 2011 Act in Chapter 10. Five respondents (East Dunbartonshire and Lanarkshire Regional Network, Regional Tenant Network Organisation, Tayside Regional Tenants Network, West Strathclyde Regional Network - Region 7 and an Individual respondent) disagreed.

Eight respondents made a comment. One of these comments was from the Individual respondent who had disagreed. They commented that these cases will involve a factual dispute, that no expenses are involved and that they can be done in writing with minimal cost.

Amongst the seven respondents who agreed and commented, further comments tended to reflect those made at earlier questions. Falkirk Council, North Lanarkshire Council and YourPlace suggested that Advice and Assistance with ABWOR would be the appropriate option while the SFHA and Shelter Scotland favoured legal assistance being available.

SFHA went on to comment that it is important to ensure that tenants have the confidence to pursue tenancy deposit claims. Shelter Scotland felt that the legal assistance option 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.

Finally, Ayr Housing Aid Centre again noted the role of advice agencies and the benefits of the partnership approach.

Question 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.

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

Responses by respondent type are set out in Table 18 below.

Table 18: Question 21 by respondent type

	Yes	No	Not answered	TOTAL
Group				
<i>Campaign or Advice Group</i>	4	-	-	4
<i>Local Authority</i>	2	-	-	2
<i>Property management company</i>	1	-	1	2
<i>Representative Body</i>	3	-	4	7
<i>Tenant Group</i>	-	4	-	4
<i>Other</i>	-	-	1	1
Total Groups	10	4	6	20
Individuals	1	-	-	1
TOTAL	11	4	6	21

A majority of those respondents who answered the question (11 out of 15) agreed publicly-funded legal assistance should be available for parties in respect of applications under the 2011 Act in Chapter 10. Four respondents (East Dunbartonshire and Lanarkshire Regional Network, Regional Tenant Network Organisation, Tayside Regional Tenants Network, West Strathclyde Regional Network - Region 7) disagreed.

Ten respondents made a comment. As noted at the beginning of this section, the analysis presented at this question also covers some of the wider issues raised around legal aid.

A number of those commenting noted their strong support for legal assistance being available, given that tenants could lose their home (Homeless Action Scotland, Legal Services Agency and Shelter Scotland). The Legal Services Agency noted that, as a matter of principle, they agreed that publicly-funded legal assistance should be available for parties in respect of private residential tenancy applications (including applications for an eviction order). They went on to comment that:

- Under the existing procedures through the courts, publicly-funded legal assistance is made available where it is reasonable to do so and where the

party concerned meets the financial tests. They were of the view that a reform transferring recovery of possession to the FTT should not result in a party being put at a disadvantage as a consequence of the change of forum in which the matter is dealt with.

- In adjudicating on residential tenancies, the FTT is weighing up a number of important statutory and common law rights but is also dealing with issues that come within the purview of a number of human rights. This includes rights to property and respect for personal and family life. They suggested that it is trite law that, when adjudicating on such matters the right of access to a court or tribunal must be practical and effective but also that, in certain cases, there is a positive obligation upon a state to provide Legal Aid.

The Legal Services Agency also noted their view that the Civil Legal Aid system is a well-trying set of arrangements that, where applied, work satisfactorily but that the system can be bureaucratic and lead to delays. They suggested that there may be value in extending the assistance by way of a representation system to the new tribunal arrangements, but noted their conviction that where there are matters of complexity and importance, publicly-funded legal advice, assistance and representation must be made available in a concrete and effective manner.

Otherwise, respondents tended to take a very similar position at this question as at preceding questions. Falkirk Council, an Individual respondent, North Lanarkshire Council and YourPlace suggested that Advice and Assistance with ABWOR would be the appropriate option while the SFHA and Shelter Scotland favoured legal assistance being available. Shelter Scotland went on to comment that, in their response to the Scottish Government's Consultation on Proposals for Regulations and Policy Supporting the Private Housing (Tenancies) (Scotland) Act 2016, they had expressed a view that the difference between mandatory and statutory terms was confusing. They suggested that when issues are legally complex and not easy to understand, 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.

CIH Scotland noted that one of the aims of the new system is that it should be simpler and more accessible than taking a case to the Sheriff Court. However, they suggested that some people will still need advice, information and support to prepare a case and that it is essential that the right support is available.

Ayr Housing Aid Centre again noted the role of advice agencies and the benefits of the partnership approach.

General Issues raised

As noted earlier, the consultation paper and the associated questions focused on the specifics of the draft regulations. However, a small number of respondents did raise some more general issues associated with the FTT. These are summarised below.

Charging of fees: A number of respondents commented on this issue. Some welcomed the FTT being free of charge for everyone (Scottish Land and Estates, Shelter Scotland).

Homes for Scotland and the Scottish Property Federation were of a different view. They had concerns that the FTT may become overloaded, particularly in the early days, and that both tenants and landlords may experience excessive delays. They recommended that a reasonable fee is charged to applicants to access the service, suggesting this would help ensure the service is adequately resourced and sustainably funded in the longer-term. The Scottish Property Federation also noted their members' support for expenses being chargeable to an applicant if unreasonable behaviour can be proved (under Rule 37).

Timescales: Homes for Scotland and the Scottish Property Federation commented that it will be critical that applications to the FTT are dealt with in a timely manner to minimise any risk and potential increased management costs for investors. They noted that the current draft procedures do not provide detailed guidance as to timescales but suggested that they should.

Capacity: On a more general point, CIH Scotland also had some concerns about the capacity of the new system and possible implications if it is not able to cope with the volume of cases generated. They were concerned that the likely number of cases presented in the consultation paper could be an underestimate and that it is not clear whether the FTT will have the capacity at the outset to deal with cases over and above the estimates given. They recommended that the situation be monitored closely and a formal review of the new system carried out after the first year of operation.

Rights to Access a Property: Homes for Scotland raised a query as to whether a Landlord has the right to access a dwelling without consent from the FTT in order to carry out obligations set out within the Model Tenancy Agreement.

Shelter Scotland also made a similar point with regard to Rule 114 – No postponement permitted. They objected to this rule and suggested 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. They went on to comment that Rule 114 highlights tensions in Rule 2 - The overriding objective between avoiding delay and dealing with proceedings in a manner proportionate to the complexity of the issues and the resources of the parties.

Annex 1

Organisations responding to the consultation
ARLA Propertymark (Association of Residential Letting Agents)
Ayr Housing Aid Centre
Chartered Institute of Housing (CIH) Scotland
East Dunbartonshire and Lanarkshire Regional Network
Falkirk Council
Greenbelt Group Ltd
Homeless Action Scotland
Homes for Scotland
Legal Services Agency Ltd
North Lanarkshire Council
Regional Tenant Network Organisation
Scottish Association of Landlords & Council of Letting Agents
First-tier Tribunal for Scotland Housing and Property Chamber
Scottish Federation of Housing Associations (SFHA)
Scottish Land and Estates
Scottish Property Federation
Shelter Scotland
Tayside Regional Tenants Network
West Strathclyde Regional Network - Region 7
YourPlace



Scottish Government
Riaghaltas na h-Alba
gov.scot

© Crown copyright 2017

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78851-085-1 (web only)

Published by The Scottish Government, July 2017

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS266442 (07/17)

W W W . G O V . S C O T