

COST OF LIVING (TENANT PROTECTION) (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Cost of Living (Tenant Protection) (Scotland) Bill, introduced in the Scottish Parliament on 3 October 2022.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 18–FM);
 - a Policy Memorandum (SP Bill 18–PM);
 - a Delegated Powers Memorandum (SP Bill 18–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 18–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BILL: OVERVIEW

5. The Bill takes the following measures:
 - it makes adjustments to the law on rent increases and sets a permitted rate (which may be varied by regulations made by the Scottish Ministers) at which rent may be increased (to be set at 0% initially), and provides for limited circumstances in which rent may be increased above this rate,
 - it confers a power to modify the law on adjudication of rent disputes on or in anticipation of the expiry or suspension of the temporary rent controls,
 - it makes adjustments to the law on evictions to temporarily restrict the enforcement of various eviction orders, and it provides for limited exceptions to the restriction,

This document relates to the Cost of Living (Tenant Protection) (Scotland) Bill (SP Bill 18) as introduced in the Scottish Parliament on 3 October 2022

- it allows for increased damages to be awardable in the event of an unlawful eviction.
6. The measures introduced by this Bill relating to rent increases and evictions will apply to:
- private residential tenancies under the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”),
 - assured tenancies and short assured tenancies under the Housing (Scotland) Act 1988 (“the 1988 Act”),
 - Scottish secure tenancies and short Scottish secure tenancies under the Housing (Scotland) Act 2001 (“the 2001 Act”), and
 - student residential tenancies.
7. In addition, the provisions in the Bill in relation to evictions will apply to protected tenancies (including short tenancies) and regulated tenancies under the Rent (Scotland) Act 1984 (“the 1984 Act”).

CROWN APPLICATION

8. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or a Scottish statutory instrument unless the provision expressly exempts it. This Bill applies to the Crown in the same way as it applies to everyone else.

DETAIL ABOUT PROVISIONS

Part 1 – Residential tenancies – rent cap and evictions

9. Section 1 introduces schedule 1 which makes temporary modifications in relation to rent controls in the following:
- the 2016 Act in relation to private residential tenancies (paragraph 1 of schedule 1),
 - the 1988 Act in relation to assured tenancies and short assured tenancies (paragraph 2 of schedule 1),
 - the 2001 Act in relation to Scottish secure tenancies and short Scottish secure tenancies (paragraph 3 of schedule 1),
 - student residential tenancies (governed by contract) (paragraph 4 of schedule 1).
10. Section 2 introduces schedule 2 which makes temporary modifications to the law in relation to evictions. In particular, it makes adjustments to the law on evictions to temporarily restrict the enforcement of various eviction orders, and it provides for limited exceptions to the restriction.

Part 2—Part 1: supporting provisions

Advancement of equality and non-discrimination

11. Section 3 provides that the Scottish Ministers must have regard to the importance of communicating in an inclusive way and to opportunities to advance equality and non-discrimination when exercising the functions contained in Part 1 (including schedules 1 and 2).

Subordinate legislation making powers

12. Section 4 provides that any power to make subordinate legislation conferred by Part 1 (including schedules 1 and 2) includes the power to make ancillary provision – that is, incidental, supplementary, consequential, transitional, transitory or saving provision. The section also provides that any regulation-making power conferred by virtue of Part 1 includes the power to make different provision for different purposes and areas.

Suspension, revival and expiry of Part 1

13. Section 5 provides the Scottish Ministers with a power, by regulations, to suspend the operation of any provision in Part 1 (including schedules 1 and 2), and to revive the operation of any such provision that has been suspended. For example, this power may be used to suspend any provision which is, in the view of the Scottish Ministers, not currently necessary or proportionate, but which may need to be revived in the future if it becomes necessary and proportionate again. Regulations under this section are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010) if they textually amend any part of an Act, but are otherwise subject to the negative procedure (see section 28 of that Act).

14. Section 6 expires Part 1 (including schedules 1 and 2) at the end of 31 March 2023, unless the Scottish Parliament approves draft regulations (under subsection (3)) providing for the expiry of Part 1 at the end of 30 September 2023. If the Scottish Parliament approves such regulations, it may later approve draft regulations (under the same subsection) allowing a further, final extension until the end of 31 March 2024, at which point any remaining provisions of Part 1 will expire. Regulations under subsection (3) are subject to the affirmative procedure. In addition, subsection (7) allows the Scottish Ministers, by regulations, to make consequential, transitional, transitory or saving provision in connection with the expiry of a provision in Part 1. For example, this may be used to clarify the legal effect of anything previously done under an expired provision. Regulations under subsection (7) are subject to the affirmative procedure if they textually amend any part of an Act, but are otherwise subject to the negative procedure.

15. Section 7 allows the Scottish Ministers, by regulations, to expire any provision in Part 1 (including schedules 1 and 2) earlier than it would otherwise. It also provides that, where the Scottish Ministers consider that any provision in Part 1 is no longer necessary or proportionate in connection with the cost of living, they must bring forward regulations to suspend the provision (where they consider that the provision may need to be revived) or otherwise expire the provision. Regulations under this section are subject to the affirmative procedure if they textually amend any part of an Act, but are otherwise subject to the negative procedure.

Reporting

16. Section 8 requires the Scottish Ministers to periodically review the necessity and proportionality of the provisions in Part 1 (including schedules 1 and 2) in connection with the cost of living and then prepare, and lay before the Scottish Parliament, a report on each review. The initial reporting period covers the period between the Act for the Bill receiving Royal Assent and the end of 31 December 2022, and thereafter the reporting period covers each successive 3-month period until 31 December 2023 or the earlier expiry of Part 1. But no review or report is required for any such period if, during the period, the Scottish Ministers are required by section 6(6) to lay before the Scottish Parliament a statement of their reasons why regulations should be made under section 6(3) to change when Part 1 expires.

Part 3—Residential tenancies: rent adjudication

17. Section 9 introduces schedule 3 of the Bill which inserts a regulation-making power—
- into the 2016 Act, exercisable on or in anticipation of the expiry or suspension of paragraph 1 of schedule 1 (of the Bill), to modify Chapter 2 of Part 4 of the 2016 Act in connection with the rent adjudication process in relation to private residential tenancies before a rent officer or the First-tier Tribunal for Scotland, and
 - into the 1988 Act, exercisable on or in anticipation of the expiry or suspension of paragraph 2 of schedule 1 (of the Bill), to modify Part 2 of the 1988 Act in relation to assured tenancies and short assured tenancies in connection with the rent adjudication process before the First-tier Tribunal for Scotland.

18. Section 10 expires section 9 at the end of 31 March 2024, unless the Scottish Parliament approves draft regulations (under the power in subsection (2)) providing for the expiry of section 9 up to one year later. This power may be exercised more than once. Regulations under subsection (2) are subject to the affirmative procedure. If the Scottish Ministers lay any such draft regulations before the Scottish Parliament they must, at the same time, lay a statement of their reasons.

Part 4—General

19. Section 11 confers on the Scottish Ministers a power, by regulations, to make ancillary provision (incidental, supplementary, consequential, transitional, transitory or saving provision) for the purposes of, in connection with or for giving full effect to the Bill or any provision made under it. It also confers on them a power, by regulations, to modify any such regulations in consequence of the use of their powers under sections 5 to 7. Regulations under this section are subject to the affirmative procedure if they textually amend any part of an Act, but are otherwise subject to the negative procedure.

20. Section 12 brings the Bill into force on the day after the Act for the Bill receives Royal Assent. It also allows the Scottish Ministers to make, by regulations, transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill. Regulations under this section must be laid before Parliament, but are otherwise subject to no parliamentary procedure (see section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010).

Schedule 1—Rent cap

Private residential tenancies

21. Paragraph 1(1) of schedule 1 provides that the 2016 Act applies, subject to sub-paragraph (2), with the modifications set out in paragraph 1 of the schedule.
22. Sub-paragraph (2) provides that the modifications in paragraph 1 have no effect in relation to any rent-increase notice given under section 22(1) of the 2016 Act by a landlord under a private residential tenancy to a tenant before 6 September 2022. Existing rights of tenants to challenge any rent increase will be maintained for rent increase notices given before 6 September 2022. This means that, where a rent increase notice was issued prior to 6 September 2022, the 0% cap will not apply and the proposed rent will be applied 3 months after the tenant receives the rent-increase notice (or such longer period as may be agreed between the landlord and the tenant) unless the tenant has made an application to a rent officer (part of Rent Service Scotland) under section 24 of the 2016 Act to challenge the rent-increase notice.
23. Sub-paragraph (4) modifies the effect of section 19 of the 2016 Act. Section 19(1) of the 2016 Act provides that the rent payable under a private residential tenancy may not be increased more than once in a 12 month period. Sub-paragraph (4)(b)—
- firstly, inserts a new subsection (3) into section 19 of the 2016 Act in consequence of the new Chapter 2A of Part 4 of the 2016 Act (to be inserted by paragraph 1(17) of schedule 1 of the Bill) to allow a landlord to apply to a rent officer seeking a rent increase above the level of the permitted rate in certain circumstances,
 - secondly, inserts a new subsection (4) of section 19 conferring a regulation-making power (subject to the affirmative procedure) on the Scottish Ministers to amend that section to permit a second rent increase in a 12 month period in certain circumstances (as may be specified in the regulations).
24. Sub-paragraph (5) inserts a new section 21A into the 2016 Act (with temporary effect) providing that from 6 September 2022 a landlord under a private residential tenancy may not increase rent by more than the permitted rate (which is initially to be set at 0%). The permitted rate may be changed by the Scottish Ministers by regulations (subject to the affirmative procedure). Any rent-increase notice given on or after 6 September when the permitted rate is 0% has no effect.
25. In consequence of the new section 21A of the 2016 Act imposing a rent cap, sub-paragraph (6) modifies section 22 of the 2016 Act providing that any rent increase agreed between a landlord and tenant has no effect to the extent that the increase is more than the permitted rate.
26. Sub-paragraphs (8) and (9) modify sections 24 and 25 of the 2016 Act with the effect that, except where the permitted rate is 0% (meaning that no rent-increase notice can be given), a tenant who has received a rent-increase notice from a landlord may refer the proposed rent increase to a rent officer for a decision on whether the proposed rent increase does or does not exceed the permitted rate of increase. If it does not, the rent officer will approve the proposed rent increase by order. If the proposed rent would be an increase of more than the permitted rate, the rent officer will order that the rent may be increased by the permitted rate (see new sections 25(1A) to (1C) of the 2016 Act inserted by sub-paragraph (9) of schedule 1).

27. In circumstances where the application to a rent officer under section 25 is to be limited to the rent officer deciding whether the proposed rent increase is at or below the level of the permitted rate (and is more limited than the current process of rent determination by a rent officer to be determined at the level of open market rent), the following provisions of the 2016 Act are not necessary and are temporarily to be treated as having been repealed:

- section 26 (rent officer's duty to issue provisional order) – see sub-paragraph (10),
- section 32 (determination of open market rent) – see sub-paragraph (15),
- section 24 (duty of rent officers and the First-tier Tribunal for Scotland to make information about open market rents determined) – see sub-paragraph (18).

28. Sub-paragraphs (12) and (13) modify the effect of sections 28 and 29 of the 2016 Act to provide that the landlord or the tenant may appeal against an order by a rent officer under section 25(1A) or (1B) (deciding that the proposed rent increase is at or below the permitted rate and ordering that the rent payable is the proposed rent, or otherwise ordering that the rent payable is the current rent payable as increased by the permitted rent) to the First-tier Tribunal for Scotland (“FTT”). On determining the rent payable on appeal, the FTT must decide that the rent payable is the current rent as increased by the permitted rate.

29. Sub-paragraph (14) consequentially modifies section 31 of the 2016 Act dealing with what is effectively an underpayment of rent which arises where the effective date on which the rent officer's or the FTT's decision regarding rent increase takes effect is later than the date that the rent increase had originally been due to take effect in accordance with the rent-increase notice.

30. Sub-paragraph (16) makes consequential provision to section 33 of the 2016 Act (which provides that where a referral made to a rent officer under section 24, or an appeal to the FTT under section 28, is withdrawn). The rent officer or the FTT must decide that the rent payable is the lower of rent proposed in the rent-increase notice or the current rent increased by the permitted rate.

31. Sub-paragraph (17) inserts a new Chapter 2A of Part 4 of the 2016 Act containing exceptions where a landlord may apply for a rent increase above the permitted rate. New section 33A of the 2016 Act enables a landlord to make an application to a rent officer to apply a proposed rent increase above the permitted rate in order to recover up to 50% of the increase in any prescribed property costs (defined by new section 33A(4) of the 2016 Act, subject to modification by regulations made by the Scottish Ministers under section 33A(5) that require the approval of the Scottish Parliament) incurred by the landlord in the 6 months before the application. Prescribed property costs are any of the following costs relating to the let property: interest payable in respect of a mortgage or standard security, a premium payable in respect of insurance (other than general building and contents insurance), and service charges that are paid for by the landlord but the payment of which the tenant is responsible for under the tenancy. Under section 33B, any rent increase ordered by the rent officer must be no more than 50% of the increase in the landlord's prescribed property costs incurred in that 6 month period (as specified in the application to the rent officer) subject to an overall limit of this increase being no more than 3% of the level of the existing rent (this 3% limit may be changed by regulations by the Scottish Ministers if approved by the Scottish Parliament – see section 33F(2) but may not be lower than the level of the permitted rate).

32. Sub-paragraph (11) modifies section 27 of the 2016 Act in consequence of the application to a rent officer under section 33A(1) and an order by the rent officer under section 33B(2) or (3). Within 14 days of making the order, the rent officer may correct an error in the original order determining the rent by making a new order.

33. Chapter 2A also provides for appeals and reviews. An order of a rent officer under section 33B(2) or (3) may be appealed to the FTT under section 33C within 14 days of the order being made. As with the decision of the rent officer, any rent increase ordered by the FTT on appeal must be no more than 50% of the increase in the landlord's prescribed property costs incurred in that 6 month period (as specified in the original application to the rent officer) subject to a limit of this increase being no more than 3% of the level of the existing rent (and the 3% limit may be modified by regulations made by the Scottish Ministers subject to the approval of the Parliament – see section 33F(2)).

34. The decision of the FTT may only be reviewed again by the FTT under limited circumstances set out section 33E (which is comparable with section 30 of the 2016 Act which applies in relation to an appeal to the FTT following a referral by a tenant to a rent officer under section 24).

35. New section 33F(1) confers power on the Scottish Ministers by regulations (subject to the affirmative procedure) to modify the 50% limit on the increase in prescribed property costs in respect of which a landlord may apply to a rent officer (under section 33A(1)) to seek recovery by way of rent increase. Section 33G makes equivalent provision to section 31 of the 2016 Act, dealing with what is effectively an underpayment of rent which arises where the effective date on which the rent officer's or the FTT's decision (under section 33B(2) or (3) or 33C(3)) regarding rent increase takes effect is more than 3 months after the day on which the tenant was notified of the landlord's proposed increase under section 33A(3). This is based on the assumption in the provisions in new Chapter 2A of Part 4 of the 2016 Act inserted by the Bill that if an application by a landlord to increase rent to a level above the permitted rate is approved by a rent officer or the FTT under this Chapter, it is to take effect 3 months after the tenant has been notified under section 33A(3) of the application.

36. Sub-paragraph (19) temporarily disapplies Chapter 3 (rent pressure zones) of Part 4 of the 2016 Act meaning that a local authority will be unable to make an application to the Scottish Ministers requesting that all or part of the authority's area be designated as a rent pressure zone during the period of application of the rent cap while Part 1 of this Bill is in force. At the time of the passing of the Bill for this Act, no rent pressure zones have been designated in Scotland.

Assured tenancies and short assured tenancies

37. Paragraph 2 makes similar provision in relation to assured tenancies and short assured tenancies modifying the 1988 Act as the provision made in paragraph 1 in relation to private residential tenancies modifying the 2016 Act.

38. From 6 September 2022, a landlord under an assured tenancy or a short assured tenancy may not increase the rent payable under the tenancy by more than the permitted rate, which is

initially set at 0% (see section 23A of the 1988 Act inserted by sub-paragraph (3)). The Scottish Ministers may, by regulations, change the permitted rate.

39. But the modifications made by paragraph 2 of schedule 1 of the Bill have no effect in relation to a rent increase notice properly served under section 24(1) of the 1988 Act before 6 September 2022 (see sub-paragraph (2)(a)). Similarly, the modifications made to the 1988 Act do not affect a referral or an application to the FTT (under section 25(1) or 34(1) of the 1988) that has been made before the paragraph comes into force (see sub-paragraph(2)(b)).

40. Furthermore, the rent cap does not apply to tenancies to which the statutory rent increase process did not apply in terms of the existing law under section 24(5) of the 1988 Act (see subsection (6) of new section 23A). The rent increases relating to those tenancies are not governed by the arrangements under Part 2 of the 1988 Act and are instead governed by contractual terms. These excluded tenancies are either:

- statutory assured tenancies where the landlord varied the terms of the contract in the year following the conversion of the assured tenancy to a statutory assured tenancy under section 17 of the 1988 Act,
- contractual tenancies which include a term making provision for an increase in rent (including provision whereby the rent for a particular period will or may be greater than that for an earlier period).

41. The Bill makes provision for a new route of referral to rent officers, mirroring the modifications of the 2016 Act, which is a change from existing provisions of the 1988 Act. The 1988 Act, without the modifications made by the Bill, provides statutory rent increase notices can be appealed by a tenant directly to the FTT, and rents in general in respect of short assured tenancies can be referred to the FTT for a redetermination of appropriate rent for that tenancy. Sections 24A to 24K of the 1988 Act (to be inserted by paragraph 2(5) of schedule 1 of the Bill) replace this process, mirroring the changes made to the 2016 Act rent officer and appeal process.

42. A tenant who has received a notice to increase rent from a landlord (where the permitted rate is more than 0%) may refer the proposed rent increase to a rent officer for a decision that the proposed rent increase does not exceed the permitted rate of increase (see section 24(3)(a) of the 1988 Act as modified by sub-paragraph (4)(d) and (g)). If it does not, the rent officer will approve the proposed rent increase by order. If the proposed rent would be an increase of more than the permitted rate, the rent officer will order that the rent may be increased by the permitted rate (see sub-paragraph (5) inserting new section 24A of the 1988 Act).

43. A landlord can appeal against an order by the rent officer to the FTT within 14 days of the order being made (see new section 24B of the 1988 Act). The FTT may determine the amount of rent payable so long as it does not result in an increase to the existing rent by more than the permitted rate (see new section 24C of the 1988 Act).

44. New section 24D of the 1988 Act makes similar provision to section 33 of the 2016 Act (mentioned above).

45. Sub-paragraph (5) also makes provision for circumstances where a landlord may apply to increase the rent above the permitted rate (see new section 24E of the 1988 Act). It is similar to the provision made for private residential tenancies in paragraph 1 of the schedule in which a landlord may apply to a rent officer for an increase in rent to recover no more than 50% of prescribed property costs (as specified in the application to the rent officer) incurred subject to an upper cap of the increase being no more than 3% of the current amount of rent. Prescribed property costs are any of the following costs relating to the house that is let: interest payable in respect of a mortgage or standard security, a premium payable in respect of insurance (other than building and contents insurance), and service charges that are paid for by the landlord but the payment of which the tenant is responsible for under the tenancy.

46. The powers of a rent officer under new section 24F of the 1988 Act and the FTT under section 24G of the 1988 Act are the same as described in relation to sections 33B and 33C respectively of the 2016 Act mentioned above.

47. New section 24I of the 1988 Act makes equivalent provision to section 30 of the 2016 Act mentioned above.

48. New section 24J confers equivalent regulation powers on the Scottish Ministers to modify the 50% cap on recovery of any increase in landlord's prescribed property costs in connection with any approved rent increase above the permitted rate of increase (and the overall cap of 3% of existing rent) as conferred under new section 33F of the 2016 Act.

49. New section 24K of the 1988 Act makes equivalent provision to existing section 31 of the 2016 Act (as modified) and new section 33G of the 2016 Act mentioned above.

50. As a result of modified processes of applying to a rent officer and the FTT, sub-paragraphs (6) and (7) disapply current routes of appeal under section 25 and 34 of the 1988 Act. As mentioned above, saving provision is made under sub-paragraph (2)(b) to ensure that, on the day on which paragraph 2 of schedule 1 of the Bill comes into force, no existing referral to a rent officer, or application to the FTT, is affected by the modifications made in this schedule.

Scottish secure tenancies and short Scottish secure tenancies

51. Paragraph 3 makes provision in relation to Scottish secure tenancies and short Scottish secure tenancies. On or after 6 September 2022, a landlord under a Scottish secure tenancy or short Scottish secure tenancy may not increase the rent payable under the tenancy by more than the permitted rate, which is initially set at 0%. Any rent increase notice on or after 6 September 2022 has no effect, nor does a notice given at a time when the permitted rate was 0%.

52. The provision does not affect a landlord's ability to increase any charge other than rent that is payable under a Scottish secure tenancy or a short Scottish secure tenancy.

53. The Scottish Ministers may, by regulations, change the permitted rate. A landlord may not give a rent increase notice if it increases the rent payable under the tenancy by more than the permitted rate.

54. Paragraph 3(3) confirms that the provisions do not preclude social landlords from consulting their tenants.

55. Note that, while the provisions refer to Scottish secure tenancies, they additionally apply to short Scottish secure tenancies by virtue of section 34(6) of 2001 Act.

Student residential tenancies

56. Paragraph 4 makes provision in relation to student residential tenancies. From the day paragraph 4 comes into force, a landlord may not increase the rent payable under the tenancy by more than the permitted rate. The permitted rate is initially set at 0% meaning that no rent increase may take effect while the permitted rate is set at that level. The rent cap in relation to student residential tenancies has effect from the date on which paragraph 4 of schedule 1 of the Bill comes into force rather than from 6 September 2022. This is because student residential tenancies are governed by contractual arrangements which, generally, would have been entered into before 6 September 2022 for the 2022-2023 academic year meaning that it was not necessary or appropriate to apply this provision retrospectively.

Schedule 2—Protection from eviction

Eviction from residential properties: restrictions on enforcement

57. Paragraph 1(1) and (2) of schedule 2 imposes restrictions on the enforcement of certain orders granted by a court or tribunal. These orders would, without these enforcement restrictions, have allowed a landlord to take steps to enforce the removal of a residential tenant from the landlord's property. (In the following notes, any such order is called an "eviction order".)

58. Sub-paragraph (3) imposes limits on the duration of these enforcement restrictions. When the restrictions apply to an eviction order, the landlord cannot take further steps to enforce the order for 6 months starting from when it was granted or, if sooner, until the restrictions end. The 6-month maximum period of restrictions on the enforcement of an order cannot be extended.

59. Despite these enforcement restrictions, a landlord may still take steps to apply for and obtain an eviction order as previously. But, as with any other eviction order, if the enforcement restrictions apply to the order when it is granted or subsequently, the order cannot be enforced for 6 months starting from when it was granted or, if sooner, until the restrictions end.

60. There are different kinds of eviction order although they broadly do the same thing - they enable a landlord to take steps to remove a tenant from the landlord's property. In paragraph 1, an order of this kind is referred to as a "decree for removing". The meaning of this is set out in sub-paragraph (10). It includes the most common kinds of eviction order that may be granted by a court or tribunal to enable a landlord to remove a residential tenant from the landlord's property.

61. There are also different kinds of residential tenancy, with each kind governed by a different regime (whether statutory or common law). The main statutory regimes are—

- the 2016 Act for private residential tenancies,

- the 2001 Act for Scottish secure tenancies and short Scottish secure tenancies,
- the 1988 Act for assured tenancies (including short assured tenancies), and
- the 1984 Act for, among other things, protected tenancies (including short tenancies) and statutory tenancies.

62. Most student residential tenancies are governed instead by the common law of contract.

63. Any eviction order granted by a court or tribunal to remove a residential tenant from a property that is subject to any one of the above tenancies, could potentially be affected by the enforcement restrictions. Whether the order is subject to these restrictions depends, in part, on when proceedings for the order were raised with the court or tribunal (i.e. when the landlord first submitted an application to the court or tribunal for the order)—

- If the proceedings for an eviction order start after the restrictions come into force, the restrictions could apply to the order. If the landlord was required to give the tenant an “eviction notice” (see definition in sub-paragraph (10)) before doing so, it makes no difference when the notice was given (including whether it was given before or after details of the enforcement restrictions to be delivered by the Bill were first made public on 6 September 2022, or before or after the enforcement restrictions come into force).
- If the proceedings for an eviction order started before the restrictions come into force and an eviction notice had to be given to the tenant before doing so, the restrictions could apply to the order (regardless of when the order is or was granted) but only if the notice was given on or after 6 September 2022.
- If the proceedings for an eviction order started before the restrictions come into force and an eviction notice did not need to be given to the tenant before doing so, the restrictions could apply to the order (regardless of when the order is or was granted) but only if the proceedings started on or after 6 September 2022.
- If the proceedings for an eviction order started before 6 September 2022, the restrictions do not apply to the order (regardless of when the order is or was granted). Accordingly, any such eviction order may be obtained and enforced as previously.

64. Whilst the enforcement restrictions could apply to any eviction order that meets the criteria in sub-paragraph (1) or (2), they do not apply in a case mentioned in sub-paragraph (4) or (5)—

- Sub-paragraph (4) provides that where an eviction order relates to a student residential tenancy, the enforcement restrictions do not apply if the order is or was granted in respect of circumstances which are the same as those described in paragraph 2 (the tenant received a relevant conviction) or paragraph 3 (the tenant behaved in an anti-social manner) of schedule 2 of the Bill. Paragraphs 2 and 3 are explained below.
- Sub-paragraph (5)(a) provides that where an eviction order relates to a private residential tenancy under the 2016 Act, the enforcement restrictions do not apply if the order is or was granted on the basis of the application of paragraphs 1A, 2, 4A, 10, 12A, 13, 14 or 15 of schedule 3 of that Act. These paragraphs set out various circumstances in which an eviction order may be granted in relation to this kind of tenancy. (The 2016 Act is modified by paragraph 4 - as noted below - to insert paragraphs 1A, 4A and 12A.)

- Sub-paragraph (5)(b) provides that where an eviction order relates to a Scottish secure tenancy or a short Scottish secure tenancy under the 2001 Act, the enforcement restrictions do not apply if the order is or was granted on the basis of the application of paragraph 1, 2, 5, 7 or 8 of schedule 2 of that Act. These paragraphs set out various circumstances in which an eviction order may be granted in relation to these kinds of tenancy. These are all existing grounds. But the reference to paragraph 1 (which relates, in part, to rent arrears) is qualified. The effect is that the enforcement restrictions do not apply to an order granted on the ground of rent arrears only if the amount is equal to or greater than £2,250. If the rent arrears are below that amount, an eviction order granted on that ground cannot be enforced for 6 months from when it was granted (or, if sooner, until the enforcement restrictions are brought to an end).
- Sub-paragraph (5)(c) provides that where an eviction order relates to an assured tenancy (including a short assured tenancy) under the 1988 Act, the enforcement restrictions do not apply if the order is or was granted on the basis of the application of Ground 1A, 2, 8A or 15 of schedule 5 of the 1988 Act. These are Grounds on which an eviction order may be granted in relation to this kind of tenancy. (The 1988 Act is modified by paragraph 5 - as noted below - to insert Grounds 1A and 8A.)
- Sub-paragraph (5)(d) provides that where an eviction order relates to a protected tenancy (including a short tenancy) or a statutory tenancy under the Rent (Scotland) Act 1984, the enforcement restrictions do not apply if the order is or was granted on the basis of the application of Case 1A, 2 or 8A, paragraph (c)(vi) in Case 11 or paragraph (c)(iv) in Case 12 of schedule 2 of the 1984 Act. These are Cases where an eviction order can be granted in relation to these kinds of tenancy. (The 1984 Act is modified by paragraph 6 - as noted below - to insert Cases 1A and 8A.)

65. Sub-paragraph (6) provides that where an eviction order is subject to the enforcement restrictions, and was granted under section 51 of the 2016 Act or sections 16 or 36 of the 2001 Act after those restrictions came into force, the order does not bring the tenancy to an end until the landlord has recovered possession of the property through the enforcement of the order (at any time after the restrictions on the enforcement of the order end). This ensures that the landlord does not end up in a situation where a tenancy comes to an end at a time when an eviction order cannot be enforced against the tenant.

66. Sub-paragraph (7) ensures that any period when an eviction order mentioned in section 16(5A)(c) of the 2001 Act is subject to enforcement restrictions under sub-paragraph (1) or (2) is disregarded when calculating the period for which the landlord has a right under the order to recover possession of the property in question. In other words, the period when the landlord has those rights is paused whenever the enforcement restrictions apply to the order.

67. Sub-paragraph (8) confers a power on the Scottish Ministers to modify, by regulations, the circumstances in which the enforcement restrictions in paragraph 1 of schedule 2 do not apply. Sub-paragraph (9) provides that these regulations are subject to the affirmative procedure.

Student residential tenancies: criminal behaviour

68. As noted above, the enforcement restrictions that are imposed by paragraph 1(1) and (2) of schedule 2 do not apply in relation to a student residential tenancy where the eviction order is or

was granted in respect of the circumstances set out in paragraph 2 of the schedule. This is where a tenant receives a relevant conviction for an offence that was committed by using, or allowing the use of, the let property for an immoral or illegal purpose, or an offence that is punishable by imprisonment and committed within, or in the locality of, the let property.

Student residential tenancies: anti-social behaviour

69. As noted above, the enforcement restrictions that are imposed by paragraph 1(1) and (2) of schedule 2 do not apply in the case of a student residential tenancy where the eviction order is granted in respect of the circumstances set out in paragraph 3 of the schedule. This includes circumstances relating to anti-social behaviour of the tenant within, or in the locality of, the property.

Safeguards for landlords: substantial rent arrears and financial hardship

70. Paragraphs 4 to 6 of schedule 2 set out some additional grounds on which an eviction order may be granted, with effect from the date on which the enforcement restrictions in paragraph 1(1) and (2) of the schedule come into force. Where an eviction order is granted on one of these additional grounds, the enforcement restriction do not apply and the order can be enforced in the usual way. Whether and how these apply depends on the type of tenancy in question—

- In relation to private residential tenancies, paragraph 4 modifies the 2016 Act to insert new paragraphs 1A, 4A and 12A into schedule 3 of the 2016 Act. The new grounds are: the landlord’s intention to sell the property to alleviate financial hardship, the landlord’s intention to live in the property to alleviate financial hardship, and circumstances where the tenant has accrued substantial rent arrears.
- In relation to an assured tenancy (including a short assured tenancy), paragraph 5 modifies the 1988 Act to insert new paragraphs 1A and 8A into schedule 5 of the 1988 Act. The new grounds are: the landlord’s intention to live in the property to alleviate financial hardship, and circumstances where the tenant has accrued substantial rent arrears.
- In relation to a protected tenancy (including a short tenancy) and a statutory tenancy, paragraph 6 modifies the 1984 Act to insert new paragraphs 1A and 8A into schedule 2 of the 1984 Act. The new grounds are: the landlord’s intention to live in the property to alleviate financial hardship, and circumstances where the tenant has accrued substantial rent arrears.

71. The new grounds of “substantial rent arrears” apply if the tenant has accrued rent arrears in respect of one or more periods, and the cumulative amount equates to, or exceeds, an amount that is the equivalent of 6 months’ rent under the tenancy. But a court or tribunal must also be satisfied that it is reasonable to grant an eviction order on this ground, taking into account, among other things, whether the rent arrears are due to a delay or failure in the payment of certain benefits.

72. In addition, paragraph 5(3) of schedule 2 modifies section 19(4) of the 1988 Act so that the minimum period to be specified in an eviction notice under that section is two months if the notice specifies either of the new Grounds (1A or 8A) that are inserted into the 1988 Act by the paragraph.

Unlawful eviction: notification and determination damages, etc.

73. Paragraphs 7 and 8 of schedule 2 make provision for the determination of damages where a tenant has been unlawfully evicted. This applies to unlawful evictions taking place on or after the commencement of the Bill. Such a determination may be for an amount that is not less than 3 months' rent and not more than 36 months' rent – but which may be reduced to an amount of less than 3 months' rent if the court or First-tier Tribunal considers that to be appropriate. The provisions also place a requirement on the First-tier Tribunal to inform the police and local authorities when an order is made. In the case of a social landlord, the Sheriff Court is required to inform the Scottish Housing Regulator when an order is made.

Schedule 3—Rent adjudication: power to modify

74. Paragraph 1 of schedule 3 confers regulation-making powers that are exercisable on or in anticipation of the expiry or suspension of paragraph 1 of schedule 1. These powers enable the Scottish Ministers to modify Chapter 2 (rent variation instigated by landlord's notice) of Part 4 of the 2016 Act in connection with the determination of rent payable under a private residential tenancy by a rent officer or the First-tier Tribunal. Regulations under this power are subject to the affirmative procedure. For example, the power could be used to change the basis on which rents are determined (i.e. otherwise than on the basis of market value as currently provided for in section 32 of the 2016 Act). It could also be used to provide that a rent adjudicator can only determine an increased rent if the increase is the same or lower than the increase sought by the landlord.

75. Paragraph 2 of schedule 3 makes similar provision with respect to the rent adjudication process for assured tenancies and short assured tenancies under Part 2 of the 1988 Act with the regulation-making powers being exercisable on or in anticipation of the expiry or suspension of paragraph 2 of schedule 1. Regulations under this power are subject to the affirmative procedure.

This document relates to the Cost of Living (Tenant Protection) (Scotland) Bill (SP Bill 18) as introduced in the Scottish Parliament on 3 October 2022

COST OF LIVING (TENANT PROTECTION) (SCOTLAND) BILL

EXPLANATORY NOTES

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