EXECUTIVE NOTE

THE PROPERTY FACTORS (SCOTLAND) ACT 2011 (MODIFICATION) ORDER 2012

SSI 2012/Draft

The above draft instrument will, if approved, be made by the Scottish Ministers in exercise of the powers conferred by sections 29(1) and (2) and 30(2) of the Property Factors (Scotland) Act 2011 ("the Act"). The instrument is subject to the affirmative procedure.

Policy Objectives

The Act aims to create a framework which will provide increased protection for homeowners who use the services of a property factor. It has three main elements:

- a compulsory register for property factors;
- a code of conduct with which all registered property factors will be required to comply;
- a new statutory dispute resolution mechanism, to be known as the homeowner housing panel.

The purpose of this draft Order is to amend the Act to allow material about individuals directly concerned with the control or governance of property factors to be omitted from the register of property factors when it is made available to the public. The material which may be excluded is material which falls within section 5(2) of the Act:

- conviction of any offence involving fraud or other dishonesty, violence or drugs;
- practice of unlawful discrimination on the grounds of any of the protected characteristics in Part 2 of the Equality Act 2012; and
- contravention of any provision of the law relating to tenements, property or debt.

Policy Background

The Act requires the Scottish Ministers to consider certain matters when deciding whether an applicant is a fit and proper person to be entered on the register of property factors. These matters include certain criminal convictions and contraventions of the law which are mentioned in section 5(2) of the Act.

The Act does not specify how the Scottish Ministers should access this information in order to have regard to it when deciding whether a person is a fit and proper person to be a property factor. The Scottish Government has concluded that it is necessary to require applicants seeking registration as a property factor to include information regarding relevant convictions and contraventions of the law in their application. Regulation 3 of the Property Factors (Registration) (Scotland) Regulations 2012 (SSI 2012/181), which is made under section 3(2)(f) of the Act, requires applicants to provide information relating to relevant convictions and contraventions of the law in their application.

To create a workable operational regime under the Act, it is considered necessary for the Scottish Ministers to hold information relating to criminal convictions and contraventions of law, which will be personal information and, in the case of criminal conviction information, sensitive personal data. However, section 4(6) of the Act requires all information supplied on making an application by virtue of section 3(2) of the Act to be included in the register. In addition, under section 1(2) of the Act, the register is to be made available for public inspection at all reasonable times.

Implications of disclosure of material falling within section 5(2) of the Act

The effect of the Act as noted, taken with SSI 2012/181, requires personal information relating to criminal convictions and contraventions to be included in the register, which in turn is to be made publicly available. The Scottish Government is concerned that publication of this information is likely to amount to unlawful interference with the right to respect for private life guaranteed by Article 8 of the European Convention on Human Rights in relation to both criminal convictions (*X v. Norway*, Application No. 7945/77), which is sensitive data and afforded greater protection (*S and Marper v. United Kingdom*, Application No. 30562/04 and 30566/04) and civil contraventions (*Lundvall v. Sweden*, Application No. 10473/83) as public and unlimited disclosure of this information would not be proportionate and would therefore amount to unjustified interference with this Convention right. The information is not clearly sought for the purpose of public dissemination - it is required by the Scottish Ministers under the Act to assess if a person is a fit and proper person to be a property factor and so entered on the register. It is submitted that disclosure of this personal information is not in the public interest. It is unnecessary for homeowners to be able to access this information. If homeowners wish to raise concerns about individuals involved in factoring they can raise these with the Scottish Ministers and, if there is an alleged failure to carry out duties and/or comply with the property factor code of conduct, with the homeowner housing panel. Criminal conviction and contravention information is a separate category from the other information required by section 3(2) of the Act – the name and business address of persons directly concerned with control or governance of the property factor and the buildings or land in relation to which the factor acts, which is the kind of information homeowners should have access in order to contact their factor and check that the factor is registered.

Furthermore, information in relation to criminal convictions and civil contraventions is unlike other information included in the application in accordance with section 3(2) of the Act as there is no obligation (under section 7 of the Act) to notify the Scottish Ministers of changes to this information during the period of registration. Instead, it represents information at a particular moment in time obtained to allow the Scottish Ministers to decide a particular application as to whether the applicant is a fit and proper person to be entered in the register of property factors. There is no requirement to supply the information again until a further application (registration is required every 3 years). In particular, if criminal conviction information were to be included in the register, there is a further risk that a conviction could become "spent" in accordance with section 4 of the Rehabilitation of Offenders Act 1974 during the period of registration and therefore irrelevant.

Ancillary provision under section 29 of the Act

The proposed modification of the Act by this draft Order is limited to allowing the Scottish Ministers to omit a defined class of material falling within section 5(2) of the Act from the

public register, and a narrower class of case than could be required by regulations made under section 3(2)(f) of the Act. The provision in the Act that the register of property factors is made available for public inspection will be met by making the register publicly available on-line as soon as is reasonable following 1 October 2012. This draft Order, if approved, will be made under the powers available to the Scottish Ministers under section 29(1) and (2) and 30(2) and is considered to be supplementary for the purposes of, in consequence of, and for giving full effect to the obligation on the Scottish Ministers imposed by section 5(2) of the Act to have regard to certain conviction and contravention information in deciding whether a person is a fit and proper person to be a property factor.

The Scottish Government consider that this Order is appropriate to make practical operational provision to implement the Act without affecting Parliament's intention that relevant information is included in the public register while at the same time protecting personal information relating to criminal convictions and contraventions in view of the legal issues noted above.

Consultation and Impact Assessments

The effect of regulation 3 of SSI 2012/181 taken with sections 4(6) and 1(2) of the Act requiring publication of information relating to certain criminal convictions and contraventions has been discussed with the Information Commissioner's Office, which is in support of non-disclosure in these circumstances. It was not considered that further consultation was necessary.

An equality impact assessment (EQIA) has not been considered necessary for this instrument, as there are no direct impacts on any of the relevant equalities groups. An EQIA has been carried out for certain other instruments relating to the implementation of the Act's provisions (in particular, the Property Factors (Registration) (Scotland) Regulations 2012, which is the instrument which creates the requirement to provide the "fit and proper person" information in an application). These EQIAs are available on the Scottish Government's website.

Financial Effects

The Minister for Housing and Transport confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Housing, Regeneration, Commonwealth Games and Sport Directorate

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