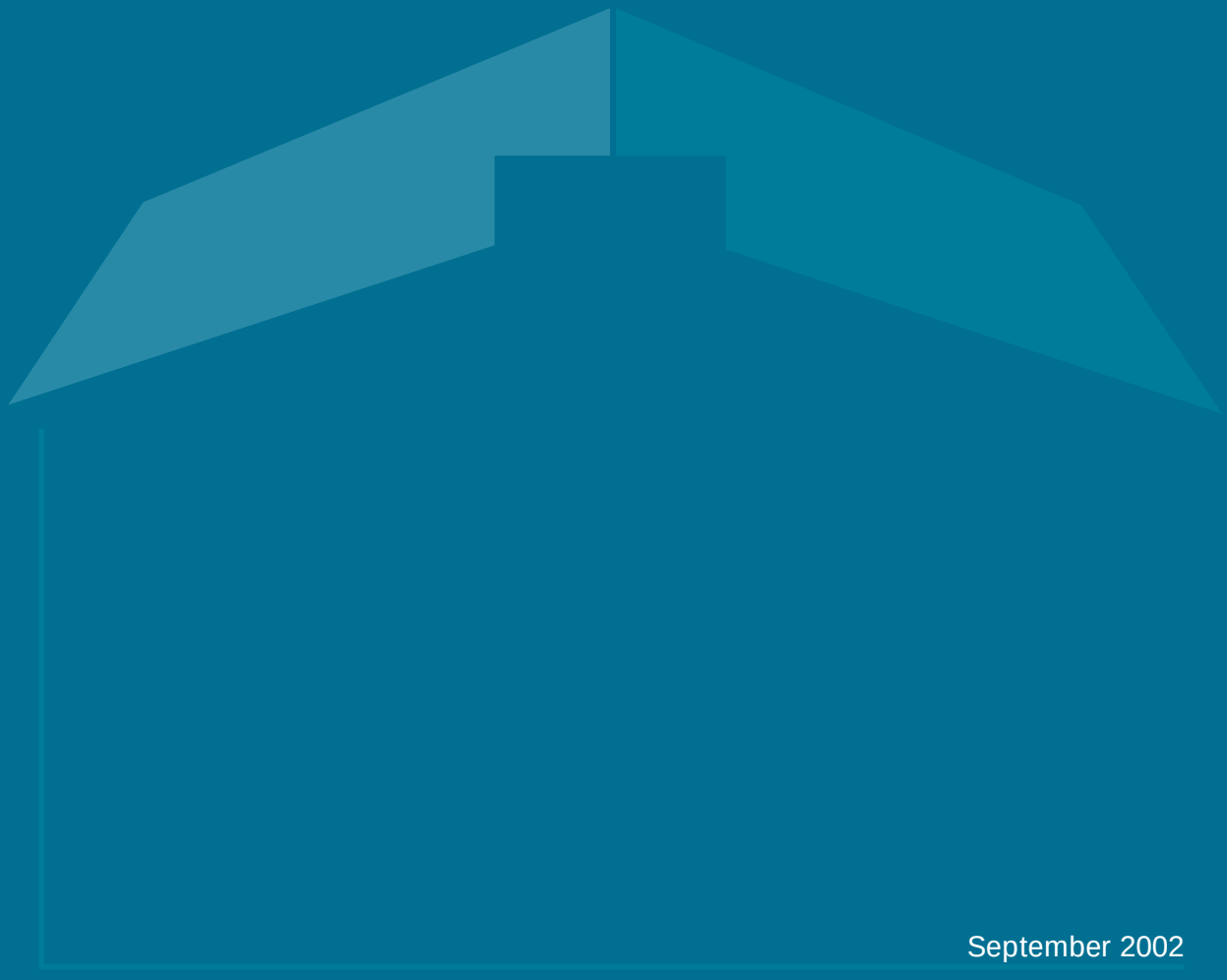
Housing(Scotland)Act 2001

Model Short Scottish Secure Tenancy Agreement



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SCOTTISH EXECUTIVE

Making it work together

Housing(Scotland)Act 2001

Model Short Scottish Secure Tenancy Agreement

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Foreword

This document consists of four parts. Section One is an explanation of how to use the Model. Section Two contains the Model Agreement itself and Section Three is the summary which would be given also to the tenant as part of the signing-up process. The final part, Section Four is a detailed legal commentary to the Model, which explains the reason for each paragraph. It is not intended to be a comprehensive and authoritative interpretation of the law but it may be used as a reference tool so as to understand the reason for the inclusion of each paragraph.

1 HOW TO USE THE MODEL

1.1 The form of the Model Short Scottish Secure Tenancy Agreement (MoshSsta) is as follows. There are three categories of clause. The first category is the Core clause. This represents a summary of the landlord and tenant's Core rights and obligations which are expressed in the Housing (Scotland) Act 2001 and other relevant housing legislation. These Core rights include compensation for improvements and right to repair. The expression of these Core rights in the Agreement can only be a gloss on the statute which takes precedence in the event of any dispute as to interpretation. Such clauses are mandatory. They are indicated in **bold**. The second category is those clauses which replicate, in a contractual fashion, the common law rights and obligations in respect of repairs, maintenance and use and care of the house. Such clauses are also mandatory. They are indicated in *italics*. (Where clauses are bold and in italics, the source is both the common law and statute.) The third category of Clause is optional. It deals with a variety of peripheral matters that landlords may or may not wish to include. It also covers optional augmentation to the statutory and common law position that some landlords may wish to include. Such clauses are indicated in ordinary typeface. Clauses in square brackets [ ], indicate clauses with options depending on local arrangements (such as frequency of rent payments). Detailed references are given in the notes to each paragraph. A number of clauses derive from other statutory sources not specific to housing law but are not part of the Core rights. These are not highlighted in the text. Reference is made to them in the Notes. It is recommended that such clauses be maintained in any short Scottish secure tenancy agreement. Landlords are free to add other clauses to their own tenancy agreement or vary them so long as the requirements of the 2001 Act are met.

1.2 It is recognised that the full text of MoshSsta would probably not be read by the majority of tenants. It is also recognised that it would be impractical to expect housing officers to take tenants through the full text of MoshSsta in the signing-up process. However, MoshSsta is not designed to be read at a single sitting or to be used for the signing-up process. It is there to encapsulate the rights and obligations of both landlord and tenant. In effect, it provides a useful reference tool for landlord and tenant where more detailed information is required on the legal responsibilities of landlord and tenant. A summary form of the Agreement (see next paragraph) would be used at the signing-up process. It is intended that a tenant or housing officer wishing more detail about any aspect of the tenancy will be able to make reference to MoshSsta for clarification. In addition, there are also detailed notes referring to each paragraph of MoshSsta. These notes will not appear in the version signed by the landlord and tenant but are intended as an aid to understanding of the Agreement.

1.3 MoshSsta is intended to be used with the Summary MoshSsta (SuMoshSsta). It follows the same structure as the principal Agreement but is considerably shorter. SuMoshSsta is no longer than the majority of social sector tenancy agreements and shorter than many. The purpose of SuMoshSsta is to provide a document which encapsulates the principal elements of MoshSsta. It will help housing officers when signing-up tenants. It also provides a handy summary for tenants

and housing officers of the main terms of the tenancy. However, it does not and cannot act as a substitute for MoshSsta; neither does it in any way change the meaning of any term or condition contained within MoshSsta. It is insufficiently precise and comprehensive to be anything other than a broad summary of the position. Nevertheless, it is intended to have a practical everyday utility.

1.4 Thus, at signing-up, the short Scottish secure tenant will receive the following documents:

- SuMoshSsta (which the housing officer uses in the signing-up process to explain the principal terms).
- MoshSsta which is signed by landlord and tenant after the tenant has been given the opportunity of reading the text, (but if the tenant does not wish to do so, its legal validity is not affected).
- Tenant's Handbook, or equivalent (which will provide extra detail particularly in relation to local matters). Neither the Tenant's Handbook nor the SuMoshSsta will have direct contractual effect.

Landlords will be aware that in terms of section 34 of the Act, an essential prerequisite for the formation of a short Scottish secure tenancy is that before the creation of the tenancy, the prospective landlord must serve on the tenant a statutory notice complying with section 34(4) and The Short Scottish Secure Tenancies (Notices) Regulations 2002. If that is not done, no short Scottish secure tenancy is created. The tenancy will be a Scottish secure tenancy. Service of the notice can be done in the ways specified in section 40 of the Act. It may be served on the tenant(s) during the signing-up process as long as the service is done before the parties sign the Agreement. However, as a matter of good practice, landlords should serve the notice a day or more before the creation of the Agreement wherever feasible.

2. MODEL SHORT SCOTTISH SECURE TENANCY AGREEMENT

Contents

1 INTRODUCTION

1.1 **This document is a Short Scottish Secure Tenancy Agreement between us, [Name and address of landlord], and you:**

.....**(tenant/joint tenant) and**

.....**(joint tenant)**

1.2 **We agree to rent accommodation to you on the terms and conditions in this Agreement. The accommodation includes the fixtures and fittings contained within it, the use of the common parts and the means of access to it. It also includes any other facilities that we may specify in writing to you. It is referred to as the "house" in this Agreement. The term "common parts" is explained at paragraph 1.11.** If you ask us, we will give you a more detailed description of the house and a plan detailing your rights relating to the common parts, and access to your house.

1.3 **The full address of the house is:**

.....

.....

1.4 **The tenancy will start on .....[This Agreement will take effect from .....] (the entry date). This is regardless of the date on which this Agreement is signed. The tenancy will continue from the entry date until the termination date which is.....However, if neither you nor us end the tenancy in one of the ways described in Part 6 of this Agreement the tenancy will be automatically renewed for the same period unless we and you agree that the renewed tenancy should be for a different period. That renewed tenancy will also be a short Scottish secure tenancy. In some circumstances, this short Scottish secure tenancy may automatically convert to a Scottish secure tenancy 12 months after the date of entry. See Part 6 for more details.**

1.5 The rent is £..... every [week/fortnight/4 weeks/calendar month] [payable in advance by you on or before the first day of each rental period] [payable in arrears on the last day of each rental period]. [The following period(s) is/are rent free .....]

[1.6 We may provide services in connection with your tenancy. If we do, they are set out in a separate document together with the cost of each of those services. That document will also state whether the services are optional or compulsory. That document forms part of this Agreement. It is a condition of this Agreement that you pay for those compulsory services unless those services are housing support services provided via the local Council's Supporting People department.]

1.7 **We will consult you about any proposed increase in rent or service charge and have regard to your opinions before we make our decision. We are entitled to change the amount of rent and any service charge, as long as we tell you in writing at least four weeks before the beginning of the rental period when the change is to start.** We will not normally change the rent or service charge more than once every 12 months. **You have a right, on request, to a statement of our rent and service charge policy. See paragraph 7.3 for more details.**

1.8 If you break any part of this Agreement, we may:

- take legal action against you (including eviction proceedings); AND
- charge you for any resulting losses we have suffered including any legal expenses as assessed by the court.

1.9 You can telephone us or write to us if you would like to know more about anything contained in this Agreement. We will do our best to help you. You can also get independent advice and information from a number of organisations such as Law Centres, Solicitors, Housing Advice Centres, Citizens Advice Bureaux, Tenants Associations, the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission.

1.10 If you want another copy of this Agreement, we will provide one on request. If you want a copy of it in another language or another form (such as Braille or audio tape), please tell us and we will provide you with one as soon as we can. However, in the event of any dispute, it is this version of the Agreement which is binding on you and us.

1.11 **INTERPRETATION**

In this Agreement, the following words have the following meanings except where the context indicates otherwise.

- We/us/our – the landlord
- You/your – the tenant and any joint tenant
- **Tenant – includes any joint tenant**
- Neighbour – any person living in the locality
- Neighbourhood – the locality of your house
- Common Parts – this includes any part of the structure and exterior of the building in which the house is located (such as the roof, guttering, and outside walls) as well as any common facilities in that building (such as the common close, common stairway, entrance steps, paths, entrance doors and doorways, passages, bin chute accesses, yard, gardens, outhouses, bin areas, cellar, back green and back court)
- Repair – see paragraph 5.1

- House – see paragraph 1.2
- Co-habitee – a person, whether of the opposite sex or not, who is living with you in a relationship similar to that of husband and wife
- **Family – this term includes: your spouse, co-habitee, parent, grandparent, child (including a child treated by you as your child and stepchildren), grandchild, brother, sister, uncle, aunt, niece, nephew; and any of those of your spouse**
- Anti-social – see paragraph 3.2
- **Overcrowding – more people are sleeping in the house than is allowed by section 135 of the Housing (Scotland) Act 1987**
- **Scottish secure tenancy – a tenancy as defined by section 11 of the Housing (Scotland) Act 2001**
- **Short Scottish secure tenancy – a tenancy as defined by section 34 of the Housing (Scotland) Act 2001**

1.12 This Agreement, in parts, attempts to summarise current legislation. In case of conflict between those parts and current legislation, the legislation shall prevail. Where legislation has been amended since this Agreement was entered into, this Agreement shall be read consistently with the amended legislation.

1.13 You are responsible for ensuring that no-one living with you does anything that would be a breach of this Agreement if they were the tenant. If they do, we will treat you as being responsible for any such action.

1.14 **CHANGING THIS AGREEMENT**

No part of this Agreement may be changed except in the following circumstances:

- **we and you agree in writing to change it; OR**
- **we increase the rent or service charge in the way described in paragraph 1.7 above; OR**
- **we or you apply to the sheriff under section 26 of the Housing (Scotland) Act 2001 for an order to change the Agreement and the sheriff grants such an order.**

1.15 **JOINT AND SEVERAL LIABILITY**

If two or more people have signed this Agreement, they are jointly and severally liable for the terms and conditions of this Agreement. This means that each one of them is fully responsible for making sure that all the conditions in this Agreement are kept to, including payment of rent. **You can apply for a joint tenant to be added to the tenancy: see paragraph 4.1 below.**

2 USE OF THE HOUSE AND THE COMMON PARTS

2.1 *You must take entry to the house, occupy and furnish it* **and use it solely as your only or principal home**. You are entitled to have members of your family occupying the house with you, as long as this does not lead to overcrowding. If we ask, you must tell us who is living in the house. You should tell us as soon as there is a change in those who are living in your house.

2.2 *You, those living with you, and your visitors must take reasonable care to prevent damage to:*

- *the house;*
- *decoration;*
- *[our furniture;]*
- *the fixtures and fittings;*
- *the common parts;*
- your neighbours' property.

For example:

- *before you leave the house unoccupied, you must check reasonably thoroughly that there is no risk of damage from fire, water or gas supplies in your house;*
- you must tell us if you intend to go away for more than four weeks and your house will be unoccupied during that time;
- *if your house is going to be unoccupied for any length of time, and there is a risk of water pipes freezing when you are away, you must tell us before you leave.*

2.3 *You and anyone living with you must not run any kind of business from the house.* However, if you ask us, we may give permission. See paragraph 9.3 of this Agreement for more information about doing this. If we give permission, we may also increase your rent.

2.4 **You must not allow your house to become overcrowded**. If the overcrowding is as a result of an increase in the size of your family living with you, you should apply to us for a house transfer. We will try to get you a larger house. In this circumstance only, we will not treat you as being in breach of this condition. However, if we offer you suitable alternative accommodation you must agree to take it unless there are good reasons for not taking it.

2.5 [KEEPING OF PETS. This paragraph should state the conditions relating to pets. This paragraph may cover the following issues:

- number of pets (if any) allowed;
- types of pets allowed;

- definition of pet;
- whether permission needs to be obtained for the keeping of pets, how that is to be obtained and the criteria applied;
- the general conditions applying to all permitted pets. The following are some of the conditions that may be applied:
  - keeping your pet is not prohibited by the Dangerous Dogs Act 1991, or by any other law;
  - you are responsible for the behaviour of any pets owned by you or anyone living with you;
  - you must take all reasonable steps to supervise and keep such pets under control;
  - you must take all reasonable steps to prevent such pets causing nuisance, annoyance or danger to your neighbours. This includes fouling or noise or smell from your domestic pet;
  - you must take reasonable care to see that such pets do not foul or cause damage to the house, your neighbour's property, anything belonging to us or anything we are responsible for, such as the common parts;
  - landlord entitled to require removal of the pet if causing nuisance or damage;
  - tenant responsible for cleaning up dog faeces.]

2.6 *You must not use or allow the house to be used for illegal or immoral purposes.* This includes but is not limited to the following: dealing in controlled drugs; running a brothel; dealing in stolen goods; illegal betting and illegal gambling.

2.7 *While you are in occupation of the house, you must make reasonable efforts to heat the house, taking into account your income. You must make reasonable efforts to ventilate the house using any suitable means provided in the house for doing so.*

2.8 You must take your turn, with all other tenants and owner-occupiers sharing the common parts, in keeping them clean and tidy. If you share a common stair, you must also take your turn in regularly cleaning, washing and keeping tidy the common stair, its windows, banisters and any bin chute accesses. If you and the others cannot agree on the arrangements for doing this or you fail to do the work, we are entitled to decide exactly what you should do and when. Before making our decision, we will consult with you and the others. Our decision will be binding on you. If you do not do the work contained in this paragraph, we may do it ourselves and charge you for it. This is in addition to any other legal remedies open to us.

2.9 You must comply with any local arrangements for the use and sharing of the common parts including drying greens and drying areas. You must comply with any local rotas for the use and sharing of the common parts. In cases of dispute between the users of the common parts, we are entitled to decide the arrangements and rotas for the use of and the sharing of the common parts. Before making our decision, we will consult with you. Our decision will be binding on you.

2.10 If you have exclusive use of a garden attached to the house, you must take reasonable care to keep it from becoming over-grown, untidy or causing a nuisance (unless we have agreed to take care of it). If you fail to do this, we are entitled to decide exactly what work requires to be done so as to comply with this duty. Before making our decision, we will consult with you. Our decision will be binding on you. If you do not do the work contained in this paragraph we may do it ourselves and charge you for it. This is in addition to any other legal remedies we may have. You must not remove, chop down or destroy any bushes, hedges or trees without our written permission [unless you planted them].

2.11 If you share a garden with others, you must take your turn with them to keep it from becoming overgrown, untidy or causing a nuisance (unless we have agreed to take care of it). If you and the others cannot agree on the arrangements for doing this or you fail to do the work, we are entitled to decide exactly what you should do and when. Before making our decision, we will consult with you and the others. Our decision will be binding on you. If you do not do the work contained in this paragraph, we may do it ourselves and charge you for it. This is in addition to any other legal remedies we may have. You must not remove, destroy or chop down any bushes, hedges or trees without our written permission [unless you planted them].

2.12 No property belonging to you or anyone residing with you or visiting you, including bicycles, motorcycles or prams, should be stored in any of the common parts except in areas set aside for storage. You must not do anything which causes inconvenience or danger to anyone using the common parts.

2.13 You must put all your household rubbish for collection in the bin store or other proper place allocated for it. You must take reasonable care to see that your rubbish is properly bagged. If rubbish is normally collected from the street, it should not be put out earlier than the evening before the day of collection. Rubbish containers should be returned to their normal storage places as soon as possible after the rubbish has been collected. You must comply with the local arrangements for the disposal of large items (such as large electrical items).

[2.14 USE OF HEATERS FIRED BY PARAFFIN AND LPG. Here may be inserted provisions, if desired, relating to the use of heaters fired by liquid petroleum gas (such as Calor gas heaters) or paraffin. The provisions may deal with matters such as whether such heaters are allowed, in what type of accommodation and the maximum number of such heaters.]

[2.15 STORAGE OF LPG AND PARAFFIN. Here may be inserted provisions, if desired, relating to the storage of LPG and paraffin. The provisions may deal with the maximum amount that may be stored and where as well as conditions relating to safety precautions.]

2.16 No vehicle, caravan or trailer belonging to you or anyone living with you or anyone visiting you may be parked on our land unless:

- that land is set aside for parking; OR
- we have given you written permission; OR
- it is a public road;

AND, in every case,

- it does not cause a nuisance or annoyance to your neighbours.

2.17 Nothing belonging to you or anyone living with you or your visitors may be left or stored on our land unless:

- the land is set aside for that purpose; OR
- we have given you written permission;

AND, in every case,

- it does not cause a nuisance or annoyance to your neighbours.

2.18 If you want to change any part of this Agreement which restricts your use or enjoyment of the house, you must first ask us in writing. If we refuse, you have a right to make an application to the sheriff. See paragraph 9.3 for more details.

3 RESPECT FOR OTHERS

3.1 You, those living with you, and your visitors, must not harass or act in an anti-social manner to, or pursue a course of anti-social conduct against, any person in the neighbourhood. Such people include residents, visitors, our employees, agents and contractors and those in your house.

3.2 **"Anti-social" means causing or likely to cause alarm, distress, nuisance or annoyance to any person** or causing damage to anyone's property**. Harassment of a person includes causing the person alarm or distress. Conduct includes speech. A course of conduct must involve conduct on at least two occasions.**

3.3 In particular, you, those living with you and your visitors must not:

- make excessive noise. This includes, but is not limited to, the use of televisions, hi-fi's, radios and musical instruments and DIY tools;
- fail to control your pets properly or allow them to foul or cause damage to other people's property;
- allow visitors to your house to be noisy or disruptive;
- use your house, or allow it to be used, for illegal or immoral purposes;
- vandalise or damage our property or any part of the common parts or neighbourhood;
- leave rubbish in unauthorised places;
- allow your children to cause nuisance or annoyance to other people by failing to exercise reasonable control over them;
- harass or assault any person in the house, or neighbourhood, for whatever reason. This includes that person's race, colour or ethnic origin, nationality, gender, sexuality, disability, age, religion or other belief, or other status;
- use or carry offensive weapons;
- use or sell unlawful drugs or sell alcohol.

3.4 In addition, you, those living with you and your visitors must not do the following in an anti-social way:

- run a business from your house;
- park any vehicle, caravan or trailer;
- carry out work to any type of vehicle, caravan or trailer;
- use alcohol.

The particular prohibitions on behaviour listed in paragraphs 3.3 and 3.4 do not in any way restrict the general responsibilities contained in paragraph 3.1 above.

3.5 You, those living with you, and your visitors, must not bring into the house or store in the house any type of firearm or firearm ammunition unless you have a permit.

3.6 You will be in breach of this Agreement if you, those living with you, or your visitors do anything which is prohibited in this part of the Agreement.

3.7 If you have a complaint about nuisance, annoyance or harassment being caused by a neighbour (or anyone living with him/her or his/her visitors), you may report it to us. We will investigate your complaint within [14] days. If, after investigation, there are good grounds in our opinion for your complaint, we will take reasonable steps to try to prevent the behaviour happening again. These steps may include mediation or legal action. A copy of our written policy about dealing with these kinds of complaints is available from us.

3.8 We will act fairly to you in all matters connected with your tenancy. We will not unfairly or unlawfully discriminate against you in any way on the grounds of your race, colour, ethnic origin, nationality, gender, sexuality, disability, age, religion or other belief or other status. If you believe we have acted unfairly to you in any way, you may wish to use our complaints procedure. You may also wish to take independent advice.

4 SUB-LETTING, ASSIGNATION AND EXCHANGE OF YOUR TENANCY

4.1 **If you want to:**

- **take in a lodger; OR**
- **sub-let part or all of your house; OR**
- **assign the tenancy (pass on the tenancy to someone else); OR**
- **carry out a mutual exchange; OR**
- **otherwise give up possession of the house**

you must first get our written permission. To do this, you must tell us in writing:

- **the details of the proposed change** including who you want to sub-let, give up possession or assign to, take as a lodger, or exchange with (and the house involved); AND
- **the amount of rent and any other payments (including a deposit) you propose charging (if any);** AND
- when you want the sub-letting, lodging, assignation exchange or giving up of possession to take place.

If you want another person to be a joint tenant, both of you must apply to us in writing. The other person must use the house, or intend to use the house, as his or her only or principal home. We will not unreasonably refuse permission.

If you want to assign your tenancy, the house must have been the only or principal home of the person to whom you want to assign the tenancy for at least 6 months before the date of your written request.

For landlords who are fully mutual housing co-operatives, you should include the following: "The assignee, sub-tenant or tenant moving into the house as a result of an assignation, sub-let, lodging agreement, or exchange or giving up of possession must become a member of the association before the change takes effect."]

4.2 **We will not unreasonably refuse permission for an assignation, subletting, giving up of possession or taking a lodger. Reasonable grounds for refusing permission include the following:**

- **we have served a notice on you warning that we may seek eviction on certain grounds because of your conduct;**
- **we have obtained an order for your eviction;**
- **it appears that you propose to receive a payment or an unreasonable rent or deposit;**

- **the proposed change would lead to the criminal offence of overcrowding;**
- **we intend to carry out work on the house (or the building of which the house forms part) which would affect the part of the house connected with the proposed change.**

These examples do not in any way alter our general right to refuse permission on reasonable grounds. If we give permission, you cannot increase the rent or other payments made to you by the other person unless we give our permission. See paragraph 9.3 for more detail on getting permission.

4.3 **We will not unreasonably refuse permission for a mutual exchange of your house. The exchange must be with another house where the tenant holds a Scottish secure tenancy or short Scottish secure tenancy. The landlord does not need to be us. The other landlord must also agree to the exchange. Reasonable grounds for refusing permission include the following:**

- **we have served a notice on you warning that we may seek eviction on certain grounds because of your conduct;**
- **we have obtained an order for your eviction;**
- **your house was let to you because of your employment with us;**
- **your house was designed or adapted for persons with special needs and if the exchange was allowed, there would be no person living in the house who required those designs or adaptations;**
- **the other house is substantially larger than you and your family need or it is not suitable for the needs of you and your family;**
- **the proposed exchange would lead to the criminal offence of overcrowding.**

These examples do not in any way alter our general right to refuse permission on reasonable grounds. See paragraph 9.3 for more detail on getting permission.

4.4 **If you are married, or if you live in the house with someone as husband and wife, we may need their consent.** If you are a joint tenant, we will need the other tenant's written consent to the proposed change. **If you want to change the joint tenancy to a single tenancy because the other joint tenant has abandoned the tenancy, you should ask us to use our powers under paragraph 6.8 of this Agreement.**

5 REPAIRS, MAINTENANCE, IMPROVEMENTS AND ALTERATIONS

Repairs and maintenance: our responsibilities and rights

5.1 *In this Agreement, the words "repair" and "repairs" includes any work necessary to put the house into a state which is wind and watertight, habitable* and in all respects reasonably fit for human habitation.

5.2 ***Before the start of the tenancy, we will inspect your house to ensure that it is wind and watertight,*** *habitable* **and in all other respects reasonably fit for human habitation**. ***If repair or other work needs to be done to bring the house up to that standard, we will do so before the tenancy begins***. **We will notify you about any such work**. ***Any other repairs may be carried out after the tenancy begins.***

5.3 ***During the course of your tenancy, we will carry out repairs or other work necessary to keep the house in a condition which is*** *habitable*, ***wind and watertight*** *and in all respects reasonably fit for human habitation*. ***We will carry out all repairs within a reasonable period of becoming aware that the repairs need to be done***. *Once begun, the repairs will be finished as soon as reasonably possible*. All repairs will be done to the standard of a reasonably competent contractor, using good quality material.

5.4 ***We will carry out a*** *reasonably diligent* ***inspection of the common parts before the tenancy begins. We will take reasonable steps to remove any danger we find before you move into your house***. **We will repair any other defect we find which will significantly affect your use of the common parts, or the house, within a reasonable period**. We will repair any damage to boundary walls and fences within a reasonable period if the damage significantly affects your use of the common parts of your house or if it poses a danger to any user. During the course of the tenancy, we will carry out inspections, at reasonable intervals, of the common parts.

5.5 **If we need the co-operation or permission of another person to carry out repairs or other work to the house or common parts, or to inspect, we will do our best to get it. We may be unable to do non-emergency repairs until we get such permission.**

5.6 *Our general repair obligations contained in paragraphs 5.2 and 5.3 include a duty to carry out repairs relating to* ***water penetration****, rising dampness and condensation dampness as well as the obligations contained in this paragraph. We will provide and maintain the house so that any tenant who we might reasonably expect to live in the house can heat the house to a reasonable temperature at a reasonable cost, so as to avoid condensation dampness and mould. If during the tenancy, the house suffers from condensation dampness which is partially or*

wholly caused by a deficiency in, or absence of, any feature of the house (including insulation, provision for heating or ventilation), we will carry out repairs (including, where appropriate, replacement, addition or provision of insulation, ventilation or heating systems) within a reasonable time so that that feature is not a cause of the condensation dampness.

5.7 **Our duty to repair includes a duty to take into account the extent to which the house falls short of the current building regulations by reason of disrepair or sanitary defects.**

5.8 **We will:**

- **keep in repair the structure and exterior of the house;**
- **keep in repair and in proper working order, any installations in the house provided by us for;**
  - **the supply of water, gas and electricity,**
  - **sanitation (for example basins, sinks, baths, showers, toilets),**
  - **hot water heating,**
  - **space heating (for example central heating) including fireplaces, flues and chimneys.**

Installations include those which we own or lease which directly or indirectly serve the house. We will not, however, be responsible for repair of any fixtures and fittings not belonging to us which make use of gas, electricity or water. Neither will we be responsible for the repair or maintenance of anything installed by you or belonging to you which you would be entitled to remove from the house at the end of the tenancy unless we have specifically agreed.

We will inspect annually any gas installations in the house provided by us. We will provide you with a copy of the inspection report within 28 days of the inspection. If the inspection reveals the need for repair or replacement of any such installation, we will do so within a reasonable period. We will give you a copy of the current inspection record before the beginning of the tenancy.

If your house is served by a communal television or communications aerial provided by us, we will take reasonable steps to repair any defect within a reasonable period. Where repairs or maintenance have to be done, we will make reasonable efforts to minimise disruption to you.

[5.9 We will take all reasonable steps, together with any other joint owners of the water supply installations, to comply with the Water Bye-Laws in force in your area. The Bye-Laws, among other things, specify that:

- all storage cisterns must be properly installed having regard to the need for prevention of waste and contamination and insulation against frost;

- the stopcocks and servicing valves must be placed so that they can be readily examined, maintained and operated with reasonable practicability;
- the water pipes, both inside and outside the house, must be effectively protected against freezing and damage from other causes.

We will inspect the installations for the storage and supply of water we are responsible for at the beginning of the tenancy and at reasonable intervals thereafter so as to comply with the Water Bye-Laws.]

5.10 ***Nothing contained in this Agreement makes us responsible for repairing damage caused wilfully,*** accidentally ***or negligently by you, anyone living with you or an invited visitor to your house.*** If we decide to carry out the work, you must pay us for the cost of the repair. This paragraph does not apply to damage caused by:

- *fair wear and tear;*
- **vandals** (provided that you have reported the damage to the police and us as soon as the damage is discovered).

5.11 We will carry out necessary repairs due to fire, flood or Act of God, within a reasonable time or offer equivalent permanent rehousing as soon as such a house becomes available. Until that time, we will try to help you to get temporary accommodation if the house is uninhabitable.

5.12 **We have the right to come into your house to inspect it and its fixtures and fittings or carry out repairs to it**, or adjoining property, **during reasonable times of the day. We will give you at least 24 hours' notice in writing**. We have the right of access to your house in order to lay wires, cables and pipes for the purposes of telecommunications, water, gas, electricity, providing we give you reasonable notice in writing. *We have the right of access to the common parts at any reasonable time*. If you refuse us entry, we will have the right to make forcible entry provided we have given you every reasonable opportunity to let us in voluntarily. If we have to make forcible entry, in this situation, you are liable for the costs of any damage reasonably caused. *In an emergency, we have the right to make forcible entry to your house without notice.*

5.13 *If we know that any house or flat adjoining your house, which we own, is likely to remain unoccupied* for longer than four weeks*, we will take reasonable steps to avoid damage or danger to you or your property arising from that house or flat being unoccupied*. These steps may include, but are not limited to the following:

- to seeing that its doors and windows are properly secured;
- to seeing that the water, gas and electricity supplies to the house or flat are turned off where possible.

5.14 ***If we cause damage to the house or your property in connection with*** inspections, ***repairs*** or improvements or entry, ***we will reinstate the damage*** *or compensate you for your losses. We have a right to require you to move temporarily to suitable alternative accommodation if this is necessary for the repairs to be done.* If you are moved temporarily, we will reimburse you for any extra expenses you have as a result. You will be charged rent during this period but no more than you normally pay.

5.15 ***Our duties to repair contained in this part of the Agreement continue until this Agreement comes to an end.***

Repairs and maintenance: <u>your</u> responsibilities and rights

5.16 *You must report to us, as soon as reasonably possible, any damage to the house, the common parts or loss or damage to our property.* You can do this in person or by telephone. You can arrange for someone else to do this on your behalf. [We operate an emergency telephone service outside office hours.]

5.17 *You are responsible for taking reasonable care of the house. This responsibility includes carrying out minor repairs and internal decoration. It also includes keeping the house in a reasonable state of cleanliness. However, you are not responsible for carrying out repairs which are due to fair wear and tear.*

5.18 **You have a right to have certain small repairs carried out within fixed time limits and instruct contractors specified by us if they are not done within those time limits. You may also have a right to compensation in the case of delay. We will tell you when you report the need for a repair whether that repair is one covered by this scheme.**

5.19 *If we have failed to carry out repairs that we should under this Agreement, you have the right to carry out the repairs yourself and deduct the reasonable cost of doing so from your rent.* However, you may only do so if:

- you have notified us in writing about the need for the repairs; AND
- we have not done those repairs within a reasonable period; AND
- you have made a formal complaint under our complaints procedure (see paragraph 8.1); AND
- you have finished the complaints procedure and you are still dissatisfied; OR 3 months have passed since you made the formal complaint under the complaints procedure.

YOU ARE STRONGLY ADVISED TO TAKE LEGAL ADVICE BEFORE EXERCISING YOUR RIGHT UNDER THIS PARAGRAPH. YOUR HOME IS AT RISK IF YOU WRONGLY EXERCISE THIS RIGHT. All repair work instructed by you must be done by a reputable firm and must conform to all current legislation.

[5.20 You are strongly recommended to insure your personal possessions against loss or damage caused by fire, flood, theft, accident, etc. We operate such a scheme. Ask us for details.]

Alterations and improvements

5.21 **If you want to:**

- **alter, improve or enlarge the house, fittings or fixtures;**
- **add new fittings or fixtures** (for example kitchen or bathroom installations, central heating or other fixed heaters, double glazing, or any kind of external aerial or satellite dish);
- **put up a garage, shed or other structure;**
- **decorate the outside of the house;**

you must first get our written permission. We will not refuse permission unreasonably. We may grant permission with conditions including conditions regarding the standard of the work. See paragraph 9.3 for more details about the procedure.

5.22 **If you have made alterations or improvements with our permission, you may be entitled to compensation at the end of your tenancy under regulations governing such arrangements. We also have the power, even if you do not qualify under these regulations, to make a discretionary payment.**

5.23 If you carry out any alterations or improvements without our permission we are entitled to restore the house to its previous condition during or at the end of your tenancy. If we do so, we are entitled to charge you for this work.

6 ENDING THE TENANCY

The tenancy can be ended in any one of the following ways described in paragraphs 6.1 to 6.7.

6.1 By Notice from you

You, give us written *notice that you want the tenancy to end on the termination date.* You must tell us at the same time if you are married or if you live in the house with another person as husband and wife. If you do, their agreement may also be required.

6.2 By Notice from us

We serve you with a notice to quit expiring on the termination date of this Agreement. This notice to quit will be served at least 40 days before the termination date. *This notice will only have the effect of preventing the tenancy under this Agreement from automatically renewing.* ***You will not have to leave the house unless and until we obtain a court order.***

6.3 By Written Agreement

By written agreement between you, and us. You must tell us at the same time if you are married or if you live in the house with another person as husband and wife. If you do, their agreement may also be required.

6.4 By Court Order once the fixed period of the tenancy has ended

The sheriff grants an order for eviction following a request by us. At the end of the period of the tenancy stated at paragraph 1.4, (or at the end of any continuation of the tenancy), we may seek an order for your eviction from the sheriff. We may ask for such an order under Section 36 of the Housing (Scotland) Act 2001. Before we do so, we will first send you a written notice giving you the earliest date from which we will start court proceedings. *We will also send you a notice to quit as described in paragraph 6.2 above.* **If we raise court proceedings, the court must make an order allowing us to repossess the house if it appears that:**

- **the original term of the tenancy has come to an end; AND**
- **the tenancy is not automatically renewing; AND**
- **there is no further tenancy agreement between us and you for the house; AND**
- **we have correctly sent you the written notice referred to above.**

The court must grant decree for repossession providing the above procedures have been correctly carried out by us.

6.5 By Court Order on other grounds

The sheriff grants an order for eviction following a request by us. You have a right to defend any legal action taken by us against you. **We may ask for such an order under Section 14 of the Housing (Scotland) Act 2001 on any of the grounds contained within Schedule 2 of the Act. Before we do so, we will first send you a written notice. We will also send that written notice to anyone else living with you who is a member of your family aged 16 or over and your lawful sub-tenants, lodgers, and assignees. They will also have a right take part in the court proceedings.**

The Schedule 2 grounds:

- **you owe us rent or you have broken some other condition of this Agreement;**
- **you, someone residing in your house, or anyone visiting it, has been convicted of using the house or allowing it to be used for illegal or immoral purposes or a criminal offence, punishable by imprisonment, which was committed in the house or the locality;**
- **the condition of the house or common parts, or furniture we have supplied, has deteriorated because of the fault of you, your sub-tenant or somebody in your household;**
- **you, and your spouse or co-habitee, have been absent from the house for more than 6 months without good reason or you have stopped living in it as your principal home;**
- **we gave you this tenancy as a result of false information given by you in your application for the house;**
- **you, someone residing in your house, or anyone visiting it, has acted in an anti-social manner towards (or harassed) someone else in the locality and it is not reasonable for us to transfer you to another house.**

  In all the above cases, the sheriff must also be satisfied that it is reasonable to make an order for eviction.
- **you or someone residing in your house has been guilty of nuisance or annoyance in or in the neighbourhood of the house, or has pursued a course of conduct amounting to harassment of someone else in the locality and it is appropriate, in our opinion, to transfer you to another house;**
- **the numbers of people in the house amount to the criminal offence of overcrowding;**
- **we intend to demolish or carry out substantial work to your house (or the building in which it is located) within a reasonable time and that work cannot reasonably be done if you are still living there;**

- **the house has been designed or adapted for people with special needs and no-one in your household has such special needs but we require the house for someone who has;**
- **the house is part of a larger group of houses which have been designed or adapted or located near facilities for people with special needs and no-one in your household has those needs but we require the house for someone who has;**
- **we have leased your house from somebody else and that lease has ended or will end within 6 months;**
- **[we are an islands council, the house is held for education purposes, you are not (or will shortly cease to be) employed by us for education purposes and now it is needed for someone else for those purposes.]**

  In the seven cases above, the sheriff must grant an order for eviction if we also offer you a suitable alternative house as defined by Schedule 2 (Part 2) of the Housing (Scotland) Act 2001.
- **we want to transfer the house to your husband or wife (or ex-husband or wife) or co-habitee, where one of you no longer wishes to live with the other. In this case, we will offer you a suitable alternative house as defined by Schedule 2 (Part 2) of the Housing (Scotland) Act 2001. The sheriff must also be satisfied that it is reasonable to grant the order.**

6.6 By Abandonment by you

We have reasonable grounds for believing that you have abandoned the house. We will also give you at least 4 weeks' notice that we believe that you have abandoned the house. If, at the end of that period, we have reasonable grounds for believing that you have abandoned the house, we may repossess it by service of another notice. You have a right to make application to the sheriff against repossession within 6 months. We will secure the safe custody and delivery to you of any property which is found in the house if its value is sufficient to cover the costs of storage. We will have the right to make a charge for this and to dispose of any property if you have not made arrangements for its delivery within a given period.

6.7 By Death

By your death. **Your tenancy cannot be inherited by anyone after you die.** [However, if there is a surviving joint tenant, s/he will become the sole tenant on the death of the other tenant.]

6.8 Abandonment by a joint tenant

If we have reasonable grounds for believing that a joint tenant has abandoned the house, we may give that tenant 4 weeks' notice. If we are satisfied on reasonable grounds, at the end of the 4 week period, that the joint tenant has abandoned the house, we may serve another notice. This second notice will terminate that joint tenant's interest in the tenancy in not less than 8 weeks. That second notice will not, however, terminate the tenancy which will continue. That tenant has a right of appeal to the sheriff.

6.9 Termination by joint tenant alone

A joint tenant may, at any time, end his or her interest in the tenancy of the house by giving 4 weeks' written notice to us and to the other joint tenant(s). That notice will not, however, terminate the tenancy which will continue.

6.10 Conversion to Scottish secure tenancy

If you were given this short Scottish secure tenancy for one of the following three reasons, your tenancy may convert to a Scottish secure tenancy. These reasons are:

- **an order for repossession of a house was made against you in the 3 years before the beginning of this tenancy because of anti-social or similar behaviour;**
- **an anti-social behaviour order has been made against you or a member of your household before the beginning of this tenancy;**
- **an anti-social behaviour order was made against you, your subtenant, lodger or a member of your household and we converted the Scottish secure tenancy that you had over the house into a short Scottish secure tenancy by serving you with a notice.**

In these cases, your tenancy will normally convert automatically to a Scottish secure tenancy 12 months after the creation of this tenancy.

- **We will make available appropriate housing support services to you during your tenancy to enable conversion of the tenancy to a Scottish secure tenancy.**
- **However, if we have served a notice, within those 12 months, telling you that we intend to start legal proceedings to evict you, the tenancy may not convert at the end of that 12-month period. It will then convert only if:**
  - **the notice expires or we withdraw the notice; OR**
  - **we are finally unsuccessful in any court proceedings for your eviction.**
- **If the tenancy does convert to a Scottish secure tenancy, we will tell you this and the date when the conversion took place.**

6.11 Before moving out of your house, you must do the following:

- leave the house in a clean and tidy condition;
- remove all your belongings;
- make sure any lodgers or sub-tenants leave with you;
- allow us access to your house before you move out, at reasonable times, to show new tenants round;
- hand in your keys to the housing office;
- remove any fixtures and fittings you have installed without our written permission and put right any damage caused. This does not affect your obligations under paragraph 5.23 above;
- check with us to make sure that you have paid all payments due to us;
- apply for any compensation you may be entitled to under paragraph 5.22 above;
- leave the house in good decorative order;
- do the repairs you are obliged to do;
- give us a forwarding address unless there is good reason for not doing so.

7 INFORMATION AND CONSULTATION

7.1 You are entitled, under the Data Protection Act 1998 to inspect personal information held on you in our housing files. We will provide photocopies of this information on request. We may make a charge of up to £10 for this. We will provide you with a copy of any such information we hold within 40 days of your request in writing. You may have other rights under that Act in relation to your personal data, which we will honour. **You are entitled to check information you have provided in connection with your housing application free of charge.**

7.2 **[We will publish an annual report on our housing management performance which you may obtain from us on request.] We will give you information about whether you have the right to buy your house, before the beginning of the tenancy. See also paragraph 9.1. We will give you information about our complaints procedure.**

7.3 **On request, we will provide you with information relating to:**

- **the terms of your tenancy;**
- **our policy and procedures on setting rent and service charges;**
- **our policy and rules about;**
  - **admission to the housing list,**
  - **allocations,**
  - **transfers of tenants between houses,**
  - **exchanges of houses between our tenants and tenants of other landlords,**
  - **repairs and maintenance,**
  - **whether you have the right to buy your house (see also paragraph 9.1),**
  - **our tenant participation strategy,**
  - **our arrangements for taking decisions about housing management and services.**

7.4 **We will consult you about making or changing:**

- **policies regarding housing management, repairs and maintenance if the proposal is likely to significantly affect you;**
- **proposals for changes in rent and service charges where they affect all or a class of tenants (and you are to be affected);**

- **proposals for the sale or transfer of your house to another landlord;**
- **decisions about the information to be provided relating to our standards of housing management and performance;**
- **performance standards or targets in relation to housing management repairs and maintenance;**
- **our tenant participation strategy.**

We will take into account any views that you have before making a final decision. Any consultation with you will include giving you comprehensive information in an accessible form and reasonable time to express views.

8 COMPLAINTS

8.1 If you think that we have broken this Agreement or have failed to do anything we promised, you can complain to us under the complaints procedure which we will have made available to you.

8.2 If you are still dissatisfied after going through our complaints procedure, you may also have the right to complain to the Ombudsman. You may also wish to take advice from an independent source such as a law centre, solicitor, housing advice centre, Citizens Advice Bureau or tenants' association.

8.3 *If we have failed to carry out any of our material obligations under this Agreement, you have a right (in addition to any other legal rights you may have) to withhold your rent until we do comply with our obligations.* However, you may only do so if:

- you have told us in writing why you think we have broken this Agreement; AND
- we have not fulfilled our obligations within a reasonable period; AND
- you have made a formal written complaint under our complaints procedure (see paragraph 8.1); AND
- you have finished the complaints procedure and you are still dissatisfied; OR 3 months has passed since you made the formal written complaint under the complaints procedure.

YOU ARE STRONGLY ADVISED TO OBTAIN LEGAL ADVICE BEFORE WITHHOLDING YOUR RENT. YOUR HOME IS AT RISK IF YOU WRONGLY WITHHOLD RENT. IT IS ESSENTIAL IN ALL CASES THAT ALL THE RENT WITHHELD IS PLACED IN A SECURE ACCOUNT AND THAT YOU CAN PROVIDE EVIDENCE OF THIS.

9 GENERAL PROVISIONS

9.1 RIGHT TO BUY

Your tenancy is a short Scottish secure tenancy. Therefore, you do not have the right to buy your house under Part III of the Housing (Scotland) Act 1987 as amended by the Housing (Scotland) Act 2001.

9.2 MANAGEMENT SERVICES

You have the right, in terms of section 55 of the Housing (Scotland) Act 2001 together with others in a tenant management co-operative, to seek to exercise the management of one or more aspects of the housing service that we provide. We will provide more details to you about this right on request.

9.3 PERMISSIONS

- **Where this Agreement requires you to obtain our permission for anything you must make your request in writing. We will not refuse the request unreasonably.**
- **If we refuse permission, we will tell you what the reason is. We will give you our decision in writing as soon as possible.**
- **We may give you permission on certain conditions.** We may withdraw our permission if the activity which we have given you permission for is anti-social to anyone in the neighbourhood.
- If you object to our decision, you can appeal using our complaints procedure.
- **If the request for permission is about taking a lodger, sub-letting, assignation, exchanging the house (see Part 4 of this Agreement), we will reply to your written request within one month of receipt of the written application. If we do not reply within one month, we are taken to have agreed to your request. If we refuse this kind of permission, we will notify you of the reasons for our refusal in writing within one month of receipt of your application. If you are unhappy about our refusal you have the right to make application to the sheriff.**
- **If the request for permission is about alterations or improvements, etc. to the house (see paragraph 5.21 of this Agreement), we will reply to your written request within one month of receipt of the written application. In that reply we will tell you if we agree to the proposed alterations, etc. and if so, whether we attach any conditions. If we do not reply within one month, we are taken to have agreed to your request. If we refuse this kind of permission, we will let you know in writing our reasons for refusal within one month of receipt of your written application. If you are unhappy about our refusal or the conditions that we have attached, you have the right to make application to the sheriff.**

- **If the request for permission is about changing the terms of the tenancy relating to your use or enjoyment of the house (see paragraphs 2.3 and 2.18) and we refuse permission, you have a right of application to the sheriff.**

9.4 NOTICES

If you want to send any form of document to us, it will be sufficient if you send or deliver it to us at our headquarters or our local office. **If we want to give you any document, we will deliver it to you, leave it at your last known address or send it by recorded delivery to your last known address.** We will assume that this is your current address and that all documents to you should be sent there unless you tell us that you want anything to be sent to another address.

9.5 COMPLETION OF THIS AGREEMENT

By signing below, you are completing a legally binding contract committing you to all of the terms of this Agreement. This Agreement does not terminate any existing tenancy. The terms and conditions of this Agreement replace the terms and conditions under any other tenancy agreement that you had with us, immediately before this Agreement came into effect, in relation to the house. By signing below, you are also confirming that you have already been served with a notice under section 34(4) of the Housing (Scotland) Act 2001 telling you that this is a short Scottish secure tenancy, why you have been offered this tenancy and how long the tenancy is for.

SIGNED FOR LANDLORD .....

NAME.....

WITNESS NAME.....

WITNESS SIGNATURE .....

WITNESS ADDRESS .....

.....

DATE .....

SIGNED BY TENANT/JOINT TENANT.....

WITNESS NAME.....

WITNESS SIGNATURE .....

WITNESS ADDRESS .....

.....

DATE .....

SIGNED BY TENANT/JOINT TENANT.....

WITNESS NAME.....

WITNESS SIGNATURE .....

WITNESS ADDRESS .....

.....

DATE .....

3. SUMMARY MODEL SHORT SCOTTISH SECURE TENANCY AGREEMENT

1 INTRODUCTION

1.1 This document is a summary of the Agreement between us, [LANDLORD] and you. It is not intended to change or add to the Agreement. This summary tells you the most important things about your tenancy with us. If you want to know more, refer to your Agreement which is the legally binding agreement between us. Additional information is contained in the Tenant's Handbook. Alternatively, you can ask us or an independent advisor, such as a solicitor or advice worker, for help.

1.2 Your tenancy starts on …… It will finish on …… It may be continued for a further period after then. Your rent is £…… per [week/fortnight/4 weeks/calendar month] payable in [advance][arrears]. [Any services included, and the costs, are noted in a separate document.] We will give you a plan showing you exactly what areas of the common parts you can use if you ask us.

1.3 You must take all reasonable steps to make sure you, and anyone living with you, or visiting you keeps to the terms and conditions of the Agreement. If you break any term of the Agreement, we may take legal action against you. This may include claiming money from you as well as eviction proceedings. If you are a joint tenant, you are both responsible equally for paying rent and keeping to the Agreement.

2 USE OF THE HOUSE AND THE COMMON PARTS

2.1 *You must occupy the house* and **use it as your main home.**

2.2 *You must take reasonable care to avoid damage to your house and your neighbours' houses. This is particularly important in freezing weather.*

2.3 [PETS POLICY.]

2.4 You must take your turn in cleaning the common parts and keeping the garden tidy. You must deal with your rubbish properly. You must park any kind of vehicle in the proper place.

3 RESPECT FOR OTHERS

3.1 You, those living with you, and your visitors must not harass or do anything anti-social to other people in the neighbourhood. This includes your neighbours and our employees.

3.2 If you have a complaint about other people's anti-social behaviour, tell us. We will investigate and take action if appropriate.

3.3 We will not discriminate unfairly against you in any way. We have a complaints procedure if you think we have acted wrongly or unfairly.

4 SUB-LETTING, ASSIGNATION AND EXCHANGE OF YOUR TENANCY

If you want to sub-let or assign (pass over your tenancy to someone else) or exchange your house or take in lodgers or add or change the joint tenant, you must first get our written permission.

5 REPAIRS, MAINTENANCE, IMPROVEMENTS AND ALTERATIONS

5.1 **Before the tenancy begins, we will inspect the house and carry out necessary repairs to ensure that it is wind- and water-tight, habitable and reasonably fit for human habitation. After you move in, we will carry out repairs to the house, to keep the house in that condition within a reasonable period.** Please report to us any repairs that need to be done.

5.2 **In particular, we will keep in repair the structure and exterior of the house and installations for water, gas, electricity, sanitation, heating and hot water.**

5.3 ***We will take responsibility for doing work to deal with condensation dampness if the dampness is being caused to some extent by some feature of the house, such as ventilation, heating or insulation.***

5.4 **We are not responsible for repairing damage caused by you, anyone living with you, or your visitors.** If we do repair such damage, we will charge you. This does not apply to wear and tear.

5.5 **If we need access to your house to carry out repairs or to inspect it, we will give you at least 24 hours' notice. You must allow us access.** *We may have to decant you to another house to do repairs.* If we do, we will compensate you for any extra expenses you have as a result. *We will also compensate you if we cause damage to your property when doing the repairs. We will not compensate you for damage to your personal property where we have not been at fault.* Therefore, you are strongly advised to get insurance.

5.6 **Before carrying out improvements or alterations to your house, you must get our written permission. We may pay you compensation at the end of your tenancy for these.** If you don't get our permission, we can charge you for restoring the house.

5.7 *You, and the others living in the house, must take reasonable care of it. You are responsible for minor maintenance.*

6 ENDING THE TENANCY

6.1 **The tenancy can be terminated in the following ways:**

- by you giving us written notice;
- by us giving you notice to quit;
- by written agreement between you and us;
- **by us getting a court order for eviction after having first given you notice;**
- **by you abandoning the house;**
- by your death. Your tenancy cannot be inherited [but any joint tenant can remain as tenant].

In limited circumstances, this tenancy may convert into a Scottish secure tenancy after 12 months. We will tell you if this applies to you.

7 INFORMATION AND CONSULTATION

7.1 **We have policies dealing with many areas of housing management such as, rent arrears, how we set our rents, eviction, allocations and transfers. Ask us for a copy.**

7.2 **We will consult with you before making or changing housing management policies which are likely to significantly affect you.**

7.3 **We will provide you with a variety of information about our policies and the information we hold on you if you ask.**

8 COMPLAINTS

8.1 If you think we have broken the Agreement, you can complain using our complaints procedure. You can also complain to the Ombudsman and take legal advice.

8.2 *You may be entitled to withhold your rent if you think we have broken the Agreement.* You must use our complaints procedure first. YOU ARE STRONGLY RECOMMENDED TO TAKE LEGAL ADVICE FIRST.

9 GENERAL

9.1 You do not have the right to buy the house.

9.2 If you need our permission to do anything, you must ask for it and get it in writing. We won't say no without a good reason.

IMPORTANT

This is only a summary of the Short Scottish Secure Tenancy Agreement you signed. It is not legally binding. The Agreement is the legal document that lays out all your legal rights and obligations. This Summary does not alter that Agreement in any way. If you want to know more detail about your rights and responsibilities, you should read the Agreement which is divided up in the same way as this Summary. Alternatively, you can ask us or get help from an independent source such as a Law Centre, solicitor, Housing Advice Centre, Citizens Advice Bureau, Tenants' Association, the Commission for Racial Equality, Disability Rights Commission or the Equal Opportunities Commission. We will give you these addresses and telephone numbers on request.

4. LEGAL COMMENTARY ON MODEL SHORT SCOTTISH SECURE TENANCY AGREEMENT

INTRODUCTION TO THE SHORT SCOTTISH SECURE TENANCY

1. The short Scottish secure tenancy (short SST) is based on the Scottish secure tenancy. Both are introduced by the Housing (Scotland) Act 2001 ("the Act"). The majority of tenancies that social landlords will offer to their tenants will be Scottish secure tenancies. In a relatively small number of cases, social landlords will be entitled, but not obliged, to offer a prospective tenant a short SST instead. The circumstances in which this may be done are set out in Schedule 6 to the 2001 Act. In summary they are:

   - Tenant has had order for repossession made against him/her in the UK on the grounds of anti-social or similar behaviour in previous 3 years;
   - Tenant or member of household is subject to an anti-social behaviour order ("ASBO"). (Note that The Housing (Scotland) Act 2001 (Commencement No. 5, Transitional Provisions and Savings) Order 2002 provides that this will not apply in the case of an order made before 30 September 2002 and which continues after that date;
   - Temporary letting to person moving into the area to seek accommodation;
   - Temporary letting pending development of the principal house;
   - Temporary letting to homeless person;
   - Temporary letting for person requiring housing support services;
   - Landlord has leased the house and the terms of the lease preclude sub-letting under a Scottish secure tenancy.

   In the first two cases, the tenancy is effectively a "probationary" tenancy: see further paragraph 5 below. Unless the let falls into one of these categories, a short SST cannot be granted. The prospective tenant has a right of appeal to the sheriff against being offered a short SST or occupancy agreement instead of a Scottish secure tenancy or short SST, as the case may be (s38). The sheriff may order the landlord to let the house offered under a different agreement if s/he considers that there are "good grounds" for doing so.

2. It should be noted also that a short SST may come into being by operation of s35. That section provides that a Scottish secure tenancy will convert into a short SST where the landlord serves a notice on the tenant to that effect. The landlord may only do so where the tenant or a member of the household is subject to an ASBO. (See paragraph 1 above for transitional provisions). In that circumstance, the short SST may convert back to a Scottish secure tenancy at a later stage if certain conditions are met (s37). This is explained at paragraph 6.10 of the Model. If the tenancy does convert into a short SST, there is no statutory obligation to provide a fresh tenancy agreement such as one based on this model. There is a right of appeal (s35(5)) by way of summary application to the sheriff by a tenant who has been served with a notice converting the SST to a short SST. That appeal must be within 21 days after the date of intimation of the notice, or a longer period if

"special cause" is shown (Rule 2.6 of the Summary Applications, Statutory Applications and Appeals etc. Rules 1999 (SI 1999/929). The sheriff may grant the appeal if s/he is satisfied that there are "good grounds" for doing so.

3. The other conditions for the creation of a short SST are provided for in s34. In summary they are as follows:

- the tenancy would have been a Scottish secure tenancy were it not for s34. That is, the requirements for the creation of a Scottish secure tenancy (see s11) must be met;
- the tenancy is for a fixed term of at least 6 months. There is no maximum period; and
- the prospective landlord has served a statutory notice on the prospective tenant **before** the creation of the tenancy (i.e. before the tenancy agreement is signed). The form of the statutory notice is found in The Short Scottish Secure Tenancies (Notices) Regulations 2002.

If the last two conditions are not met, the tenancy created will be a Scottish secure tenancy rather than a short SST.

4. The tenancy will continue for the fixed period agreed by the parties. At the end of that fixed period, unless the parties have taken steps to prevent tacit relocation, the tenancy will renew for the same period (or for one year if the initial period was longer than one year) and under the same terms. That process of tacit relocation may continue indefinitely. Alternatively, the parties are free to agree that the tenancy should be continued for some other period on the same or different terms (s34(5)). The parties are free to agree that it should continue for a period of less than 6 months. The tenancy will nevertheless continue to be a short SST (s34(5)).

5. A short SST will convert to a Scottish secure tenancy in limited circumstances (s37). The circumstances are that:

- the short SST has been granted as a "probationary" tenancy (see paragraph 1 above);
- or the short SST had been created by the service of a notice (see paragraph 2 above);
- and no notice of proceedings under s14(2) or s36(2) has been served in the 12 months following the creation of the tenancy;
- or if such a notice has been served, the notice has expired or been withdrawn or court proceedings were finally resolved in favour of the tenant.

The fact of conversion and the date of the conversion must be notified by the landlord to the tenant.

6. The rights of the short SST tenant are the same as for a Scottish secure tenant with the following differences, some crucial (see s34(6)):

- There is no right to buy.
- There is no right of succession.
- There is no express statutory right for landlord or tenant to terminate the agreement before the end of the agreed term (though see the contractual clauses at paragraphs 6.1 to 6.3 of the Model based on the common law).
- There is only limited security of tenure (s36(5)). The landlord does not require to prove a reason for seeking repossession or that it is reasonable that decree for repossession be granted unless the section 14 recovery route is used (see paragraph 6.4 of the Model for more explanation).
- The landlord must provide housing support services where a short SST has been granted on an ASBO ground or previous eviction ground (s34(7)). The services must be those the landlord considers appropriate to enable the conversion of the short SST to a Scottish secure tenancy. The Scottish Ministers may issue guidance on this (s34(8)).
- Members of the tenant's household have no right to have a notice of proceedings served on them (if the s36 recovery route is used) and have no right to be sisted as parties to the action.

It should be noted that a short SST landlord may also seek recovery of possession on the same grounds applicable to Scottish secure tenants (s34(6) and s36(7)).

INTRODUCTION TO THE LEGAL COMMENTARY ON THE MODEL SHORT SST

1. This commentary, in the form of notes, are intended to assist in understanding the content of each paragraph in the Model Short Scottish Secure Tenancy Agreement (referred to below as the "Agreement"). They are designed for the use of landlords, housing professionals and lawyers and advisors. They reflect the author's understanding of the law as at July 2002. At the time of writing, much of the secondary legislation had been made. In addition to the Commencement Orders, the principal Orders are as follows: The Scottish Secure Tenants (Compensation for Improvements) Regulations 2002 No. 312; The Scottish Secure Tenancies (Abandoned Property) Order 2002 No. 313; The Scottish Secure Tenancies (Exceptions) Regulations 2002 No. 314; The Short Scottish Secure Tenancies (Notices) Regulations 2002 No. 315; The Scottish Secure Tenants (Right to Repair) Regulations 2002 No. 316; The Housing (Right to Buy) (Houses Liable to Demolition) (Scotland) Order 2002 No. 317; The Housing (Scotland) Act 2001

(Scottish Secure Tenancy etc.) Order 2002 No. 318; The Short Scottish Secure Tenancies (Proceedings for Possession) Regulations 2002 No. 319; The Scottish Secure Tenancies (Proceedings for Possession) Regulations 2002 No. 320(C. 16); The Housing (Scotland) Act 2001 (Commencement No. 5, Transitional Provisions and Savings) Order 2002 No. 321; The Right to Purchase (Application Form) (Scotland) Order 2002 No. 322. These Notes are not intended to be a comprehensive and authoritative interpretation of the law. They do not in any way form part of the Agreement. Neither are they intended to be used as an aid in the construction of the Agreement by the courts or tribunals. They are not intended to be given to each new tenant. They could be provided, on request by a tenant, free of charge. The numbering of the notes coincides with the paragraphing of the Agreement itself.

2. The parties' legal obligations and rights derive from the common law as well as statute. The principal statutory sources are the Housing (Scotland) Acts 1987 and 2001. All references in these notes to the 1987 and 2001 Acts are to those Acts. Also of importance is the Matrimonial Homes (Family Protection) (Scotland) Act 1981. Further elucidation may be derived from the extensive references contained in the notes or from the standard textbooks.

3. See Section 1 paragraph 1.1 for explanation of the use of **bold**, *italics*, ordinary typeface and square brackets [ ] in the text of the Agreement. References to paragraphs are to paragraphs in the Agreement. ***All references to sections and schedules are to the 2001 Act unless otherwise stated.***

LEGAL COMMENTARY ON THE MODEL SHORT SST

Note 1.1: See the "Introduction to the short Scottish secure tenancy" above for the conditions for the creation of a short SST. Whether tenants are joint or not is initially a matter for the landlord's policy and tenant choice. However, the 2001 Act makes some important changes to the position after the commencement of the tenancy. Short Scottish secure tenants have the right to convert the tenancy into a joint one subject to the consent of the landlord which is not to be unreasonably withheld (see Notes 4.1, 4.2 below). In addition, new procedures are introduced for the termination of the interest of a joint tenant (see Notes 6.6 and 6.7). Joint tenancies have certain legal consequences; see paragraphs 1.11, 1.15, 6.1, 6.3, 6.5, 6.8-6.10.

Note 1.2: The specification of the accommodation is deliberately left broad since the Agreement requires to be capable of applying to all the landlord's houses. It will require amendment to deal with local circumstances. This paragraph is *key* since the accommodation let and specified here is the "house" for almost all purposes in the Agreement. It is a requirement for the creation of both the Scottish secure tenancy and the short SST that the house is "let as a separate dwelling" (s11(1)(a)). This phrase, which is found in various English and Scottish housing Acts was the subject of a decision in the House of Lords at the end of 2001: *Uratemp Ventures Ltd v. Collins* [2001] UKHL 43. The court held that even the bare let of a room without any cooking facilities or other shared facilities was capable of being a let of a separate dwelling. Whether a dwelling is a separate dwelling will always be a matter of fact. The decision did not deal specifically with the factual situation where a tenant shares living space and facilities with other tenants. The Act, unlike the Housing (Scotland) Act 1988 (see s14) does not make specific provision for the situation where a tenant shares some of the living accommodation with other tenants. Nevertheless, it is thought that in the light of the reasoning in the *Uratemp* decision, where the parties agree that the purpose of the letting is as a separate dwelling, there should be no bar on the landlords granting either a short SST or a Scottish secure tenancy. Thus, where the tenant previously held the accommodation (defined in this Agreement as a "house") under a secure or assured or short assured tenancy (all of which require that the house is let as a separate dwelling), there would be no reason in principle why that tenancy should not be converted to a Scottish secure tenancy or a short SST (as long as the statutory conditions for the creation of such a tenancy were satisfied). The last sentence has been inserted at the suggestion, made in 1996, of the Deputy Commissioner for Local Administration in Scotland who was concerned at the number of complaints received about boundary disputes. See case number 1174 for an example of such a dispute which had serious implications for both the local authority and the tenant. For resource reasons, the provision of the plan is not made mandatory although the Deputy Commissioner believes that it would be good practice.

Note 1.3: Here should be specified the full postal address, together with the postcode and flat position, if appropriate.

Note 1.4: The first clause: "This tenancy will start on…" should be used in the case of a person who was not previously a tenant of the landlord. The alternative in square brackets: "This Agreement takes effect from…" is designed for use (in what would probably be an unusual situation) for existing tenants as the Agreement in that case does not create a new tenancy, rather it modifies the terms of the existing tenancy: see paragraph 9.5. A short SST must be for an initial fixed period of at least 6 months (s34(1)(b)). There is no maximum period. If the tenancy starts, say, on 1 March, the earliest termination date, the ish, is 31 August (see e.g. *Key Housing Association Ltd v. Cameron* 1999 HousLR 47). At the end of that period, the tenancy will continue by operation of tacit relocation unless the parties agree otherwise. It should be noted that at common law, a lease will tacitly relocate for the period of the tenancy or one year: whichever is the lesser. It is envisaged that the vast majority of short SSTs will be for a fixed period of one year or less and the terms of the fourth sentence reflect that reality. If however, in the unusual case, the original term is for more than one year, and the landlord does not wish the Agreement to renew for the same term, appropriate changes should be made to the fourth sentence. The parties may agree that the tenancy continues for a further period different from the original term (s34(5)(b)). That period may be less than 6 months. The renewed or continued tenancy will nonetheless continue to be a short SST. There is no limit to how many times the tenancy may be continued and for it to remain a short SST (though see Note 6.10 below).

Note 1.5: This paragraph contains optional provisions to deal with varying practices regarding rental periods. The options are in square brackets. Rent is normally payable in advance, however, housing benefit is always paid in arrears. Approximately 70% of social tenants receive housing benefit. To insist on rent being paid in advance therefore raises the global figure for rent arrears and places tenants unnecessarily in arrears. Hence, a choice is provided.

Note 1.6:

This paragraph is optional. It should be deleted if no services are provided. It is designed for services provided in connection with the house (e.g. gardening, cleaning) as well as for services specific to the occupant (some types of community care services e.g. counselling). The variety of services which are provided to houses and the tenants in them, and the way in which they are provided, varies tremendously from landlord to landlord and from house to house. Hence, this Agreement does not specify a particular form of words. The following is guidance on the expression of any provisions concerned with services.

Here, it is suggested that the services are to be set out in another agreement. This is permissible. It allows for greater flexibility which will be important in some situations. However, where possible, it is preferable to have the terms regarding services included in the Agreement itself rather than in another document. If they are to be included in another document, that other document should make explicit reference to this section of the Agreement and should itself be signed and dated by the parties (see further Note 9.5). The terms of the Agreement should make clear which services are compulsory and which (if any) are optional. For housing benefit purposes, it is important that the cost of the services is broken down with the cost for each service clearly identified. This is because for housing benefit purposes, some, but not all charges are eligible for rebate: see Housing Benefit (General) Regulations 1987 [as heavily amended] and in particular, Regulations 10(1)(e)-(3)(c) and Schedule 1. There must be a legal obligation on the tenant to pay the service charges before there is any possibility of their qualifying as eligible rent for housing benefit purposes. The final words referring to housing support services are intended to deal with the change, from 1 April 2003, in the rules relating to payment for housing support services. From that date, housing benefit will not pay for certain services (such as counselling) to those who need support. Instead, the services will be provided via the local authority social work department and payment for any services will be made to them. This change does not affect other services provided by the landlord which are not for those with special support needs, such as stair cleaning and maintenance of the common parts. Those services will continue to be provided by the landlord and paid for by the tenant to the landlord. The provisions relating to service charges should not permit unilateral withdrawal or restriction of services by the landlord. This is because such a provision may contravene the requirement of fairness in the Unfair Terms in Consumer Contract Regulations 1999. The landlord and tenant of course could agree to a change in the services provided. Non-payment of the service charges is a breach of the terms of the Agreement. The landlord's remedies include a small claims action in the sheriff court as well as proceedings for recovery of possession in serious cases. Changes in the charges are dealt with in the next paragraph.

Note 1.7: The consultation requirement is statutory where there is to be an increase for all or a class of tenants which will affect the tenants: section 25(4). The requirement is to give written notice to expire not earlier than 4 weeks before the beginning of the rental period on which the notice takes effect or the date on which rent is due to be paid if earlier. (See s25(1) and Note 1.4.). There is no statutory restriction on the number of times that rent and service charges may be increased and by how much. However, the third sentence which restricts increases, normally, to no more than one per 12 months is recommended good practice. Flexibility to increase more than once per 12 months is retained. The Tenant's Handbook should contain a section on claiming of Housing Benefit. The fourth sentence refers to the preservation of rights in respect of certain tenants in terms of Regulations made under section 11(2). The right of the tenant to a statement of the landlord's policy relating to rent and service charges is given by section 23. The right is on the request of the tenant.

Note 1.8: This paragraph makes clear the landlord's rights on breach of the Agreement. The right to claim legal expenses is restricted to judicial expenses; that is, the expenses of the court procedure as assessed (or "taxed") by the auditor of court.

Note 1.9: This is included for information only and does not have any contractual effect. Its purpose is to help make the document user friendly and indicate other sources of advice. It could go in the Tenant's Handbook.

Note 1.10: The first two sentences reflect good practice. The last sentence is to avoid difficulties arising from any conflict of interpretation. See also Note 9.5 (the signing section).

Note 1.11: Various words here are defined. The definitions apply to whole Agreement unless the context indicates that a different interpretation is required. The following is commentary on certain of the definitions:

"common parts": the definition adopted here is a comprehensive one and draws in part on Schedule 10(3)(1C) to the 1987 Act. That provision of the 1987 Act has been chosen rather than the reference to common parts contained in Schedule 2(3)(2) to the 2001 Act as that definition is one that refers back to a tenancy agreement. Thus, without a definition of the common parts in this Agreement, the definition of "common parts" would be circular. The definition may require to be adapted to suit local conditions. The definition is relevant to the house that is let (paragraph 1.2) as well as the repairing obligations (see paragraphs 5.4, 5.12). **"Co-habitee"** is the term adopted in the Agreement as a neutral way of expressing close relationships between two persons who are not married. The definition reflects that contained in s108 of the 2001 Act although the term co-habitee is not used in the legislation. The meaning of **"family"** is also taken from that section. Note that the definition of family includes the relatives of the spouse but not of a co-habitee. The definition of **"overcrowding"** is the statutory definition in s135 of the 1987 Act which is also referred to in the 2001 Act with reference to one of the grounds for eviction: see Schedule 2, Part 1(9). It has not been possible to accurately gloss the statutory definition. **"Tenant"** includes joint tenant: see s41. See further Note 2.1.

Note 1.12: The Agreement attempts to accurately state the statutory provisions relating to tenancies of this type. However, there will be cases where a reading of the statute (for example in relation to succession) might give a different result to a reading of the Agreement which attempts to reflect entirely, without variation, the statutory position. In any such case, the statutory provision takes precedence. However, there are many other terms of this Agreement which do not reflect the statutory provision because the legislation is silent in many areas. In such cases, the usual rules of interpretation of contracts apply including the rules to do with exclusion of common law rights and responsibilities.

Note 1.13: The effect of this paragraph is to make the tenant generally responsible for the actions of those living with him or her. This will help avoid the situation where a tenant claims that it is not him or her who is breaking the Agreement (for example, a son parks his caravan in an obstructive way) and the landlord might be otherwise powerless to remedy the nuisance. In various places, for the avoidance of doubt, the Agreement makes explicit the tenant's responsibility for the actions of those living with him or her. It will be for the sheriff in an eviction action to determine whether it is reasonable, in any given case, to evict the tenant for the actions of another member of the household.

Note 1.14: This reflects the terms of ss 24 to 26.

Note 1.15: This reflects the common law position. Each of the tenants is separately liable for all of the obligations of the tenancy including payment of rent (*Brown v. Paterson* (1704) Mor. 14629). Non-occupation by one does not exempt him/her from liability for non-observance of conditions by the other (*Dickson v. Dickson* (1821) 1 S. 113; (1823) 2 S. 462). See further Paton and Cameron, Landlord and Tenant, p60.

Note 2.1: The Tenant's Handbook should inform the tenant regarding housing benefit rules and absences.

The first sentence reflects the terms of s11 (1) (definition of Scottish secure tenancy in the 2001 Act). Cessation of occupation of the house as the principal home does not prevent the house from being let under a Scottish secure tenancy. However, it is a ground for eviction as is continuous absence by the tenant(s) and spouse/co-habitee for six months or more without reasonable excuse (Schedule 2, Ground 5). See also ss17 and 18 (abandonment) and paragraph 6.6 of the Agreement. The tenant has a duty at common law to take entry (Ersk II, 6, 3) and to furnish. It is thought to be an implied term at common law that in a lease of a dwelling house, the tenant is entitled to occupy with his family. The final sentence is contractual so that the landlord may know if the Matrimonial Homes (Family Protection) (Scotland) Act 1981 applies and if there is overcrowding. See paragraph 1.11 for definition of overcrowding.

Note 2.2: The reference to furniture here is optional and may be removed if no furniture is supplied with the tenancy. The tenant has a common law obligation "to use a reasonable degree of diligence in preserving the house from injury" (Ersk II, 6, 43). The tenant must act in a "tenant like" fashion. See *Warren v. Keen* [1954] 1 QB 15 for illustration of the meaning of "tenant like". The tenant is liable thus for damage caused by his/her wilful or negligent behaviour (*Hardie v. Black* (1768) Mor. 10133), that of his sub-tenants and servants (*Sutherland v. Robertson* (1736) Mor. 13979; *McLellan v. Ker* (1797) Mor. 10134) and family and guests (*Warren v. Keen*). It follows that the tenant is not liable to the landlord for damage caused other than wilfully or negligently by him/her self, family, co-residents and visitors. Neither will the tenant be liable for damage caused wilfully by third parties. (See notes to 5.10.) Correspondingly, where the tenant suffers loss as a result of 3rd party actings (for example flooding) the landlord is not liable (e.g. *Mechan v. Watson* 1907 SC 25; *Allan v. Robertson's Trs* (1891) 18 R 932; *NB Storage Co. v. Steele's* Trs 1920 SC 194). The reference to neighbours is to tie in with para 5.13 (landlord duty where adjoining property). The 4-week clause ties in with para 6.5 (abandonment of house). The specific reference to freezing pipes derives from *Mickel v. McCoard* 1913 SC 896: the tenant's duty of care extends, in freezing weather, to either draining down the water system or informing the landlord of his/her absence. Where the tenant, those residing in the house (including family) or visitors have failed to act with reasonable care, the tenant is liable for any damage (*Sutherland v. Robertson*) even if s/he was not personally negligent.

Note 2.3: At common law, a tenant must not invert possession, that is, use the subjects for a purpose other than that for which they were let; here, as a dwelling house. (See generally for example Paton & Cameron, Landlord and Tenant, (2nd ed. 1967, p137). See also paragraph 2.6.

Note 2.4:

Overcrowding is defined at 1.11. referring to section 135 of the 1987 Act. There is no definition in the 2001 Act of overcrowding and the provisions in the 1987 Act are unaffected by the passage of the 2001 Act.

The remaining sentences merely reflect good practice in allocations and do not place a contractual obligation to re-house immediately.

Note also that there are certain other provisions in the 1987 Act relating to overcrowding. Section 142 permits an occupier of a house to apply to the local authority for a licence permitting overcrowding which may be granted in exceptional circumstances and where it is expedient to do so. The following sections have been brought into force only in the Dysart Ward of the Burgh of Kirkcaldy and the Burgh of Queensferry. Section 144 provides that a landlord of a house is guilty of a criminal offence, if he lets it without giving that person a written statement of the permitted number of people in the house. Sections 139 and 140 provide that it is a criminal offence for an occupier to permit overcrowding.

Note 2.5:

Given the very wide variation of practices as regards pets among different landlords and as regards different housing types, it has not been possible to provide a single model paragraph which would be of general applicability. Instead, a number of pointers are given as to the types of issues that landlords may wish to consider in drafting this paragraph.

A brief reference is made to the Dangerous Dogs Act 1991 as this is thought to be an important issue in some parts of the country. A number of other statutes govern animals such as the Civic Government (Scotland) Act 1982, Animal Health Act 1981, Dogs Act 1871, Breeding of Dogs Act 1973, Animal Health Act 1981. Reference to such provisions could be made in the Tenant's Handbook.

Note 2.6:

At common law, the tenant has a duty not to invert possession, i.e. not to use the house for purposes other than those for which it was let: viz., a dwelling house. This paragraph also has a contractual effect in that the relevant statutory ground for eviction (Schedule 2, Part I, para 2) requires a criminal conviction. This paragraph provides, in effect, that eviction can be founded on proof, to the civil standard, of use of a house for illegal or immoral purposes. The prohibition does not, as such, extend to actions such as dealing in drugs or soliciting in the vicinity of the house. This is dealt with in Part 3 and is a breach of the Agreement (where it results in anti-social effects on neighbours).

Note 2.7:

This paragraph ties in with the Council's duties in respect of repair and dampness narrated in Part 5 of this Agreement to which reference should also be made.

Heating. At common law the tenant has a duty to remain in possession of the house so it does not suffer from being unoccupied (Rankine: The Law of Leases in Scotland (3rd ed., 1916 p233-236). See also *Smith v. Henderson* (1847) 24 R 1102). It follows from this that the house must be kept aired and fired so as to prevent damp. (*Mickel v. McCoard* 1913 SC 896). However, a tenant is not obliged to spend an excessive amount on heating, even if that is the only way of preventing, say, condensation dampness (*McCarthy v. Glasgow District Council* (1988) SCOLAG 21; *Fyfe v. Scottish Homes* 1995 SCLR 209; *Guy v. Strathkelvin District Council* 1997 HousLR 14). The condition of the house and therefore what the tenant can be expected to spend must be related to the realities of life (McCarthy, *supra*) and the spectrum of lifestyles of the type of tenant that the landlord can reasonably expect to live in its properties (*Quick v. Taff Ely Borough Council* [1986] QB 809; *Gunn v. Glasgow District Council* 1992 SCLR 1018 (Notes); 1997 HousLR 3 and *Guy v. Strathkelvin District Council* 1997 HousLR 14). Thus, the tenant's duty at common law to "air and fire" the house is subject to the landlord providing a tenantable house, which is capable of being heated to a reasonable temperature at a reasonable cost (*Gunn; Fyfe*). Where that is not possible, due perhaps to defective or insufficient insulation (*Gunn*), the landlord is liable to repair and for damages unless it can show that the tenant was at fault, that is, it is able to prove that the tenant acted in an untenant like manner and as a result the damage occurred (see examples in *Gunn*). There is no general duty to air and fire the house when not in occupation, merely to take reasonable care (*Mickel, supra*).

Ventilation. Similarly, while a tenant has a duty to ventilate the house (*Mickel; Smith, supra*) this is subject to the duty of the landlord to provide a house capable of ventilation (*Summers v. Salford Corporation* [1943] AC 283 (HL)). Windows alone may not be proper ventilation (*Edinburgh District Council v. Davis* 1984 SCOLAG 86). Thus, again, the tenant's common law duty to air or ventilate the house is subject to the landlord's duty (deriving from the over-riding common law duty of providing and maintaining a habitable house) to provide adequate means for ventilation. Furthermore, in determining whether the house is reasonably fit for human habitation, in terms of Schedule 10 to the 1987 Act and Schedule 4(5) to the 2001 Act, regard must be paid to the current building regulations relating to sanitation (which includes ventilation) where lack of ventilation is an issue. (See also *Guy* and *Fyfe*). The Building Regulations specify, among other things, minimum standards for the provision of ventilation and insulation.

Note 2.8: Contractual. This paragraph is unnecessary if the landlord undertakes the work. This paragraph preserves the rights of the landlord to a range of remedies following non-compliance by the tenant. The remedies are eviction (unlikely to be successful in practice), carrying out the work and recharging the tenant (and action for payment and or eviction if not paid), and action for specific implement (i.e. court order against tenant requiring him/her to carry out the work, usually sought with request for payment in the alternative). It should be noted that the wording of this paragraph alone would probably be insufficiently precise in itself to found an action for specific implement. A decree for specific implement based on the lease obligations must be specified in a clear and precise manner so that the defender is left in no doubt as to his/her obligations. The rule is that the courts will not grant an order for specific implement of a contractual obligation unless the order, deriving from that obligation, can be drafted sufficiently specifically as to leave the Defender tenant in no doubt as to what s/he has to do (Walker – Civil Remedies, Chap.13) In addition, the landlord cannot "innovate" on the lease, i.e. attempt to force the tenant to carry out an obligation not clear within the lease itself. It follows that the contractual obligation must be capable of expressing the tenant's duties with clarity. Hence the provision relating to the landlord's right to determine the precise arrangements which would depend on local conditions. Landlords should, as a matter of good practice, have in place arrangements for carrying out such work (and garden work) for those tenants who cannot reasonably be expected to do it themselves: e.g. people with severe disabilities, elderly people, etc.

Note 2.9: This contractual paragraph is intended to give a clear right to the landlord to intervene in disputes of this type. Where resolution of a dispute of this kind cannot be achieved through consensus, a mechanism is provided for the imposition of a solution, enforceable by legal action if necessary. See Note 2.8 above for more detail on the need for such a provision.

Note 2.10: This paragraph, which is contractual, applies only to those with exclusive use of a garden. Those who share a garden are dealt with in the following paragraph. The general duty is contained in the first sentence. At common law, the landlord is the owner of plants and trees growing on the landlord's land and gardens even if the tenant planted them. However, some landlords may consider it harsh to forbid a tenant the right to remove or cut down a plant or tree which s/he planted hence the final optional clause in this and the next paragraph.

See also notes to paragraphs 2.8 and 2.9.

Note 2.11: This paragraph deals only with those who share a garden. See also paragraphs 2.9 and 2.10 and notes thereto.

Note 2.12: This paragraph is contractual. It can be adapted to deal with local conditions.

Note 2.13: This paragraph is contractual. It can be adapted to deal with local conditions.

Note 2.14: Depending on local practices and the type of house, it may be desirable to restrict the use of certain types of heaters. This optional paragraph provides suggestions as to the content of any such provision.

Note 2.15: Depending on local practices and the type of house, it may be desirable to restrict the storage of inflammable or explosive substances. This optional paragraph provides suggestions as to the content of any such provision.

Note 2.16 and 2.17: Both are contractual and are designed to tie in with Part 3 of this Agreement.

Note 2.18: This reflects the right of the tenant to seek to change any term of the Agreement which restricts his use of the house: see s26.

General Note to Part 3

The purpose of this part is to provide in effect a binding code of good behaviour. It incorporates elements both of the law and recommended good practice. For example, there is no specific statutory or common law obligation for a landlord to deal with complaints about anti-social behaviour. That aspect is dealt with here. The Scots law position is more fully narrated in Collins and O'Carroll (1997), "Anti-social Behaviour and Housing: The Law", published by Legal Services Agency, Chartered Institute of Housing in Scotland and others. See also the Scottish Office Development Department circular 16/1998 for a very good summary of the law and good practice. Both are now a little out of date. See also Atkinson, Mullen and Scott, The Use of Civil Legal Remedies for Neighbour Nuisance in Scotland, Scottish Office Central Research Unit, (2000), especially chapters 2, 10 and 11. The object of this Part is two-fold. First, to make clear to the tenant what behaviour is prohibited in an unambiguous way. Secondly, to provide the legal platform should the landlord decide that it wishes to take legal action including interdict.

Note 3.1:

This paragraph and the following have been written to dovetail with the amended grounds for eviction introduced by section 23 of the Crime and Disorder Act 1998 and now contained in grounds 7 and 8 of schedule 2 to the 2001 Act. See further paragraph 6.4. This paragraph is intended to make the tenant responsible not only for his/her conduct, but that also of the tenant's visitors and those living with the tenant.

Note 3.2:

This definition is intended to reflect the definition contained within grounds 7 and 8 of Schedule 2 to the 2001 Act. The definition also includes damage to property, which might not otherwise be caught by those grounds.

Note 3.3:

This contractual paragraph provides amplification of the general obligation in paragraph 3.1 to provide a non-exhaustive list of prohibited behaviour. All the examples given are of behaviour which is prohibited *per se*. The examples are thought to be those which are the commonest of this type.

Note 3.4: This contractual paragraph provides amplification of the general obligation in paragraph 3.1 to provide a non-exhaustive list of prohibited behaviour. All the examples given are of behaviour which is prohibited only if the carrying out of that behaviour has an anti-social result. The examples are thought to be those which are the commonest of this type. The final sentence makes clear that the examples in this and the preceding paragraph do not affect the generality of the prohibition in paragraph 3.1.

Note 3.5: Contractual. Firearms offences are increasing in Scotland. Some landlords and tenants are concerned about their use. This optional paragraph prohibits unlawful storage of firearms and ammunition.

Note 3.6: This paragraph is included for the avoidance of doubt to preclude any legalistic arguments that a tenant may not be liable for the actions of visitors since the visitor is not a party to the lease.

Note 3.7: Contractual. Good practice means that landlords take effective action to deal with complaints of anti-social behaviour in terms of a well considered policy and strategy: see SODD Circular 16/1998; Collins and O'Carroll Chap 2, and Atkinson, Mullen and Scott (2000). The range of possible responses is broad. Although the case of *Dundee District Council v. Cook* 1995 SCLR 559 suggests that a Council does not have title and interest to seek interdict against those who are not its tenants, it is thought that that case may have been wrongly pleaded or decided and that that case is not authority for the proposition that a Council can never seek interdict for such behaviour against a non-tenant (See Collins and O'Carroll, Chap 4). In any event, there would be nothing to prevent a Council pursuing action in the name of the aggrieved tenant, with his/her permission and suitable undertakings as to expenses. In addition, good practice requires social landlords to have a published anti-social behaviour policy.

Note 3.8: Landlords (and most organisations and individuals) are under a duty not to discriminate on the grounds of sex (Sex Discrimination Act 1975), race, etc. (Race Relations Act 1976) or disability (Disability Discrimination Act 1995), subject to various exceptions. Article 14 of the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998, prohibits discrimination against any person relating to any other Convention right, on any ground related to "status". Breach of these duties may result in legal action against the Landlord. Prohibition of discrimination on other grounds is a matter of good practice. See also s106 of the 2001 Act which obliges RSLs and local authorities to encourage equal opportunities and the observance of equal opportunities.

Note 4.1: This reflects the statutory code contained in s32 (assignation, sub-letting, etc.), s33 (exchange of houses) and s11(5) (assumption of joint tenant). These provisions apply equally to short Scottish secure tenants as they do to Scottish secure tenants: see s34(6). In all cases, the consent of the landlord is to be obtained. Note that the procedure for assumption of joint tenants appears to be quite different from that applicable to other forms of variation of the tenancy (unless a court were to take the view that the assumption of a joint tenant amounts to giving up of possession of the house, within the meaning of section 32(1), in which case, the same procedures and appeal routes would apply).

Note 4.2: This reflects the statutory code contained in s32 (assignation, sub-letting, etc.), s33 (exchange of houses) and s11 (5) (assumption of joint tenant). The examples of grounds for refusal are taken from the legislation and are not exhaustive. Note that s32(4) makes special provision for housing co-ops in that the assignee, etc. must be a member of the co-op when the assignation, etc. takes effect. Paragraph 9.3 provides more on the procedure, deemed grant of consent and the rights of appeal to the sheriff.

Note 4.3: This reflects the new statutory provisions introduced by section 33. The examples of grounds for refusal are taken from the legislation and are not exhaustive. If the short Scottish secure tenant proposes to exchange with a (*full*) Scottish secure tenant, it is thought that the landlord has three choices. First, it may decide that in the circumstances it is reasonable to refuse permission. Secondly, it may decide to grant permission but to serve a notice under s34(4) (assuming that a Schedule 6 ground exists), creating for the incoming tenant a short Scottish secure tenancy as of the date of exchange, so that the incoming tenant does not thereby acquire a Scottish secure tenancy (which would normally be the effect of s33(6)) when the house was previously held on a short Scottish secure tenancy. (This might be necessary where the house is itself leased and the terms of the lease forbid letting on a (full) Scottish secure tenancy or where the incoming tenant falls within Schedule 6). Thirdly, it may decide to grant permission and to grant the incoming tenant a Scottish secure tenancy despite the fact that that the house was previously held under a short Scottish secure tenancy or that the incoming tenant held a short Scottish secure tenancy in the other house. Of course, the other landlord may have reasons for refusing the exchange in which case, the exchange would not take place in any event (subject to appeal). Note that s33(4) makes special provision for housing co-ops in that the exchanger must be a member of the co-op when the exchange takes effect. Paragraph 9.3 provides more on the procedure, deemed grant of consent and the rights of appeal to the sheriff.

Note 4.4: The Matrimonial Homes (Family Protection) (Scotland) Act 1981 in effect prohibits “dealings” with the matrimonial home which affect the rights of occupation of the “non-entitled spouse” without the consent of that non-entitled spouse. A “dealing” includes the assignation, exchange, etc. of the matrimonial home. Opposite sex co-habitees do not have the same automatic occupancy rights in relation to the matrimonial home. However, such a co-habitee can seek a declaration from the sheriff court of occupancy rights and while such a declaration is in force, dealings will require the consent of the co-habitee. The 1981 Act gives no rights at all to same sex co-habitees or others residing with the tenant. Their consent is not required. Hence, the term “co-habitee” is not used in this paragraph. See section 20 for the procedure for dealing with abandonment of the tenancy by a joint tenant.

General Note to Part 5

This Part reflects the current common law and statutory position in relation to the crucial area of repairs and related matters. The 2001 Act deals with repairs, improvements and compensation at sections 27 to 31 and Schedule 4. However, the majority of the law dealing with repairs is found elsewhere. The following are some of the principal sources of the law, and commentaries on the law, in relation to repairs:

Housing (Scotland) Act 1987 (especially Schedule 10 (which applies to the vast majority of rented houses); Rankine (1916), Law of Leases in Scotland; Stair Memorial Encyclopaedia, Vol. 13; Paton and Cameron (1967), Landlord and Tenant; Robson (1993) Residential Tenancies; Brown and McIntosh (1987) Dampness and The Law Shelter; Knafler (1997), Remedies for Disrepair, Sweet and Maxwell. O'Carroll and McIntosh (1993), Solicitors Dampness Action Pack, Legal Services Agency, contains a useful summary of the law and relevant cases. It is important to note that the statutory code relating to repairs contained in Schedule 10 to the 1987 Act cannot be contracted out of except by application to the sheriff. Any clause of a tenancy agreement which purports to exclude or restrict the implied repairs obligations is void (Schedule 10(5)).

Note 5.1:

The common law duty of repair (see paragraphs 5.2 and 5.3 and Notes thereto) is to provide and maintain the house in habitable (or tenantable) condition rather than to "repair" as such. Thus, works may be required to the house which may not ordinarily (or as a matter of law) be properly termed "repair" (e.g. – addition of insulation: *Gunn v. Glasgow District Council* 1992 SCLR 1018 and see *Neilson v. Scottish Homes* 1998 HousLR 56). In this, Scots law is quite different from English law where there is no equivalent common law obligation (see e.g. *Quick v. Taff Ely Borough Council* [1985] 3 All ER 321). It has been suggested that the statutory formulation ("in all respects reasonably fit for human habitation") does no more than reflect the common law obligation (*Murray v. Edinburgh District Council* 1981 SLT 253 and c.f. *Summers v. Salford Corporation* 1943 AC 243 (HL)). Both formulations are included here in case there is a difference. It should be noted that much, if not most, of the caselaw on repairs was decided on the common law duties.

Note 5.2: The duty of the landlord at common law is to provide the house at the beginning of the tenancy, in a habitable condition (Rankine, p240; *Lamb v. Glasgow District Council* 1978 SLT (Notes) 64; *Docherty v. Inverclyde District Council* 1995 SCLR (Notes) 965; *Neilson v. Scottish Homes* 1998 HousLR 56), wind and watertight against ordinary encroachment of the elements (*Wolfson v. Forrester* 1910 SC 675; Rankine p242), reasonably fit for the purposes for which it was let (Rankine p240), and in all respects reasonably fit for human habitation (1987 Act, Schedule 10(1)). The new expression of statutory duties contained in Schedule 4(1) of the 2001 Act effectively encapsulates these duties. The 1987 Act and 2001 Act duties are co-terminal. These duties entail an inspection at or immediately prior to the commencement of the tenancy (e.g. *Lamb; Bell v. SSHA* 1987 SLT 320). That duty is now effectively expressed in Schedule 4(2)(a) of the 2001 Act. The duty is one of warrandice, that is, a guarantee that the subjects are in such repair at the commencement (see Erskine, Institutes, II, 6, 39 and 43 and Rankine p241-2). The 2001 Act expresses this duty by the use of the word "must" rather than by reference to the term warrandice. Thus any necessary repairs in order to ensure that the house let at the commencement of the tenancy conforms to statute and common law (i.e. not only the wind and watertight condition) must be carried out at or prior to the commencement of the lease. The 2001 Act expresses this effectively in Schedule 4(1) and (2). If the repairs are not done, then the landlord is in breach of its common law obligations (e.g. *Brodie v. McLachlan* 1900 SLT 145) and now in breach of its statutory duties. Repairs which are not required to bring the subjects to a habitable, etc. condition (for example, minor repairs to internal doors where there are no health and safety implications) need not, at common law or in statute, be done at that time. Thus, the clear intention of the Act is that during the inspection prior to the commencement of the tenancy, the landlord draws up a list of repairs that need to be done. That list is divided into two: those which have to be done before the commencement of the tenancy (to ensure that the house is wind and watertight, habitable and in all respects reasonably fit for human habitation) and those which are not necessary to meet that condition. Those other repairs, if they are to be done at all, may be done during the term of the tenancy.

Note 5.3: General. Once the tenancy has begun, the landlord's duty is to undertake to keep the house in all respects reasonably fit for human habitation (Schedule 10 (1)(2), 1987 Act, *Summers v. Salford Corporation* [1943] AC 283 HL), wind and watertight (*Wolfson v. Forrester* 1910 SC 675) and in tenantable condition (Rankine, p240-2). This duty is recognised in the 2001 Act in Schedule 4(1)(b). The use of the word "keep" does not imply an absolute obligation. The duty is fulfilled by carrying out repair, or other work, within a reasonable time of becoming aware of the need for repair. (Rankine, p240, Paton and Cameron, p132, *Shields v. Dalziel* (1887) 24 R 849, *Gunn v. NCB* 1982 SLT 526, *McGreal v. Wake* (1984) 128 SJ 116, *Golden Casket (Greenock) v. BRS (Pickfords)* 1972 SLT 146; *O'Brien v. Robinson* [1973] AC 912; [1973] 2 WLR 393; (HL)). See now Schedule 4(3)(a) of the 2001 Act. The reasonableness of that time will depend on all the circumstances including the seriousness of the disrepair (e.g. *Scottish Heritable Security v. Granger* (1881) 8 R 459, *Gunn v. NCB supra, Bolan v. Glasgow District Council* (1984) SHLR 40 *McGreal v. Wake* (1984) 128 SJ 116; *Shields v. Dalziel* (1987) 24 R 849), the effect on the tenant, the effect on the building, the complexity of the works, the ease with which it is possible to specify what needs to be done, the landlord's own internal or published policy, policies of other, similar landlords, expert evidence (from, say, plumbers, architects, housing professionals) including possibly the existence of a planned modernisation programme. However, where the disrepair was present at the commencement of the tenancy, there is no such reasonable period of time since the landlord guarantees that the house is tenantable at the start of the tenancy: see Note 5.2. The final sentence is contractual and good practice. It is thought that the doctrine *volenti non fit injuria* (no liability to a person who has voluntarily accepted a risk) does not apply to housing disrepair cases, at least those based on contract (*Neilson v. Scottish Homes* 1998 HousLR 56) although continued residence may be relevant to the assessment of damages (*Neilson, supra*).

Note 5.4: The landlord is also under a duty at common law to inspect the common parts at the commencement of the tenancy to see that, at the very least, no foreseeable danger to the tenant or user of the common parts exists (which is not obvious) as the subjects must be reasonably fit for the purposes for which they were let and in this Agreement, the subjects include the common parts: Erskine II, 6, 43 (*e.g. Mellon v. Henderson* 1913 SC 1207, *Johnstone v. Glasgow District Council* 1980 SLT 50, *Hughes Tutrix v. Glasgow District Council* 1982 SLT (Sh Ct) 70)). This is now expressed in Schedule 4(2)(a) of the 2001 Act.

The third sentence reflects the provisions of Schedule 10(3)(1B) to the 1987 Act.

The fourth sentence is optional. In lets of urban houses, the legal position regarding repair of fences, etc., is not entirely clear. The Local Government Ombudsman receives many complaints about such matters. Fences, etc., are not included in the definition of common parts in clause 1.11. It is recommended that the optional clause is used or some other formulation which makes the position clear.

The fifth sentence is contractual. There is no common law duty implied into a tenancy agreement on a landlord to inspect the house during the course of the tenancy (*Hampton v. Galloway and Sykes* (1899) I F 501; *Murray v. Edinburgh District Council* 1981 SLT 253) unless it has reason to suspect disrepair. But the position may be different in respect of those parts of the common parts which are solely under the control of the landlord (for example, a locked attic space to which only the landlord has the key) or to which the tenant can not reasonably obtain access (for example the roof). For cases on this point see *Murphy v. Hurley* [1922] 1 AC 369 (repair of sea wall) cited in *O'Brien v. Robinson* [1973] AC 912. Furthermore, it can be said with some force that where the landlord has built the entire building (as will often be the case with social landlords) and/or has provided installations therein (e.g. plumbing), it is thereby fixed with the knowledge of the probable life expectancy of such installations and the manufacturer's recommendations for maintenance and inspection. If inspection and maintenance is not carried out and damage occurs thereby, the landlord may be liable, in delict and under the Occupiers Liability Act 1960, for such losses. A related argument might be made out in respect of latent defects in construction (see *Reid v. Baird* 1876 4 R 234 and *Golden Casket (Greenock) Limited*, *supra*). For these reasons, a duty to inspect at intervals is included. The length of the intervals will vary with the part to be inspected.

Note 5.5: This reflects Schedule 10(3)(3A) to the 1987 Act.

Note 5.6:

The first sentence does two things. First, it reflects the common law relating to rising damp (*Gunn v. NCB* 1982 SLT 526) and penetrating dampness (*Wolfson v. Forrester* 1910 SC 675). Secondly, it makes clear that the general repairing obligations in 5.2 and 5.3 include obligations in respect of repair of all forms of dampness; which again reflects the common law.

The remainder of the paragraph summarises the difficult legal area of landlord's duties in respect of condensation dampness. It is beyond the scope of this note to summarise fully the legal position in this area. Readers are referred to the publications noted in the General Note to this Part and to Note 2.7. There is also a detailed summary of the law in this area in the commentary attached to the case report of *Fyfe v. Scottish Homes* 1995 SCLR 209, a leading case in this area. The legal basis for this part of the paragraph can be summarised as follows.

The landlord's legal duties in respect of condensation dampness derive from the general common law and statutory duties referred to in 5.2 and 5.3 above. The second sentence is taken directly from the decision of *Fyfe*. The use of the word "reasonable" in relation to cost and temperature reflects the fact that it is impossible to determine precisely for all constructions of houses, in all conditions, what the figures will be. The matter is essentially a "jury question" to be determined by the court, usually with the assistance of expert evidence from housing professionals such as architects or perhaps surveyors. Reasonable cost again is a jury question and derives from *McCarthy v. Glasgow District Council* (1988) SCOLAG 121, (approved in *Fyfe*) where it was held that a house is not, in law, in habitable condition if it is "only by applying a large amount of heat and incurring inordinate heating bills" that it might be made habitable. However, the landlord's obligation is only to supply and maintain the house in such a condition for that class of tenants which is within the spectrum of lifestyles (including income) which the landlord could reasonably foresee (*Quick v. Taff Ely Borough Council* [1986] QB 809 and *Fyfe*). Where the tenant has caused the condensation dampness because of his/her failure to act in a tenant like fashion, there is no liability on the landlord (*Maguire v. Glasgow District Council* 1991 1 SHLR 1; *Hoy v. Glasgow District Council,* both reported in Scottish Housing Law Reports, Vol 1 (published by Legal Services Agency Limited)). Where the landlord alleges that the tenant is responsible for the condensation dampness (for example by insufficient or inappropriate heating), it must be able to specify exactly what the tenant did (or failed to do), what s/he ought to have done, that the commission or omission caused the condensation dampness, and finally that had the tenant behaved correctly, then condensation dampness would not have occurred (*Guy v. Strathkelvin District Council* 1997 SCOLAG 30; 1997 HousLR 14).

The final sentence attempts to reflect the common law position as contained in the authoritative judgement in *Gunn v. Glasgow District Council* 1992 SCLR (N) 1018 1997 HousLR 3 read together with the general common law position and other cases relating to this area including those noted above. (See Brown and McIntosh, O'Carroll and McIntosh, and Knaffler for detailed citations.)

Repairs require to be carried out within a reasonable time in terms of the common law: see Note 5.3.

Note 5.7: This paragraph reflects the terms of Schedule 4(5) and (6) of the 2001 Act. Sch 10(1)(4) to the 1987 Act, which is in similar terms, was considered in *Fyfe v. Scottish Homes* 1995 SCLR 209 (a condensation dampness case). It was held that a court, when assessing whether a house is habitable, may have regard to the regulations which were in force for the construction of new buildings at the commencement of the tenancy, even though the house may have been built before the regulations came into force. The court, of course, would be entitled to have regard to other matters, including the age of the building. Although the *Fyfe* case focused on those regulations which were in force at the commencement of the tenancy, it may be that, in relation to disrepair occurring during the tenancy, the relevant regulations would be those in force at the date of the disrepair. The effect of the section is not to impose a requirement on landlords to upgrade the house each time the regulations change: rather, the duty is to "have regard" to them in assessing their repair responsibilities. See also *Guy v. Strathkelvin Council* 1997 HousLR 14 in which a similar argument was upheld.

Note 5.8: The first three bullet points reflect Schedule 10(3) to the 1987 Act. The reference to the chimneys is not specified in the Act. Neither is there any Scottish or English caselaw on this point. However, they are installations for space heating. Accordingly responsibility for the cleaning of the chimneys is, subject to the tenant's general duty to act in a tenant like fashion, that of the landlord.

The third bullet point reflects Schedule 10(3)(2)(c) to the 1987 Act. The second sentence, which is derived from that part, itself refers to the common law position regarding fixtures attached to the house by the tenant. The basic common law position is that a tenant may remove fixtures attached by him/her for the purposes of his trade (*Syme v. Harvey* (1861) 24 D 20; *Marshall v. Tannoch Chemical Company* (1886) 13 R 1042) and articles annexed for ornamentation or for the better

enjoyment of the article itself (*Spyer v. Phillipson* [1931] 2 Ch 183). This is subject to the limitation that the articles must be capable of removal without material injury to the house and without being destroyed or losing their essential character or value (Amos and Ferrard: Fixtures (3rd ed. 1883) pp71,72). Plant and machinery are not prevented from being removable merely because they require to be dismantled providing they can be fitted together in the same form in another place (*Whitehead v. Bennett* (1852) 27 L.CH.474).

The fourth bullet point reflects the requirements of the Gas Safety (Installation and Use) Regulations 1999. Access for inspection is dealt with in paragraph 5.12.

The final bullet point is optional. It may be included where the definition of the common parts at paragraph 1.11 includes such equipment. The obligation does not derive from any statutory or common law source. However, it seems sensible and good practice to include such an obligation where tenants are dependent on communal facilities for such entertainment. It should be noted that the definition of repair can include the replacement of an obsolete thing by its modern equivalent: *Morcom v. Campbell-Johnston* [1956] 1 QB 106. It may be that the advent of digital television services and the abolition of analogue services may raise important issues regarding repair and replacement. It may be that the definition of the common parts chosen in this Agreement does not include such equipment and that the provision of television signals is defined as a service. In that case, it is the agreement on services (see paragraph 1.6) that determines the landlord's responsibilities for fixing defective equipment and replacement of obsolete equipment. Finally, the complex provisions of Reg 10 and Schedule 1 of the Housing Benefit (General) Regulations 1987 in relation to communal telecommunications facilities should be noted.

Note 5.9:

Generally, landlords have responsibility for installations for the supply of water (Schedule 10(3)(1)(b)(i) to the 1987 Act). Detailed Water Supply Bye-Laws exist in most parts of the UK regulating all aspects of the supply of water. The Bye-Laws in each area are based on the Model Water Bye-Laws 1986. A full account of them together with Guidance is to found in the White and Mays (1989): Water Supply Bye-Laws Guide (2nd ed.), Ellis Horwood Limited. Landlords thus are responsible for complying with the Bye-Laws, together with any other joint owners. Contravention of the Bye-Laws is a criminal offence (Bye-Law 99). Even if the Bye-Laws do not operate in a particular area, it is thought desirable that those provisions contained here ought to form part of the Agreement.

The Bye-Laws are lengthy (101 in total). It is impracticable (and unnecessary) to refer to them all. However, it is thought desirable that the essence of some of them is specifically brought to the attention of the landlord and tenant. This is particularly so, given the experience of widespread financial loss (to both landlord and tenant) that occurred during freezing conditions in December 1995 and on other occasions.

The first bullet point reflects Bye-Law 30, the second 61 to 63, and the third 49. Bye-Law 100 provides that "it shall be a defence for a person charged with an offence under the Bye-Laws to show that he took all reasonable steps and exercised due diligence to avoid commission of that offence, or he had a reasonable excuse for his act or failure to act". This is reflected in the opening words to the paragraph and explains the final sentence. The Bye-Laws do not expressly impose an obligation to inspect the water supply intervals. However, it is suggested that unless the landlords had some system of inspection, it would be difficult to argue that it had taken "all reasonable steps" to avoid contravention of the Bye-Laws. Furthermore, the landlord guarantees, as a matter of law, that the house is let at the beginning of the tenancy in a habitable condition – this necessarily entails an inspection at the beginning including of the common parts (see Note 5.2).

Note 5.10: The first two sentences (except for the word "accidentally" which is contractual) reflect the common law and statute: Sch 10(3)(2) of the 1987 Act which is believed to reflect the common law (see Notes 2.2 and 2.7).

As regards fair wear and tear, given that the tenant's duty is to act in a 'tenant-like manner' (see Notes 2.2 and 2.7) and wear and tear occurs naturally, the tenant is not liable at common law for damage caused by 'fair' wear and tear (as opposed to neglect or negligence).

As regards damage by vandals and other third parties, the position is as follows. The obligation to repair does not extend to cases where the defect is due to the tenant's own negligence, the act of a third party, or *damnum fatale*: Paton and Cameron, Landlord and Tenant at p.132. However, in cases where the landlord has the implied statutory repairing obligation imposed by Schedule 10 to the 1987 Act (such as a duty to keep in repair the structure and exterior of the house: see paragraph 5.8), the position is different. In *Hastie v. Edinburgh District Council* 1981 SLT (Sh Ct) 61 and 92, the issue was whether the landlord was liable to repair a window broken by a vandal. The court held that the effect of the statutory predecessor to Schedule 10(3)(2) of the 1987 Act (section 8 (2) of the Housing (Scotland) Act 1966), was

to reverse the common law position so that a landlord could not avoid liability for such repairs in the case of damage done by third parties. A window was held to be part of the exterior of the house. That decision was upheld on appeal to the Sheriff Principal. Naturally, the landlord is entitled to be satisfied that the damage was caused by a third party. In the case of vandals, a contractual obligation is imposed on the tenant to report the crime to the police and prove s/he has done so.

Note 5.11: This paragraph is optional. At common law, destruction by Act of God terminates the lease. However, a short Scottish secure tenancy may only be brought to an end in one of the six ways provided for in s12(1) (see part 6 below); and none of the six includes an Act of God. However, a landlord is under no duty to repair such damage in terms of statute (Schedule 10 (3)(2), 1987 Act) or to provide temporary accommodation. This paragraph gives the landlord discretion as to what to do after such damage. It is thought that social landlords would nevertheless accept responsibility in such circumstances voluntarily.

Note 5.12: The first two sentences broadly reflect Schedule 4(4).

The third sentence is contractual: repair and inspection of wires, cables and pipes is covered by the first sentence. Laying of new wires, etc. is likely not to be repairs; contractual authority is necessary.

The fourth sentence simply reflects the common law right of the landlord as owner of the subjects since the tenant has no exclusive possession of the common parts.

The fifth sentence is contractual. It is intended to deal with the situation, often encountered, where a tenant refuses, or otherwise fails, to give the landlord access for inspection, for example in connection with the landlords obligations under the Gas Safety (Installation and Use) Regulations 1998. At present, the law is unclear as to what remedies the landlord has in such a situation. This paragraph clarifies the position contractually.

The sixth sentence is contractual and deals with the consequences of the landlord exercising its right to make forcible entry.

The seventh sentence reflects the common law concept of *negotorium gestio* (agency by necessity) as well as the right of any owner of property to take reasonable steps to safeguard his/her own property. Reinstatement of damage caused through forced entry and inspection and repair, where the tenant is not at fault, is dealt with in paragraph 5.14.

Note 5.13: This is an expression of the common law duty (in delict, sometimes loosely referred to as the law of negligence) of reasonable care by the landlord to the tenant. The short Scottish secure tenant has a duty (paragraph 2.2) to inform the landlord if s/he will be away for 4 weeks or more. If s/he does so, the landlord is arguably under a duty of care to that tenant's neighbours to consider the possible consequences arising from the weather or 3rd party actings – (c.f. *Maloco v. Littlewoods Organisation* 1986 SLT 272). Where the landlord does not know that the adjoining house is empty and could not otherwise reasonably have known that, no duty arises in this regard. This paragraph should not prevent usual delictual principles from applying in cases arising from, say, 2 weeks' non-occupation where a party has suffered loss as a result of breach of duty of care by some other party. The bullet points are illustrations only of the typical sorts of work that may be required.

Note 5.14: The first sentence reflects the common law (see *Little v. Glasgow District Council* 1988 SCLR 482; *McGreal v. Wake* (1984) 128 SJ 11; 13 HLR 109; *Bradley v. Chorley Borough Council* (1985) 17 HLR 305). This duty is now found in Schedule 4(3)(b).

The second sentence reflects the common law: the landlord is entitled to have repairs carried out to its house and if that requires the temporary decanting of the tenant: that right is implied (c.f *McGreal* above). Normally, the landlord would offer suitable decanting facilities which are not to be a short Scottish secure tenancy: see s11(9) and Schedule 1(4). Note also that Schedule 2(10) allows for eviction where repairs or other work requires to be done on the house in the absence of the tenant.

The law relating to the third sentence (expenses on decanting), which is optional, is not entirely clear in Scotland. In *McGreal v. Wake*, it was held that such expenses are payable if the repairs were not done in a reasonable period of time (thus triggering a breach of contract) and it was not essential for the tenant to decant in order to allow the repairs to be done. Both criteria will be problematic, to say the least, to assess in any given situation. For reasons of pragmatics and good practice, the position is contractually clarified. See also *Calabar Properties Limited v. Stitcher* [1984] 1 WLR 289 and Knaffler (1997), p214.

The reason for the fourth sentence, which is optional, is as follows. At common law, where the subjects are unusable, wholly or partly, whether due to the landlord's actions or any other cause apart from the tenant him/herself, (*Muir v. McIntyres* (1887) 14 R 470) the tenant is entitled to a fair abatement (i.e. reduction) in rent: *Renfrew District Council v. Gray* 1987 SLT (Sh Ct) 70. In the case of decanting, the abatement will be 100%. This sentence is inserted to contractually clarify the common law position. Without this provision, the tenant might be put in the invidious position of suffering not only the inconvenience of decanting but also the imposition of a higher rent, perhaps more than s/he could afford.

Note 5.15: The duties of repair contained in this part continue until the Agreement is terminated in one of the ways set out in Part 6. Thus, even where the landlord is pursuing recovery of possession, the duties of repair still stand. The position is, of course, the same where a tenant has served notice that s/he wishes to exercise the right to buy. Until ownership passes to the tenant, the landlord has the duties of repair contained in this Part – not just to keep the house wind- and water-tight.

Note 5.16: It is normal for the tenant to be placed under an obligation to report the need for repairs. In addition, the landlord's obligation to repair after the commencement of the tenancy is not triggered until it becomes aware of the need for a repair – see Note 5.3.

Note 5.17: This reflects the common law (Erskine Institutes II, 6, 43; *McLellan v. Kerr* (1797) Mor 10134, *Mickel v. McCoard* 1913 SC 896). See also Note 2.2 and *Warren v. Kean* [1954] 1 QB 15. The Tenant's Handbook may specify what is meant by minor repairs and maintenance. By minor repairs and maintenance is meant things like replacing batteries in smoke alarms, replacing lightbulbs, replacing keys, etc. It is important that the examples given in the handbook do not seek to place a responsibility on the tenant which is that of the landlord. For example, clearing choked drains or pipes is a landlord's responsibility which cannot be contracted out (Schedule 10(3), 1987 Act) unless the disrepair has resulted from the failure of the tenant to use the house in a proper manner.

The third sentence (cleanliness) is a reflection of the tenant's duty to act in a reasonably tenant-like fashion (see Note 2.2). This obligation should not be interpreted strictly given the wide variance in personal standards. It is intended to deal with states of uncleanliness which go beyond aesthetics and into serious issues of hygiene and safety.

The final sentence reflects the common law: minor degrees of deterioration are normal and acceptable and neither party has a duty to repair: see e.g. *Plough Investments v. Manchester City Council* [1989] 1 EGLR 244. Finally, landlords may wish to insert a contractual provision forbidding tenants from carrying out minor internal work which could prejudice health and safety: such as the painting or covering of gas fire surrounds with unsuitable materials. The Tenant's Handbook could give further examples.

Note 5.18: The first two sentences are simply a brief reference to Regulations made in terms of s27(2): The Scottish Secure Tenants (Right to Repair) Regulations 2002. The Regulations apply to Scottish (and short Scottish) secure tenants of local authorities, RSLs and water and sewerage authorities. Tenants covered by the Regulations have the right to have certain repairs carried out within a particular timescale. If the repairs are not done within that timescale, the tenant may instruct a contractor from a list held by the local authority. Compensation may be payable if the repair is still not done within specified timescales.

Note 5.19: This reflects the common law position (Rankine on Leases, p242; Gloag on Contract (2nd ed. 1929), p629; *Baird v. Inglis* (1671) 2 BS 562). However, the common law position has been modernised and modified by tying it in to the landlord's complaints procedure. All social landlords have one and are expected to have one by the regulatory authority that was Scottish Homes. See Part 9 of the Agreement. The modification to the common law right proposed in this paragraph is designed to achieve a reasonable compromise between the need for the tenant to have repairs done within a reasonable time and the need for the landlord to retain some control over how and when repairs are carried out on its properties and which type. The paragraph warns the tenant that legal advice should be taken before exercising this right. This is so that the tenant can check his/her legal position and in particular whether the repairs that the tenant wants to be carried out are repairs that the landlord is obliged to carry out. It is only where the landlord is in breach of its obligations as set out in paragraphs 5.1 to 5.15 that the right of the tenant to carry out the repairs and deduct the cost from the rent arises. If the tenant does so in respect of repairs which are not the obligation of the landlord, or the cost is unreasonable, the landlord may well succeed in an action for eviction based on rent arrears.

Note 5.20: This paragraph does not impose any contractual obligation and may be removed to the Tenant's Handbook. However, it is an important area and some landlords may wish to retain it in the Agreement.

Note 5.21: This paragraph is intended to summarise the statutory position: see s28 and Sch 5, Part 1 as well as paragraph 9.3 of this Agreement. The examples in the second bullet point are added for clarity; they do not appear in the statute. The examples in the third bullet point are taken from the statute. The fourth bullet point is taken, by implication, from s28(1).

Note 5.22: This is a reference to s29 (power but not duty to make compensation) and s30 (duty to pay compensation in certain circumstances). S30 prescribes which tenants are entitled to compensation on termination of the tenancy and in which circumstance. Regulations made under s30 prescribe the precise circumstances and make further provision. These are The Scottish Secure Tenants (Compensation for Improvements) Regulations 2002.

Note 5.23: This provides a contractual remedy for a breach of 5.21.

Note 6.1: Whereas there is specific statutory authority for the termination of a tenancy by the tenant by notice in the case of the Scottish secure tenant, that authority is removed in the case of the short SST tenant: s34(6)). At common law, a lease for less than one year will tacitly relocate for the same period unless either of the parties serve notice on the other than they intend to bring the lease to an end at the ish: Rankine p 602. At common law, the method of so doing by the landlord is a notice to quit (see paragraph 6.2). The method of doing so by the tenant is unequivocal notice in writing (or possibly also verbally: compare *Gilchrist v. Western* 1890 17R 363 with *Morrison's Exrs v. Rendall* 1986 SLT 227): Rankine p597. The amount of notice to be given by the tenant at common law is the same as for the landlord, that is 40 clear days in the case of a lease for longer than 4 months (Rankine p597; s38 Sheriff Courts (Scotland) Act 1907). However, it is considered that in the context of a short Scottish secure tenancy, insistence on this rule would be impracticable for many if not most tenants. Hence, contractually, no minimum notice is required although it must be in writing and expire at the ish: that is the termination date: see paragraph 1.4. Landlords may wish to insist on a minimum period

and may do so by appropriate amendment of this paragraph. It is thought that if the tenant had a right to terminate earlier than at this time, it might be argued that the tenancy was not one which was for a term "of not less than 6 months" as required by s34(1)(b) and therefore not a short SST. (In England, it does not seem that any criticism has been made of Assured Shorthold tenancies for a fixed period where the landlord is entitled to terminate after 6 months even though the stated term of the tenancy is for a longer period (see e.g. *Aylward v. Fawaz* (1997) 29 HLR 408 and *Singh v. Emmanuel* (1997) 74 P&CR D18, both decisions of the Court of Appeal)). This contractual paragraph (although based on the common law) provides flexibility while, it is thought, complying with the statutory definition of the short SST. Where there is a joint tenancy, and one only of the tenants wishes to terminate the tenancy, s13 reverses the common law position (see *Smith v. Grayton Estates Ltd* 1960 SC 349) and allows the tenancy to continue with the remaining joint tenant. See paragraph 6.8. Therefore, if the tenancy is held by joint tenants, but only one gives notice, the tenancy continues and will tacitly relocate unless the landlord takes steps to terminate the tenancy by means of a notice to quit: see paragraph 6.2. Under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, the consent of the "non-entitled spouse" is required before valid "dealing" in the matrimonial home can take place: see also Note 4.4.

Note 6.2:

This provision is necessary in order to allow for the automatic recovery of possession procedure: see paragraph 6.4. To prevent tacit relocation (see Note 6.4 below) and so to conform to s36(5)(b), the landlord must serve a notice to quit (also known as a notice to remove) at common law. The requirements for a valid notice to quit are detailed in Mitchell: Eviction and Rent Arrears (1995) at pages 35 to 37. In brief, the notice to quit must be in writing, unequivocal, describe the parties and the subjects and state the date on which the tenant is called upon to quit. This should be the termination date. The notice must be served at least 40 clear days before the termination date in the case of a lease for 4 months or more (Sheriff Courts (Scotland) Act 1907). It must be served by one of the people and in one of the ways permitted by Ordinary Cause rule 34.8: i.e., authorised officer of the landlord, sheriff officer or solicitor and by registered post or recorded delivery or, in the case of a sheriff officer, in one of the ways permitted by Ordinary Cause Rule 5.4. It is important to note that a notice to quit is not the same as the written notice referred to in paragraph 6.4 (the notice of proceedings: see s36(2)(a)). Although, unlike the position for assured and short assured tenancies, there is no prescribed information that must be included in the notice to quit advising the tenant of their rights (see SI 1988/2067), it would be good practice to provide some similar clarificatory information in such a notice. Further, the tenant is not obliged to quit as of the date of the termination date. He can only be

required to move by court order: s36(6)(a) (which reflects the common law requirement of due process in the case of a person formerly occupying under a colourable title). The precise legal status of the tenant between the termination date and the date of any decree for recovery of possession is unclear: compare the concept of "statutory assured tenancy" provided by s16 of the Housing (Scotland) Act 1988 in the case of assured and short assured tenancies.

Note 6.3: Whereas there is specific statutory authority for the termination of a tenancy by agreement in the case of the Scottish secure tenant, that authority is removed in the case of the short SST tenant: s34(6)). At common law, the tenant may renounce the tenancy during the term of the tenancy expressly or by implication: Rankine: Chap XX. It is a matter for the landlord whether it accepts the renunciation (in which case, without more, it is held to have waived any future rights under the tenancy) or it does not (in which case it may elect to hold the tenant to his/her obligations under the tenancy (such as payment of rent (subject to the common law requirement to mitigate its loss)).The purpose of this paragraph, which is contractual (although based on the common law principles noted above), is to enable the parties to agree that the tenancy should come to an end at any time. It is thought that as the consent of both parties is required before the tenancy can be terminated in this way, s34((1)(b) (minimum term of 6 months) is still fulfilled and that this provision of itself does not prevent the tenancy being a short Scottish secure tenancy. See also Note 6.1.

Note 6.4: See s36. This is the primary route intended by the legislation for landlords who seek to recover possession of a house let under a short SST. The provisions are closely modelled on those relating to short assured tenancies: see section 33 of the Housing (Scotland) Act 1988. The intention of the legislation is that so long as the landlord can demonstrate that the four conditions have been complied with (see further in this Note), the court is obliged to grant decree for recovery of possession. The landlord does not require to prove a reason for wishing to recover possession. Neither does the landlord have to satisfy the court that it is reasonable to grant decree. S36 is designed to deal with the situation where the original term of the tenancy has expired (or any continuation thereof). Where the landlord wishes to recover at any other time (for example because of rent arrears during the term of the tenancy), the landlord may use the alternative route provided by s14: see Note below and s36(7).

The first condition is that the tenancy has reached the ish originally provided for in the tenancy agreement: see paragraph and Note 1.4. In other words, the landlord is not entitled to use the s36 route where the tenancy continues during the initial fixed period.

The second condition is that tacit relocation is not operating. Tacit relocation (literally, "silent renewal of lease"), in this context, is the common law rule whereby a lease will, by operation of law, be treated as automatically renewing itself for the same period (or for a year if that period is greater than one year) and on the same terms, unless either of the parties have taken steps to prevent tacit relocation from operating (See *Rankine on Leases*, Chap XXII.). Tacit relocation will be barred by the parties agreeing before the ish that the tenancy agreement is to be renewed on terms different from that originally agreed (for example, the lease is to continue month to month after the ish. Such a tenancy would still be a short SST: s34(5)). It would also be prevented by the parties agreeing in the tenancy agreement that following the expiry of the initial period, the tenancy would continue for some other period. Tacit relocation is also prevented by the service of a valid notice to quit. The third condition is that no further contractual tenancy is in existence. The parties may have expressly agreed to renew the tenancy or innovate on it. Alternatively, the actings of the parties (for example, in some circumstances, the acceptance of rent after the ish) may give rise to the implication that the parties have set up a new contract. A new agreement may be a short SST or a Scottish secure tenancy. It is highly unlikely to be anything else.

The fourth condition is that a valid statutory notice of proceedings under s36(2) has been served. See The Short Scottish Secure Tenancies (Proceedings for Possession) Regulations 2002.

Note 6.5: See s14 and 16. This is the alternative route that a landlord may take instead of that in paragraph 6.4: see s36(7). This is the usual route which requires to be followed in the case of Scottish secure tenancies. The main difference is that the court always retains discretion whether to grant decree since it has to be satisfied that it is reasonable to do so. Furthermore, the landlord must prove one of a number of grounds for seeking repossession. The grounds for eviction are all those contained within Schedule 2. See s14 to 16. Note that the statutory notice of proceedings (s18(1)) is different from the s36(3) notice. In relation to the final bullet point, it should be noted that the co-habitee must have resided in the house for 6 months before the application for the transfer. Note also that the statutory notice referred to here is different from the one that applies when the mandatory repossession route is used: see Note 6.4 above. This notice must be served on all

"qualifying occupiers" (s 14(6)) which are indicated in the paragraph. See The Scottish Secure Tenancies (Proceedings for Possession) Regulations 2002. The landlord must first have made such enquiries as may be necessary to establish, so far as reasonably practicable, whether there are qualifying occupiers, and if so, their identities.

Note 6.6: See ss17 and 19. Regulations made under s18(4) deal with the storage of any property left in the house by the tenant: They are found in The Scottish Secure Tenants (Abandoned Properties) Order 2002. That Order provides that all property found in a house which has been abandoned must be kept for a minimum period of 28 days and a notice must be given telling the tenant that. After the 28 days, if the property is not collected, it may be disposed of unless its value is greater than the cost of storing, in which case, it must be kept for a total period of at least 6 months.

Note 6.7: Whereas there is specific statutory authority for the termination of a tenancy by death in the case of the Scottish secure tenant (assuming that there is no statutory successor: s12(1)(c) and s22), that authority is removed in the case of the short SST tenant: s34(6)). The common law is that unless the terms of the tenancy provide that death terminates the tenant's interest: the tenant's interest devolves to his/her estate and is then distributed in terms of the law of succession. That broad position was preserved by statute with various qualifications and further provisions: ss16, 29 Succession (Scotland) Act 1964. In the case of intestacy however, where there is express prohibition of assignation, the consent of the landlord is required before the executor can transfer to a person entitled under the rules of intestacy. This rule applies also in the case of at least some statutorily protected tenancies: (or else there would be no need for ground 7 in the case of assured tenancies: see Schedule 5, 1988 Act). In Scotland, the Court of Session has been prepared to find that a statutorily protected lease might have been capable of succession: *Muir v. Arrol* 1954 SC 306 (although it did not need to make such a ruling for other reasons) and that a statutorily protected tenancy might devolve, on the death of the tenant, either by operation of the succession provisions contained within the Rent Acts, or through operation of the usual rules of succession. Leases which are pure creatures of statute, rather than contractual tenancies given special protection by the Housing Acts, (such as statutory assured tenancies), probably cannot be succeeded to: see discussion in Megarry: The Rent Acts (11th ed.). However, a short Scottish secure tenancy is not a pure creature of statute in the same way as a "statutory tenancy" under the Rent (Scotland) Act 1984 (and its

predecessors) or a statutory assured tenancy under section 16 of the Housing (Scotland) Act 1988. It is by definition a contractual tenancy which acquires certain statutory protection if certain conditions are met (in the same way as other contractual tenancies acquire certain protection under other Housing Acts). There is no recent authority on succession to statutorily protected leases. The 2001 Act makes no specific provision as to succession so that while it is clear that there is no statutory right of succession, it is not entirely clear whether the usual rule, being that death of the tenant does not *ipso facto* terminate a lease, will apply. The purpose of this paragraph, which is contractual, is that for the avoidance of doubt, on the death of the tenant, the lease terminates. The final sentence is optional and allows the surviving joint tenant to continue to occupy under the tenancy.

Note 6.8: See ss20 and 21.

Note 6.9: See s13.

Note 6.10: See s37, Schedule 6(1), (2) and the Notes in the Introduction to the short SST above with regard to the creation of the short SST.

The intention of this paragraph and s37 is that in three cases, the short SST may convert automatically into a Scottish secure tenancy after a period of time. Those three cases are summarised in paragraph 6.10 of the Agreement. The first bullet point is a reference to Schedule 6(1). The second bullet point is a reference to schedule 6(2) and the third is a reference to s35. The SST in that case, is converted to a short SST immediately the landlord serves a notice on the tenant conforming to s35(3). Such a notice may only be served where any of the tenants, lodgers, subtenants (or anyone residing with the tenant) is subject to an anti-social behaviour order under s19 of the Crime and Disorder Act 1998. The tenant has a right of appeal against such a notice to the sheriff by way of summary application. In terms of Rule 2.6 of the Summary Applications, Statutory Applications and Appeals etc. Rules 1999 (SI 1999/929), that appeal must be made within 21 days after the date of intimation of the decision to the tenant. However, the sheriff has the power to allow the summary application to be heard out of time if “special cause is shown”.

In effect, this provision creates a “probationary tenancy”. The probationer has 12 months to show their good behaviour. If in that time, no notice of proceedings has been served (under either s14(2) or s36(2), and in the former case, under any ground, not just behaviour grounds), the tenancy will automatically convert into a Scottish secure tenancy on the expiry of 12 months. If however, such a notice is served during that period, the tenancy will not automatically convert at the end of the 12-month period. It will only convert if the notice expires without proceedings having been commenced (the notices have a 6-month validity), the notices are withdrawn or if any court proceedings are finally resolved in favour of the tenant and at least 12 months have passed since the creation of the tenancy. The reference to court proceedings includes the exhaustion of all appeal routes. If after such action, the tenancy does convert, the date of the conversion (providing that 12 months have passed since the creation of the tenancy) is the date on which proceedings were finally resolved, the date on which the notice expired or the date that the notice was withdrawn, whichever the case may be. The landlord must advise the tenant, preferably in writing, of the date of conversion. The landlord has a duty in the case of “probationers” to ensure that “housing support services” are provided, either by itself, or through some other agency: s34(7). The Scottish Ministers may issue guidance as to the housing support services which are appropriate: s34(8). See s91(8) for the definition of housing support services.

Note 6.11: This contractual paragraph fulfils three main functions. First, a reminder to the tenant as to what s/he is legally obliged to do. Secondly (points 4, 7, 10) the landlord gains a contractual right which will assist in the process of reletting and dealing with outstanding tenancy matters. Although the tenant has no common law or statutory obligation in respect of these three matters, it is submitted that these are reasonable requirements to impose. Thirdly, the tenant is reminded of the need to claim compensation for improvements done.

Note 7.1: Gloss on the statutory position. The last sentence refers to s21(6) of the 1987 Act.

Note 7.2: The first sentence applies to local authorities only: see s17A of the 1987 Act as amended by the 1993 Act. The second sentence applies to all Scottish secure landlords: s23(4). Since tenants under a short SST do not have the right to buy, it is thought that the statutory obligation to provide information to the tenant before the creation of the tenancy about the likely obligations that the tenant would incur were such a right to be exercised does not arise since there is no right to be exercised in relation to that house. It should be noted however, that the status of some short SSTs may change to Scottish secure tenancies (see Note 6.9 above). If that occurs, the tenant would have the right to buy from the date of conversion (subject to the other rules: see Part 2, Chap 2 of the Act). In that case, the tenant is entitled to information relating to the right to buy and likely consequences if that right is exercised.

Note 7.3: See s23(6) for all bullet points. See Note 7.2 in relation to the right to buy. The points made there apply in the case of information to be given on request equally.

Note 7.4: For first bullet point, see s54. For second bullet point see s25. For third bullet point, see s54 and s76. For fourth bullet point see17A(2) of the 1987 Act (local authorities only). For the remainder of the bullet points, see s54. Note that in terms of s53, landlords are under a duty to develop a tenant participation strategy. This strategy is to include consideration of the matters on which tenants and registered tenants organisations should be consulted. So, the list of matters in paragraph 7.4 on which tenants must be consulted is a minimum. This paragraph should therefore be amended by adding, on a local basis, those other matters on which it has been decided consultation will take place. It should also be noted that, in terms of s54(1), landlords are under a separate duty to consult with tenants and registered tenants organisations with regard to the matters referred to in s54(2). This duty is not referred to in the Agreement as it is not one which applies to the parties to this Agreement in their roles of landlord and tenant.

Note 8.1: As a matter of good practice, all landlords ought to have a clear comprehensive and accessible complaints procedure which is well publicised. It is expected that the regulator of social landlords will make this a requirement. Section 23 requires the landlord to provide the tenant with information about its complaints procedure.

Note 8.2: The complaints procedure should also make clear that the tenant has further recourse to an Ombudsman if still dissatisfied after going through the complaints procedure. The second sentence is optional.

Note 8.3: **General**. The right of a tenant to withhold rent on breach of contract by the landlord is a common law right which goes to the core of the contractual relationship between them.

At common law, the obligation to pay rent is suspended where the landlord has failed in its obligations. The tenant may withhold (or retain) the rent until the landlord's obligation is fulfilled or until an abatement of rent is allowed and its amount fixed (Gloag on Contract (2nd edition 1929) p628; *Kilmarnock Light Co. v. Smith* (1872) 11 M 58). The right to withhold (or retain) rent is most typically done where the landlord is in material breach of its repair obligations (*Davie v. Stark* (1876) 3 R 1114; *Fingland and Mitchell v. Howie* 1926 SC 319) i.e. it has failed to carry out repairs within a reasonable time. Where the tenant has lost possession of part or all of the house as a result of the landlord's breach (or through some other supervening circumstance not being due to the fault of the tenant), he may be entitled to an abatement (i.e. reduction) in rent (e.g. *Stewart v. Campbell* (1889) 16 R 346; *Muir v. McIntyre* (1887) 14 R 470). Thus, the tenant may not be required to pay the retained rent once the landlord has fulfilled his obligations and retention of rent intended to force the landlord to do repairs may turn into an abatement of rent for the period of disrepair (e.g. *Renfrew District Council v. Gray* 1987 SLT (Sh Ct) 70). The common law right to retain rent may be modified by contract (e.g. *Glasgow Corporation v. Seniuk* 1968 SLT (Sh Ct) 47). See also McBryde (1987) Contract, W. Green and Son, para 14.39 *et. seq*.

However, in this Agreement, the common law position has been modernised and modified by tying it in to the landlord's complaints procedure. All social landlords have one and are expected to have one by Communities Scotland. The modification to the common law right proposed in this paragraph is designed to achieve a reasonable compromise between the need for the tenant to have repairs done within a reasonable time and the need for the landlord to retain some control over how and when repairs are carried out on its properties and which type. The paragraph warns the tenant that legal advice should be taken before exercising this right. This is so that the tenant can check his/her legal position and in particular whether the landlord is indeed in breach of its obligation. It is only where the landlord is in breach of its obligations as set out in this Agreement that the right of the tenant to withhold rent arises. If the tenant withholds rent where the landlord is not in fact in breach of its obligations, the landlord may

well succeed in an action for eviction based on rent arrears. The requirement that the tenant put the rent in an account and is in a position to evidence that is intended as a safeguard for both landlord and tenant although it is not, strictly speaking, a requirement at common law. This provision provides a certain protection to tenants to avoid the possibility of the tenant either wrongly withholding rent or misunderstanding the nature of the remedy. The tenant's rights to claim damages are not affected by this paragraph. Neither are the tenant's rights to obtain an order for specific implement, to complain to the Ombudsman or to exercise the common law right to do the repairs and deduct the costs from the rent (subject to the requirements of that right). In addition, the statutory right to repair (see paragraph 5.18) guarantees the right to have certain urgent repairs carried out swiftly. It is thought that in these circumstances, this adjustment to the common law right is fair, reasonable and proportionate and does not fall foul of the Unfair Terms in Consumer Contract Regulations 1999.

Note 9.1: See those parts of the legislation noted in the paragraph. The right to buy is dealt with in Part 2, Chap 2 of the Act which applies specifically to Scottish secure tenancies and not short SSTs. Only some rights of tenants under a Scottish secure tenancy apply to tenants under a short SST: see 34(6) and the Introduction to these Notes. The right to buy is not one of them.

Note 9.2: See s55.

Note 9.3: **General**. In terms of this Agreement, the tenant must obtain written permission before carrying out various activities, for example, making alterations or improvements, sub-letting and assignation. This paragraph summarises the procedure in all cases and the rights of appeal where they exist. That appeal must be within 21 days after the date of intimation of the notice, or a longer period if "special cause" is shown (Rule 2.6 of the Summary Applications, Statutory Applications and Appeals etc. Rules 1999 (SI 1999/929).

First bullet point. Permission is required for actions under the following paragraphs: 2.3 (business use); 2.5 (pets); 2.10/11 (cutting trees, etc.); 2.16 (parking); 2.17 (storage); 2.18 (change agreement re use); 4.1 and 4.2 (sub-tenant, lodger, assignation, exchange, joint

tenant); 5.21 (alterations and improvements) The landlord, as a public authority, should not refuse permission unreasonably. That obligation is made statutory in respect of some of the permissions.

Second bullet point. Although there is no common law or statutory obligation to give reasons in all cases, the trend in administrative law is now toward implying that duty in an increasing number of situations (see generally: Clyde and Edwards (2000) Judicial Review p531). In addition, there is a statutory duty in respect of some of the permissions. It is only fair that the decision be given as soon as reasonably possible. In respect of some permissions, there is a statutory time limit.

Third bullet point. Any conditions which are made must, of course, be reasonable ones. Withdrawal of the permission should be on reasonable grounds.

Fourth bullet point. If there is no statutory remedy provided, the complaints procedure is available. This is without prejudice to any other remedy that the tenant might have.

Fifth bullet point. This procedure is created by Schedule 5, Part 2. Although the right to convert the tenancy to a joint tenancy given by section 11(5) does not explicitly refer to an appeals mechanism in the case of refusal (in the way provided for by s32), the appeals mechanism is available where the tenant "otherwise" wishes to "give up to another person possession of the house or any part of it" (s32(1)) which must include a joint tenancy.

Sixth bullet point. This procedure is created by Schedule 5, Part 1.

Seventh bullet point. This procedure is created by s26.

Note 9.4: The first sentence is contractual and is for clarification purposes. Landlords may wish, for administrative purposes to specify exactly where any communications should be made to it. The second sentence reflects the terms of s40 and refers only to notices and documents which are required or authorised to be given under Chapter 1, Part 2 of the Act. The third sentence is contractual. However, even if the landlord is not told by the tenant of another address, if the landlord does know of another address which is the last address of the tenant, (perhaps after enquiries with neighbours), it is to that address that documents and notices under Chapter 1, Part 2 of the Act should be given.

Note 9.5: On signing the Agreement, the tenant should also be provided with a copy of the Tenant's Handbook which, among other things, will contain the Summary version of this Agreement. The signing-up process is an important stage in the landlord/tenant relationship and provides a useful opportunity for the landlord to emphasise critical points. If the tenant was previously the tenant of the same house (i.e. the Agreement is being substituted for the pre-existing lease) the effect of signing the new Agreement is not to create a new tenancy, but to substitute new terms and conditions to an existing one. Therefore, any outstanding rights and obligations (for example in relation to legal action, rent arrears, etc.) continue. If the tenant is not already a tenant of the house, a new tenancy is created. The tenant's signature also acknowledges prior receipt of the s34(4) statutory notice that must be served prior to the creation of the tenancy. Landlords would be unwise to rely on this paragraph as the sole proof that such a notice was served. Unless the landlord, if challenged, can prove as a matter of fact that the statutory notice was served on the tenant in one of the ways provided for in s40, the tenancy will not be a short SST but will instead be a Scottish secure tenancy. Landlords should ensure therefore that there is proof of prior service of the notice.

Note to Signing Section

This paragraph, by itself may not be sufficient proof in practice. See also paragraph 1.4 of Section One to this document.

This form of execution is designed to provide a "self-proving" Agreement in terms of the Requirements of Writing (Scotland) Act 1995. That Act provides that tenancy agreements for one year or less do not require to be constituted in writing. However, s23(1) of the 2001 Act provides that the landlord must draw up a tenancy agreement (i.e. this Agreement) stating the terms of the tenancy, ensuring that before the commencement of the tenancy, it is subscribed by the landlord and the tenant in accordance with the 1995 Act and provide a copy of the agreement to the tenant. Thus, the agreement must be in writing. A version not in writing, such as Braille, disk or tape, will not do. Although there is nothing in law to prevent the parties making a written agreement in a language other than English, the practical and legal difficulties associated with translation and legal interpretation mean that the version that is binding on the parties must be in English. There are special provisions in the 1995 Act concerned with signing of agreements by those who cannot read or write (s9 and Schedule 3). There are also special provisions for signing by local authorities, companies and other bodies corporate (such as industrial and provident societies): (see Schedule 2, an authorised officer, among others, may do so on behalf of the organisation). Each signature must be witnessed. The same witness can witness all signatures. It may happen that all parties do not sign at the same time: hence the separate provision of witness signature for each party. The tenant must be given the opportunity of reading the Agreement if s/he wishes. If s/he is not given a fair opportunity of doing so, then this is a relevant factor in assessing the validity of any clause in the Agreement: see Unfair Terms in Consumer Contract Regulations 1999. Section 8(1) of the 1995 Act provides that any annexation to an agreement does not require to be signed or subscribed by the parties in order to be incorporated into the agreement as long as that annexation is referred to in the document and the annexation is identified on the face of it as being that annexation referred to in the agreement. Where, however, that annexation shows or describes part or all of the land, to be incorporated into the agreement, a plan, drawing or photograph must be signed by both parties on each page and a schedule, appendix or inventory must be signed on the last page. As a matter of good practice, it is suggested that nonetheless, any other document which is to form a part of the Agreement (for example in relation to service charges) should also be signed and witnessed and reference made to this Agreement within it.

Derek O'Carroll, Advocate, July 2002

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