

POLICY NOTE

THE RENT ADJUDICATION (TEMPORARY MODIFICATIONS) (SCOTLAND) REGULATIONS 2024

SSI 2024/89

The above instrument was made in exercise of the powers conferred by section 33ZA of the Private Housing (Tenancies) (Scotland) Act 2016(1) and sections 25ZA and 53(3) of the Housing (Scotland) Act 1988(2) and all other powers enabling them to do so.

In accordance with section 33ZA(3) of the 2016 Act, and section 25ZA(3) of the 1988 Act, before laying a draft of this instrument the Scottish Ministers consulted with such persons as appear to them to represent the interests of tenants and landlords under private residential tenancies, assured tenancies and short assured tenancies, and other persons the Scottish Ministers considered appropriate.

In accordance with section 77(3) of the 2016 Act, and section 25ZA(4) of the 1988 Act, a draft of this instrument has been laid before, and approved by resolution of, the Scottish Parliament.

Summary Box

These Regulations change how rent a private residential tenancy is determined on referral by a tenant to a rent officer (or subsequent appeal to the First-tier Tribunal) under the Private Housing (Tenancies) (Scotland) Act 2016. They also change how rent in relation to statutory assured tenancies is determined on referral by a tenant to the tribunal under section 25 of the Housing (Scotland) Act 1988.

1. Policy Objectives

1.1 Part 1 of the Cost of Living (Tenant Protection) (Scotland) Act 2022 came into force on 28 October and introduced a temporary cap on most in-tenancy rent increases, as well as greater restrictions on evictions and protections against illegal evictions. Part 1 of the Act is due to expire on 31 March 2024 and to support a transition away from the emergency rent cap measures contained within the 2022 Act, in a way which appropriately reflects the interests of both tenants and landlords, schedule 3 of the Act contains a power to modify the basis on which rent is determined when there is a referral for rent adjudication in relation to a proposed rent increase.

1.2 The Scottish Government's latest report to Parliament on the operation and necessity of the 2022 Act provided an updated economic analysis. The key points were as follows:

- Households in the rented sector entered the cost of living crisis in a more vulnerable position than owner occupiers, and the most recent (November 2023) YouGov polling for the Scottish Government shows that private renters continue to be more likely to report concern about paying mortgage/rent than households generally (15% vs. 9%) as

(1) 2016 asp 19. Section 34A of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") was inserted by paragraph 1 of schedule 3 of the Cost of Living (Tenant Protection) (Scotland) Act 2022 ("the 2022 Act") and renumbered as section 33ZA by S.S.I. 2023/116.

(2) 1988 c. 43. Section 25ZA of the Housing (Scotland) Act 1988 ("the 1988 Act") was inserted by paragraph 2 of schedule 3 of the 2022 Act.

well as more likely to say that they were struggling at least a little to pay for household bills (65% vs. 47%).

- While consumer price index (CPI) inflation has fallen from 11.1% in October 2022 to 4.0% in December 2023, it remains above the Bank of England's 2% inflation target, and the level of prices remains much higher than it was prior to the cost of living crisis: over the two years from December 2021 to December 2023, the overall CPI is 15% higher, and the CPI subindex for the category "electricity, gas and other fuels" is 48% higher.
- As a result of the continuing high level of energy prices, it is estimated that the fuel poverty rate in the private rented sector will stand at 47% during the January-March 2024 Ofgem price cap period, as compared to the 36% in 2019 prior to the cost of living crisis.
- While there have been increases in real pay in recent months, this follows a period of sustained falls; for example, median real pay in Scotland based on HMRC PAYE records was 2.6% lower in the period September-November 2023 than at its peak in March-May 2021.
- The Scottish Fiscal Commission (SFC) expects that overall living standards in Scotland will fall slightly in 2023-24, which after the large fall in 2022-23, will result in a cumulative fall of 2.7% from 2021-22 to 2022-23, the largest since records for Scotland began in 1998. The SFC expects that it will take until 2026-27 for living standards to return to their 2021-22 levels.
- The decline in inflation in recent months has led to a fall in interest rates, including on buy-to-let mortgages, although rates remain significantly above pre-crisis levels.

1.3 Overall, while there have been some signs of improvement in economic conditions for households in recent months, these improvements follow a period of significant pressure such that, on average, households continue to face economic and financial conditions which are significantly more challenging than they were prior to the cost of living crisis. Private rented households continue to report being on average under greater financial stress than the average for all households. For their part, landlords face lower inflationary pressures and somewhat lower interest rates, although again there has not been a significant improvement.

1.4 Once the rent cap is expired we would expect that many rent increases proposed by landlords will proceed as normal, with tenants agreeing to pay the proposed rent increase. However, there could be situations where tenants wish to refer the proposed increase for adjudication. The emergency Act therefore provides Scottish Ministers with the ability to temporarily modify the basis on which rent increases referred by a tenant are adjudicated. Any changes made to the adjudication process would be intended to smooth the transition out of the rent cap and protect tenants from steep rent increases which could be experienced if there is a sudden move to open market rent from rent levels that have been suppressed.

1.5 The current rent adjudication process (suspended whilst Part 1 of the Cost of Living (Tenant Protection) Act is in place) allows for a rent officer or the First-tier Tribunal, dependent on the tenancy type, to make a determination on whether a rent increase is reasonable. This determination is based on comparison with the rent for other properties in an area (open market rent).

1.6 The changes proposed by Schedule 3 are transitional and are intended to form part of a gradual return to the pre-2022 Act position of rent adjudication, reflecting the temporary nature of the 2022 Act. Rent Service Scotland and the First-tier Tribunal (Housing and Property Chamber) are responsible for determining rents, under the rent adjudication requirements, based on market rates. These transitional arrangements would amend the basis of rent adjudication for a year, from 1 April 2024 to 31 March 2025, but may be extended for a further period of a year with parliamentary approval and based on assessment of circumstances at that time.

1.7 The amended adjudication process is proposed to be evaluated against three factors:

- i. the market rent;
- ii. the rent requested by the landlord; and
- iii. an additional, temporary comparator.

1.8 The final rent will be determined based on the lowest of these three figures and cannot be set above the rent requested by the landlord. The additional, temporary comparator will serve as a maximum upper limit - based on the difference between the current rent and the open market rent - and will be set at 12%.

1.9 The changes ensure that, where a rent-increase notice has been given to the tenant and the tenant refers the matter to a rent officer or to the tribunal, the rent to be paid will be the lowest of the rent proposed by the landlord, the open market rent or, if the gap between the current rent and the open market rent (“the market difference”) is more than 6%, the “permitted rent”.

1.10 The permitted rent is worked out using a formula which can be summarised as follows:

- If the gap between the market rent and the current rent is 6% or less, then the landlord can increase the rent up to the market level.
- If the gap between the market rent and the current market is more than 6%, the landlord can increase the rent by 6% plus an additional 0.333% for each percent that gap between the current rent and market rent exceeds 6%. However, the total rent increase cannot exceed 12% of current rent.

1.11 The table provided in Annex A provides an illustrative example of how a lower limit of 6% of current rent and an upper limit of 12% of current rent would operate when calculating a “permitted rent” comparator.

2. EU Alignment Consideration

2.1 This instrument is not relevant to the Scottish Government’s policy to maintain alignment with the EU.

3. Consultation

3.1 From December 2023 to January 2024 the Scottish Government engaged with key stakeholders on the proposed approach to temporarily modify the rent adjudication process, as part of the transition away from the temporary, emergency measures.

3.2 A total of 64 responses were received from tenant, landlord, letting agent and investor representatives. The overall response to the proposed amendments to the rent adjudication process was mixed. Some respondents felt the process should return to the pre-Cost of Living Act process immediately, however, a number of responses welcome the proposed changes as a necessary part of the transition away from the emergency measures.

3.3 The consultation set out two options for the upper boundary of the comparator (10% and 15% of current rent), which represents the level above which the rent officer cannot set rent irrespective of the gap between the current and market rent. There was a mixed response to the 10% and 15% levels as set out, with some respondents citing significantly increased costs for landlords that are not taken account of in the proposed approach and others expressing the view that the upper limit will be unaffordable for many tenants.

3.4 Taking account of the mixed views that were expressed in the consultation on the options of 10% and 15%, with some consultees feeling the levels were too high and some too low, the upper boundary of the taper has been set between these values, at 12%, i.e. the rent officer cannot set the rent above 12% of current rent irrespective of the gap between market rent and the current rent.

3.5 In reaching a decision on the most appropriate way to amend the rent adjudication process in order to support a transition away from the emergency rent cap measures, and in deciding on the form of the additional temporary comparator, Ministers carefully considered the range of views expressed by stakeholders. The proposed lower limit of 6% and upper limit of 12% of current rent seeks to take account of the differing views in order to strike an appropriate balance between the needs of both tenants and landlords.

4. Impact Assessments

4.1 No impact assessments have been completed for this instrument. However, a range of impact assessments were carried out for the Cost of Living (Tenant Protection) (Scotland) Act 2022.

5. Financial Effects

5.1 A Business and Regulatory Impact Assessment (BRIA) relating to the implementation of regulations to temporarily amend the existing rent adjudication process has been undertaken and will be published imminently.

Scottish Government
Directorate for Local Government and Housing

January 2024

ANNEX A

Difference between current rent and open market rent	Maximum percentage existing rent can be increased by - 6% to 12% tapering applied on 6% to 24% gap between existing and market rent
0%	0.0%
1%	1.0%
2%	2.0%
3%	3.0%
4%	4.0%
5%	5.0%
6%	6.0%
7%	6.3%
8%	6.7%
9%	7.0%
10%	7.3%
11%	7.7%
12%	8.0%
13%	8.3%
14%	8.7%
15%	9.0%
16%	9.3%
17%	9.7%
18%	10.0%
19%	10.3%
20%	10.7%
21%	11.0%
22%	11.3%

23%	11.7%
24%	12.0%
25%	12.0%
26%	12.0%
27%	12.0%
28%	12.0%
29%	12.0%
30%	12.0%