

Cost of Living (Tenant Protection) (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Cost of Living (Tenant Protection) (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 3 October 2022.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 18-EN);
 - a Financial Memorandum (SP Bill 18-FM);
 - a Delegated Powers Memorandum (SP Bill 18-DPM); and
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP18-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

4. The purpose of the Cost of Living (Tenant Protection) Bill (“the Bill”) is to respond to the emergency situation caused by the impact of the cost crisis on those living in the rented sector in Scotland by introducing a temporary rent freeze and a temporary moratorium on evictions, along with increased damages for unlawful evictions, until at least 31 March 2023, and with additional powers to temporarily reform rent adjudication in connection with the expiry of the rent freeze. The intended effect of the Bill is to:
 - i. protect tenants by stabilising their housing costs;
 - ii. where possible, during the cost crisis, reduce impacts on the health and wellbeing of tenants caused by being evicted and/or being made homeless by giving them more time to find alternative accommodation; and

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- iii. seek to avoid tenants being evicted from the private sector by a landlord wanting to raise rents between tenancies during the temporary measures and reduce unlawful evictions, through the complementary measures of a moratorium on evictions and raising the level of damages that may be awarded.

5. As this is emergency legislation, it is intended that a reporting requirement will be included to demonstrate the need for provisions to either continue or expire, where appropriate, based on evidence at the relevant time.

Rental sector context

6. The cost crisis exacerbates existing social and economic pressures faced by those living in a rented home, making them more vulnerable as a whole. These pressures are expected to be particularly acute in the winter given the rise in fuel use and costs during this period. Rented households are more likely to have lower household incomes, higher levels of poverty and to be financially vulnerable. 63% of social rented households and 40% of private rented households in Scotland are estimated to be financially vulnerable, with savings which would cover less than one month of income at the poverty line, compared to 24% of households buying with a mortgage and 9% of households owning outright¹.

7. Despite the decision of the UK Government to introduce the Energy Price Guarantee from 1 October 2022, which will cap the typical household energy bill at £2,500 for the next two years, compared to the previously announced Ofgem price cap of £3,549, this represents a further increase from the £1,971 cap in April 2022, and an even larger increase from the £1,277 cap in October 2021. Even taking into account the £400 Energy Bills Support Scheme payment, which is available in Winter 2022/23 (although not beyond), the increases in energy bills will be substantial, as set out in Table 1, which also sets out the changes relative to a cap of £2,500 since this will continue to apply in subsequent years.

Table 1. Change in cap on typical household energy bill

% change from	For cap of £2,500	For cap of £2,100 (i.e. including £400 support payment)
Apr-22	27%	7%
Oct-21	96%	64%
Oct-20	140%	102%

¹ [Scottish Government Statistical publication on Wealth in Scotland 2006-2020](#)

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8. This will lead to a significant increase in fuel poverty rates, particularly in the private and social rented sectors, as set out in Table 2, even with various policy mitigations taken into account. There is also a higher proportion of households on pre-payment meters in the social rented sector (43%) and private rented sector (22%), as compared with the owner occupier sector (5%); the finances of these households will be under particular pressure this winter as they are unable to spread energy payments over a longer period.²

Table 2. Estimated fuel poverty rates based on energy price cap and taking into account mitigations in 2022-23

	Fuel poverty rate			Change in fuel poverty rate (% points)	
	2019	Oct 2021	Oct 2022	Oct 2022 on 2019	Oct 2022 on Oct 2021
Owned outright	21%	22%	28%	7%	6%
Mortgaged	12%	13%	19%	7%	6%
Local authority	36%	39%	52%	16%	13%
RSL	39%	45%	57%	18%	12%
Private rented	36%	37%	48%	12%	11%
Scotland	25%	27%	35%	10%	8%

Note: Estimated fuel poverty rates are based on 2019 SHCS data, with energy prices uprated in line with the increase in the energy price gap. Figures for October 2022 are presented net of the following mitigations: £400 Energy Bills Support Scheme payment, £650 Cost of Living payment for those on means-tested benefits, £300 Pensioner Cost of Living Payment for pensioner households who receive the Winter Fuel Payment, £150 Disability Cost of Living Payment and £150 Council Tax rebate for households in council tax bands A-D or that receive council tax reduction. (Estimates relating to Oct 2021 and Oct 2022 are based on scenario modelling and reflect fuel poverty rates based on the Oct 2021 Ofgem fuel price cap and the Oct '22 Energy Price Guarantee).

9. Furthermore, general inflation is also very high, with the overall Consumer Price Index at 10 % in August 2022, a level which exceeds the growth in nominal earnings and benefit payments.

² Households on pre-payment meters will be particularly affected by the increase in energy prices, with these households unable to spread the costs over a longer period. The share of households on pre-payment meters is much higher in the private rented sector (22%) and social rented sector (43%) than in the owner-occupier sector (6%). This is based on the Scottish Government's analysis of the share of households on pre-payment meters using 2019 Scottish House Condition Survey data.

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10. Households in the rented sector, especially those on lower incomes, generally pay more of their income on housing costs than owner occupiers, have higher rates of income poverty and child poverty, and have less financial resilience to cope with cost of living shocks³. Given this, and taking the adverse trends described above into account, economic analysis therefore continues to suggest additional measures to protect renters remain necessary. In addition to financial implications, this action seeks to support vulnerable households from the health and wellbeing implications of the economic crisis. In addition, a secure home remains vital to the ability to maintain employment and to having a stable family life.

11. On 6 September 2022, the Programme for Government (PfG) committed to a suite of emergency measures in response to the cost of living crisis. This emergency legislation will offer protection to tenants in recognition of the particular issues that will affect tenants who rent their home. A temporary rent freeze and temporary moratorium on evictions will protect renters by putting in place measures to stabilise immediate housing costs and support renters impacted by the cost of living crisis to stay in their homes for longer. Given the urgency of this situation, the Scottish Government consider the provisions need to come into force before winter given the likely rise in fuel costs and significant impact this will have on households in the rented sector. The Scottish Government's announcement of these intentions - one month ahead of bringing emergency measures to parliament – ensure the Scottish Government's intentions are well known allowing time for adjustment.

12. Looking beyond the mainstream rental sector, a significant number of students in Scotland live in college and university halls of residence and in Purpose Built Student Accommodation (PBSA). The Higher Education Student Agency (HESA) data shows, in a typical year, there are approximately 11,500 students residing in PBSA and approximately an additional 36,000 students in college and university maintained halls attending Scottish universities. This equates to approximately 4% and 14% of all enrolments at Scottish universities respectively.

13. Although assurances have been received from the majority of institutional and PBSA providers regarding the stability of contracts, and that there is little appetite to increase costs mid tenancy, this does not cover with certainty all the providers. Many PBSA providers have signed up for the voluntary UNIPOL (a student housing charity) codes, but again this does not cover, with certainty, all the private providers and Scottish college and university providers have not adopted an equivalent code.

14. Students renting college and university and PBSA accommodation did not receive the £400 energy cost support which was for households. Although they may be eligible

³ Housing Cost to Income Ratios from Family Resources Survey data, as reported on in the [New Deal for Tenants Draft Strategy Consultation Paper](#), December 2021 (pages 21 and 22).

Income Poverty and Child Poverty figures as reported in the Scottish Government statistical publication [Poverty and Income Inequality in Scotland 2017-20](#)

Financial Vulnerability figures as reported on in the Scottish Government statistical publication [Wealth in Scotland 2006-2020](#)

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for support from other routes such as via hardship funds⁴, these are already under significant pressure and should utility cost increases be passed onto students there may be insufficient financial resource to meet all individual needs.

15. As PBSA and halls of residence providers are businesses (and not households), students in this type of accommodation, unlike those in the private rented sector, will not benefit from the energy price cap announced for households by the UK Government. They will, instead, have to rely on providers using the UK Government's Energy Bill Relief Scheme, announced on 21 September 2022, which provides a discount on gas and electricity for non-domestic customers (including all UK businesses and charitable organisations) for 6 months until end March 2023. The level of support, however, for each organisation will vary depending on type and date of contract. Even with this action, electricity and gas prices will increase and there is no guarantee they will not be passed onto students.

16. The current UK inflation rate (Consumer Prices Index (CPI)) is almost 10%, (source: ONS, September 2022) mainly driven by cost increases to electricity, gas, transport and food. The rent freeze and eviction moratorium in college and university halls and PBSA would give further assurance to students that rent will not increase. Recent research by the Mental Health Foundation Scotland⁵ and NUS Scotland⁶ highlighted the impact of financial concerns on student mental health. These measures will provide assurance with regard to students in college and university halls of residence and PBSA around in year tenancy rent increases. The Bill will therefore apply the rent freeze and moratorium on evictions to all providers, across college and university halls of residence and PBSA, to ensure parity of protection of this sector.

Overview of proposals

Rent cap

17. The Bill sets out that the rent restriction in the private rented sector will be delivered on the following basis:

18. The restriction in rent increases will apply to existing private residential tenancies, assured tenancies and short assured tenancies in order to ensure that as many tenants as possible benefit from having their housing costs stabilised because (as set out in paragraph 6) we know that tenants can be financially vulnerable.

19. Landlords will be able to re-set rent levels between tenancies. The application of the rent freeze on this basis protects tenants, helping them to stay in their homes during the cost crisis, whilst responding to the need to ensure that the measures are proportionate. This provides fair protection as prospective tenants will enter into any

⁴ <https://www.saas.gov.uk/guides/other-sources-of-funding/discretionary-funds-and-guidance-at-https://www.saas.gov.uk/files/310/saas-discretionary-fund-guidance.pdf>

⁵ <https://www.mentalhealth.org.uk/sites/default/files/2022-06/MHF-Thriving-Learners-Report-Executive-Summary.pdf>

⁶ <https://www.nus-scotland.org.uk/articles/alarming-research-on-student-poverty>

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new tenancy on the basis of a known and agreed rent and will immediately have protection from any rent increase.

20. Scottish Ministers will be able to set a maximum permissible level of rent increase (“rent cap”) with the power for this to be varied whilst the emergency measures are in force. In the period up to 31 March 2023, the cap will be set at zero to prevent rent increases. This will be kept under review and, with the agreement of Parliament, if the measures are to be extended, Ministers will consider the level of the cap in light of the wider economic circumstances at that point.

21. The 6 September 2022 is the date that the intention to cap rents was announced by the Scottish Government. To ensure that rents cannot be increased in response to this announcement, before measures could be put in place, rent increase notices issued on or after 6 September 2022 will be void. A landlord who seeks to increase the rent once the rent cap rises above zero will be required to issue a fresh rent increase notice at that time. Rent increase notices issued prior to the announcement on 6 September 2022 remain valid, as this is the first point that landlords would have known the Scottish Government’s intention to cap rents.

22. The cap will be variable so that Ministers can continue to protect tenants but also respond to changes in wider economic conditions given the ongoing uncertainty. This means if the cap is raised above 0% in the future landlords will be able to raise the rents to that level. The level of the cap will be considered as part of the ongoing review of the measures.

23. The existing rights of tenants to challenge any rent increase and appeal rent increases will be maintained for rent increase notices issued before 6 September 2022. This is to ensure that tenants who have received a notice proposing a rent increase prior to the measures coming into force will continue to be protected in line with existing requirements.

24. To ensure adherence to the rent cap, after the measures come into force, there will be a new temporary ‘verification’ process whereby tenants can refer a rent increase notice to a Rent Officer, part of Rent Service Scotland (overall referred to throughout as Rent Service Scotland) to confirm whether a proposed rent increase is in line with the rent cap. The concept of ‘market rent’ will cease to apply as a result of the rent cap. This process will only be applicable if the rent cap is raised above 0% (because no rent increase notices can be given whilst the cap is at 0%). In the case of private residential tenancies, this would be a modification to the existing adjudication process such that there will be no consideration of factors out-with the rent cap. This will also be added as a new temporary right to refer to Rent Service Scotland for tenants with assured tenancies and short assured tenancies.

25. This ‘verification’ process is to ensure that tenant can challenge a landlord if they think a notice above the permitted cap has been issued. This could be particularly relevant if the rent is not straightforward (for example includes energy costs), allowing a fair and impartial adjudication.

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26. The existing route of appeal for landlords or tenants to the First-Tier Tribunal (Housing and Property Chamber) following a Rent Service Scotland decision will be maintained, or extended in the case of assured tenancies and short assured tenancies. This is to ensure both the tenant and the landlord have a route for dispute resolution should either party disagree with the original decision.

27. The focus of the rent cap measure is on protecting tenants but it is recognised that the impacts of the cost crisis may also be felt by some landlords. As such, a safeguard is included in the emergency measures that allows for consideration of landlords' prescribed property costs (associated with the rented property). Whilst the rent cap is in force (at any level), any landlord who is eligible to make a rent increase in accordance with the existing requirements under the Private Housing (Tenancies) (Scotland) Act 2016 will be able to apply to Rent Service Scotland to increase rent in terms of an increase in limited, defined 'prescribed property costs. These prescribed costs are:

- i. the interest payable in respect of any mortgage or standard security over the rental property;
- ii. any insurance premium payable by a landlord relating to insurance connected to offering the property for rent, for example 'landlords' insurance' (excluding general building and property insurance);
- iii. any 'service charge(s)' related to the rental property that are recoverable from the tenant via their rent as part of the contractual arrangement between tenant and landlord.

28. By having the landlord make an application in relation to the prescribed costs, the emphasis is placed on the landlord to demonstrate eligibility rather than requiring the tenant to challenge the increase. This is important during the cost crisis so the tenant has confidence that the landlord has met the requirements as set out in the legislation.

29. Only 50% of the increase in these costs will be eligible for consideration of a rent increase, this offers protection to both the tenant and the landlord as neither bears the full cost of any increase while the emergency measures are in force.

30. Any increase for prescribed costs will be subject to an overall limit of a maximum of 3% of the existing rent. The inclusion of this maximum increase that can be passed on is intended as an additional level of protection for tenants, providing clarity that whilst their rent may rise whilst the cap is at zero, there is still a restriction on the level of increase they will be exposed to and protecting them from unreasonable rent increases at a time of financial uncertainty. The 3% level that has been set for the initial period to 31 March 2023 and is again intended to strike a balance between reflecting increases in key costs for landlords and ensuring that the emergency measures achieve the purpose across as many tenancies as possible. Scottish Ministers have the power to vary this limit as set out in paragraph 31.

31. Scottish Ministers will have powers to vary the prescribed costs and the 50% and 3% limits. This flexibility is deemed necessary given uncertainty in wider economic conditions and will be considered as part of the ongoing review of the measures, ensuring they remain fair and proportionate.

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32. The Bill also sets out that rent restriction in the social rented sector will be delivered on the following basis:

- The restriction in rent increases will apply to existing Scottish secure tenancies and short Scottish secure tenancies.
- The restriction will allow the Scottish Ministers to set a maximum permissible level of rent increase (“rent cap”) with the power for this to be varied whilst the emergency measures are in force. In the period up to 31 March 2023, the cap will be set at zero to prevent rent increases.
- The ability of landlords to increase rents (in line with the rent cap) will be maintained to allow for flexibility in the level of the cap if required in future.

33. The rent cap will apply to social rented sector tenancies established under Housing (Scotland) Act 2001. It will apply from the 6 September 2022 and any rent increase notices issued by a social landlord from 6 September 2022 onwards will be void. It will also not be possible for landlords to issue any new rent increase notices until such time as the rent cap expires or rises above 0%. Social landlords will still be able to consult with their tenants notwithstanding the rent cap provisions.

34. As set out in paragraph 6, some of those most vulnerable to economic challenges reside in the social rented sector and it is vital that they receive comparable protection to those in the private rented sector. Without the rent cap applying in the social sector it would be possible for landlords in these sectors to increase the rent directly impacting on those most vulnerable to the impact of the cost crisis. There is no statutory process, akin to the rent adjudication procedure in private tenancies, whereby a tenant in a social tenancy can challenge a rent increase so the rent cap gives a layer of protection for these tenants against rising costs.

35. However, we recognise that the social rented sector operates very differently in practice to the private rented sector. By setting a cap at 0% up to 31 March we provide parity and certainty of protection across the rented sector for that period and we will work in partnership with the sector about what level the cap could be set at from 1 April. By setting separate caps for the two sectors we allow for the greatest flexibility to work with stakeholders on how to keep rents low in the coming months.

Moratorium on evictions

36. The eviction moratorium aims to protect tenants by preventing landlords seeking to recover possession of a property so as to increase the rent for a new tenant. With the ongoing crisis impacting on the health and wellbeing of tenants, the evictions moratorium provides some protection against tenants losing their homes and exacerbating those particular concerns

37. The Bill contains provisions that will prevent the enforcement of eviction action in the private and social rented sector. The provisions do not interfere with a landlord’s ability to apply to a court or Tribunal and obtain an order or decree to be able to evict; instead, the Bill prevents the *enforcement* of eviction action. Unless an exemption

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applies (see below), a landlord will not be able to either serve a charge for removing on a tenant, or enforce an order for eviction. The restriction on a landlord's ability to enforce any order or decree applies in each case for a maximum of 6 months, except in a number of specified circumstances, providing tenants with more time to access support and find alternative accommodation.

38. The Scottish Government recognises that there are a number of circumstances where enforcement of an eviction order should be able to proceed to protect communities and to strike an appropriate balance between protection of tenants and the rights of landlords. This includes where a tenant is to be evicted for antisocial and criminal behaviour due to the continued negative impact on the community delaying enforcement of an order would have; where a tenant is no longer living in the let property given the negative impact this would have on housing supply; circumstances where landlords themselves are in financial hardship and need to sell or live in the let property; and in cases where there are substantial rent arrears given the negative impact of accruing further significant debt on both the tenant and the landlord.

39. The Bill therefore includes exemptions from the moratorium on:

- i. evictions granted on the existing grounds of antisocial behaviour, criminality, tenant abandonment and where a lender intends to sell the property;
- ii. new and amended grounds for eviction. These would be:
 - a. where a landlord intends to sell the let property to alleviate financial hardship (private sector only, excluding regulated tenancies under the Rent (Scotland) Act 1984 and assured tenancies under the Housing (Scotland) Act 1988);
 - b. where a landlord intends to live in the let property to alleviate financial hardship (private sector only); and
 - c. substantial rent arrears (social and private sectors).

40. Substantial rent arrears are where:

- i. for the private rented sector: the cumulative amount of accrued rent arrears (in respect of one or more periods) equates to, or exceeds, an amount that is the equivalent of 6 months' rent under the tenancy, and
- ii. for the social rented sector: the amount of unpaid rent due from the tenant is equal to or greater than £2,250. (This sum is equal to or in excess of 6 months' average rent in the Scottish social rented sector.)

41. Recognising that these measures are intended to provide protection to those impacted by the cost of living crisis, and to allow for practical delivery of these additional grounds (and therefore ensure these are a meaningful protection), all current applications lodged with the Tribunal/Court before the emergency legislation comes into force would not be affected by the emergency measures and will be allowed to continue in line with current legal requirements unless an eviction notice is served or proceedings were raised for an eviction order on or after 6 September 2022.

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42. In practice, this would see:

- Eviction orders granted in proceedings raised after the moratorium comes into force being caught by the moratorium;
- Eviction orders granted in proceedings raised before the moratorium comes into force being caught only if the proceedings were raised in relation to an eviction notice served on or after 6 September 2022 or, where no eviction notice is required, only if the proceedings were raised proceedings after that date;
- Eviction orders granted before 6 September 2022 would not be caught;
- Restrictions on the enforcement of an eviction order will only apply up to 6 months from when the order was granted;
- Some evictions will be permitted to proceed, in line with the exemptions outlined above.

43. The provisions above are in recognition of the need to ensure that there are limits to the levels of debt which tenants are left with, which they will continue to owe and which may impact on future access to housing; to limit potential losses of a landlord; and to ensure that tenants recognise the need to continue to pay rent or to seek assistance if they are struggling.

44. Tribunal discretion will continue to consider all the circumstances of individual cases therefore could still prevent or delay evictions that meet these requirements.

College and university accommodation and purpose built student accommodation

Rent cap

45. The Bill applies the rent freeze to these accommodation types but, recognises the different characteristics of this accommodation namely that they are not statutory tenancies and instead are mainly contractual agreements between the student and the provider. In college and university halls of residence and PBSA, rent is often inclusive of energy costs and is set prior to the beginning of the academic term and contracts entered into on that basis by students. However, although the majority of institutional and PBSA providers have assured the Scottish Government that rents will not increase mid-contract, this does not cover all providers with certainty. There is no statutory bar on rent being increased in these tenancies and the cost of living crisis may change the approach of landlords in the student sector. There is also no statutory process, akin to the rent adjudication procedure in private tenancies, whereby a tenant in a student tenancy can challenge a rent increase so the rent cap gives a layer of protection for these tenants against rising costs.

46. There is no uniform contract across all providers and not all providers are members of bodies such as Association for Student Residential Accommodation (ASRA) nor have adopted the UNIPOL (Student Housing Charity) codes – therefore the

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Scottish Government believe the inclusion of such accommodation providers within the Rent Freeze provisions of the Bill is justified.

47. The rent freeze will apply to student tenancies with the exception of costs related to excessive use of any utilities by the tenant.

Moratorium on evictions

48. The moratorium on evictions will also apply to College and University Halls and PBSA, however a key difference is that exemptions to the moratorium for this group are limited to evictions due to antisocial and criminal behaviour. “Anti-social behaviour” is defined with reference to conduct carried out in relation to another person which is likely to cause alarm, distress, nuisance or annoyance, or which amounts to harassment of another person. “Criminal behaviour” is defined with reference to convictions for offences which were committed through the use of the property, or for offences punishable by imprisonment which were committed within the locality of the property. The Scottish Government believe an exemption for substantial rent arrears is not appropriate for the following reasons:

- the number of evictions within the college and university halls and PBSA sector is low. Providers tend to seek recovery of rent arrears through payment plans rather than the courts;
- institutions and providers are keen to provide a supportive environment for students and this includes not only access to sources of financial support and guidance but also mental health and well-being services;
- the nature of the tenancies are different from the private and social rented sectors – they are typically for 9 months, often paid in advance or per semester. Private and social sector tenancies tend to be for much longer periods; and
- the providers are large institutions/companies that experience the implications of rent arrears differently to individual landlords. The moratorium applies only for a maximum of 6 months in any individual case, and given tenancies tend to be limited to around 9 months, the impact is very different.

Unlawful evictions

49. In recognition of the possibility that some private landlords may illegally evict a tenant in order to raise rents or recover their property for another purpose, the Bill contains provisions that will change the way in which civil damages can be awarded for unlawful eviction. This will make it easier and more meaningful for tenants to challenge an unlawful eviction and receive appropriate damages where an unlawful eviction is found to have occurred. This will also make it more difficult, more expensive and higher risk for a landlord to pursue an unlawful eviction rather than going through the lawful routes, therefore further dis-incentivising this behaviour.

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50. The provisions amend the Housing (Scotland) Act 1988 to:
- i. replace the basis for the assessment of damages for unlawful eviction with a calculation based on a multiplication of the monthly rent;
 - ii. set the minimum and maximum level of damages that the Tribunal (and Sheriff Court in social housing cases) can award at 3 times and 36 times the monthly rent respectively;
 - iii. enable the Tribunal Sheriff Court to set damages at a level lower than the minimum threshold where the circumstances of the case merit a lower award; and
 - iv. place an additional requirement on the Tribunal to inform i) the relevant local authority and police where a private landlord has been found to have unlawfully evicted a tenant; and ii) the Scottish Housing Regulator, where a social landlord is found to have unlawfully evicted a tenant. This would allow relevant authorities to consider whether any further action should be taken in relation to the unlawful eviction.

Rent adjudication

51. The Scottish Government recognises that there may be some unintended consequences through the introduction of a rent cap. For example, given that emergency legislation is - by its nature - temporary, the termination of the rent cap may lead to a large number of landlords seeking to increase their rent all at once, and setting rent again by reference to the open market rent could result in significant and unmanageable rent increases for tenants. In these circumstances, the existing rent adjudication process would not provide a reasonable mechanism for determining a reasonable rent increase.

52. Therefore, to support transition from the emergency measures, the Bill contains a regulation-making power to temporarily reform the rent adjudication process to support transition out of the emergency measures and mitigate any unintended consequences from the ending of the rent cap. This could include, for example, ensuring that Rent Service Scotland or First-tier Tribunal cannot determine a rent at a higher level than that requested by the landlord. The intention is therefore to allow for the power to expire later than other measures in the Bill reflecting the uncertainty around the length of time transitional measures may be required.

53. The regulation-making power will be subject to the affirmative procedure ensuring that appropriate Parliamentary scrutiny is given to the necessity for any temporary changes proposed and will also be subject to consultation persons representing landlords and tenants.

General provisions

54. Subject to approval by the Scottish Parliament - the general provisions of the Bill will be based on the approach taken in the Coronavirus (Scotland) Act 2020. Therefore the Scottish Government expect the following to apply:

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- given the impending increases to household financial costs from the end of October, it is intended that the Bill will commence the day after Royal Assent and the provision in Part 1 will, unless extended by regulations, expire at the end of 31 March 2023;
- the Bill will contain provisions enable the Scottish Ministers to extend the provision in Part 1 for two subsequent 6-month periods;
- the powers in Part 3 (rent adjudication) will expire at the end of 31 March 2024, but this may be extended by periods of up to one year (noting that there is no restriction in the Bill on the number of times which the power to extend by up to one year may be used more);
- there will be powers to suspend and revive the provisions in Part 1, and powers to expire these provisions earlier than 31 March 2023 (noting that a suspended provision can be revived, but not an expired provision);
- there will be a requirement to review and report on the necessity and proportionality of the provisions in Part 1 and the Scottish Ministers will be required to bring forward regulations to suspend or expire any provision that is no longer appropriate.

Timescales

55. As set out in the policy rationale, the Scottish Government needs to deliver the proposed changes urgently to ensure that the Scottish Government achieves the aim of protecting tenants from the health and financial stress which are particularly acute as a result of the cost crisis. Any delay in bringing forward this legislation would heighten this for tenants and it is therefore essential that the protections are in place before the winter period given the projected significant fuel costs and the disproportionate impact this has on tenants. The Scottish Government proposes this emergency legislation be treated as urgently as it can be, and seek expedited Royal Assent, to ensure that the protections are in place for these reasons. The Scottish Government's intentions in this area have been well publicised through the announcement of these emergency measures in the Programme for Government on 6 September 2022.

Alternative approaches

56. The Scottish Government has considered alternative approaches to the one taken by the Bill.

57. Alternative Approach A: Take no legislative action and instead support tenants through existing financial support mechanisms such as the housing element of Universal Credit, Discretionary Housing Payments and the Tenant Grant Fund.

58. The Scottish Government does not consider this to be an appropriate approach, given the current pressures on household incomes and existing evidence which demonstrates that people who rent their home are more likely to have lower household incomes, higher levels of poverty and to be financially vulnerable – and therefore be disproportionately affected by the ongoing cost crisis. Furthermore, the action by the

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UK Government to introduce the Energy Price Guarantee from 1 October 2022, will not prevent household energy Bills from significant and unprecedented increases, putting greater numbers of rented households at risk of significant financial hardship and fuel poverty.

59. Not all tenants will be able to access, or qualify for financial support available through the housing element of Universal Credit or Discretionary Housing Payments. In addition, some tenants may prefer not to access the Tenant Grant Fund or their landlord may be unwilling to engage with a local authority in relation to accessing the fund.

60. Alternative Approach B: Introduce a rent freeze and moratorium on evictions whereby the only safeguard for landlords is the ability to evict due to antisocial behaviour, criminality and/or tenant abandonment. The Scottish Government considers that a more proportionate and balanced approach is required. If a blanket rent freeze were to be applied - combined with an evictions moratorium which provides for no safeguards that take into account financial hardship being faced by landlords – then some landlords could find themselves trapped in loss-making leases. The Scottish Government believe that such an approach would be unlikely to strike a fair balance between the rights of tenants and landlords.

61. The provision of safeguards, as set out above, which take account of the financial hardship a landlord may face, are essential in order to ensure proportionality.

62. For students in college and university halls of residence and PBSA, the alternative approach could have been to write to institutional and PBSA providers seeking assurance that they would not increase rents mid contract or – with the exception of criminal or anti-social behaviour – they will not seek evictions in relation to ability to pay rent. Such an approach, through industry bodies would not, however, reach all providers as some are not members of industry bodies nor have all providers signed industry codes of good practice. Moreover, the scale of past and potential energy price rises means there is a risk that these price rises will be passed onto students, even with the UK Government's Energy Bill Relief Scheme for non-domestic customers (including all UK businesses and charitable organisations).

63. It was not considered appropriate to include pitch agreements on mobile home sites and Gypsy/Traveller Sites, regulated by the Mobile Homes Act 1983, in the emergency legislation. There are existing protections for residents under the Act, including a presumption that pitch fees will not rise above RPI. The Scottish Government has considered alternative protections for residents and will consult on a change to the basis of annual uprating from RPI to CPI, to bring it in to line with the uprating of pensions. The Scottish Government will also work with COSLA to provide parity with social tenants for residents of public sector Gypsy/Traveller sites, through an administrative pitch fee freeze and ban.

Consultation

64. Due to the emergency nature of the Bill, no formal public consultation has taken place. The measures in the Bill do reflect concerns highlighted by members of the public and members of the Scottish Parliament.

65. Formal consultation with business has not been carried out although discussion has taken place with a range of key stakeholders, including: social and private landlord representative bodies, letting agent representatives, judicial bodies, University accommodation providers and private student accommodation providers.

66. All Impact Assessments for the Bill are available on the Scottish Government website, namely:

- Equality Impact Assessment
- Fairer Scotland Duty Impact Assessment
- Island Communities Impact Assessment
- Business Regulatory Impact Assessment
- Child Rights and Wellbeing Impact Assessment
- Data Protection Impact Assessment

67. The Scottish Government under Article 36(4) of the General Data Protection Regulation (EU) 2016/679 (as it forms part of retained EU law)⁷ wrote to the UK Information Commissioner's Office (ICO) on 21 September 2022 in relation to proposed data processing under the Bill. ICO confirmed there was only a limited opportunity to engage on the proposal and they had no major concerns based on the information provided.

⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the GDPR) is retained EU law by virtue of section 3 of the European Union (Withdrawal) Act 2018 (c.16)

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Effects on equal opportunities, human rights, islands communities, local government, sustainable development etc.

Equal opportunities

68. An Equality Impact Assessment and Fairer Scotland Duty Assessment have been published. The policies are not intended to impact, directly or indirectly, on any group of people with protected characteristics, or on the wider equality duties.

69. However, people from non-white backgrounds are more likely than people from white backgrounds to live in the private rented sector⁸. Data suggests that women may be more likely to be in receipt of housing benefit⁹ and spend a higher proportion of their income on food and fuel¹⁰. Households where a member has a disability are more likely to be in poverty¹¹. Women make up the majority of unpaid carers, who evidence suggests have low financial resilience and therefore are likely to be negatively impacted by action to increase rents or evict¹². These proposals therefore are likely to have a positive impact on outcomes for these groups during the current economic crisis.

70. The majority of those in student accommodation are women. Almost half of students in halls are from outside the UK and hence those staying in PBSA and college and university halls of residence are potentially more likely to have a wider variety of ethnic backgrounds. The majority of students residing in PBSA and halls of residence are 21 and under.¹³ Action to protect students from in-tenancy rent increases and evictions should have a positive impact on outcomes for these groups. The Scottish Government considers that the temporary legislative changes are likely to positively impact across those with protected characteristics, as the legislative measures will strengthen protection from the financial impact of potential in-tenancy rent increases and where an eviction occurs, more time to find alternative accommodation.

Human rights

71. Consideration has been given to the impact of the policies on a landlord's property rights under Article 1 Protocol 1 ("A1P1") ECHR¹⁴. The majority of these provisions could be argued to constitute a control of a landlord's use of their property for the purposes of A1P1. The Scottish Government considers that the safeguards provided

⁸ [Scotland's People Annual Report 2019 \(www.gov.scot\)](https://www.gov.scot)

⁹ Whilst a precise gender breakdown isn't available for all household types on Housing Benefit or for households receiving the housing element of Universal Credit, the available data suggests that it is likely that women in Scotland are overall more likely to be in receipt of Housing Benefit or the housing element of Universal Credit than men Source: StatXplore Housing Benefit Table 4 - Family Type by Gender <https://stat-xplore.dwp.gov.uk/>

¹⁰ <https://scotland.shinyapps.io/sg-equality-evidence-finder/> under fuel and food

¹¹ [Poverty and Income Inequality in Scotland 2017-20 \(data.gov.scot\)](https://data.gov.scot)

¹² [Poverty rates for informal carers | JRF](#)

¹³ Source: HESA student data, Scottish Government Analysis (<https://www.hesa.ac.uk/>)

¹⁴ [Protocol 1, Article 1 protects your right to enjoy your property peacefully](#)

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for in the Bill, as part of the rent freeze and moratorium on evictions, strike an appropriate balance between the landlord's rights in the property and protection of the tenant from rent increases and eviction during the ongoing cost crisis. Accordingly, all provisions in the Bill are considered to be proportionate.

Rent cap

72. In relation to the rent freeze provisions, the restriction of a landlord's ability to charge rent for a property is a control of use for the purposes of A1P1. Any such restriction must therefore be justified by reference to the three-part test of being in accordance with the law, having a legitimate purpose, and proportionality.

73. The Bill contains measures that will be in primary legislation and so will be in accordance with the law. The social and economic protection of tenants is a legitimate purpose for the control of the use of property. The intrusion with landlords' rights is mitigated by the creation of a safeguard for landlords, whereby they may apply to Rent Service Scotland to increase rent to recover a portion of the increase in prescribed legitimate property costs. There is also then an ability for either landlord or tenant to appeal an order by Rent Service Scotland in this context to the First-Tier Tribunal (Housing and Property Chamber) to ensure the order is accurate. In addition, further protection is provided to landlords by (a) the power to vary the percentage of prescribed property costs (b) the power to vary the maximum permissible increase; and (c) the power for Ministers to modify the frequency of rent increases in the course of 12 months to enable landlords who have already made a prescribed property cost rent rise to avail themselves of a rent increase associated with the cap rising above zero. All of these powers are necessary for the Scottish Government to continue to strike the appropriate balance between the rights of landlords and tenants as the economic situation progresses, and of course must be exercised in a way that is ECHR compatible.

Moratorium on evictions

74. As with the imposition of rent controls, a moratorium on eviction action would represent a control of the use of a landlord's property.

75. The Bill contains measures that will be in primary legislation and so will be in accordance with the law. The social and economic protection of tenants is a legitimate purpose for the control of the use of property. The inclusion of the exemptions to the eviction moratorium, as set out above, provides appropriate safeguards to ensure that the interests of landlords and tenants have been appropriately balanced. The moratorium will apply to an individual case for a maximum of 6 months. In addition, exemptions are provided for, including for substantial rent arrears and where a landlord wishes to sell or live in a property due to financial hardship. The safeguards provided for in relation to the rent control proposals (to increase rent by the amount of 50% of prescribed property costs, to a maximum of 3% of rent payable, the power to vary the percentage of prescribed property costs, the power to vary the maximum permissible increase, and the power for Ministers to modify the frequency of rent increases in the course of 12 months to enable landlords who have already made a prescribed property cost rent rise to avail themselves of a rent increase associated with the cap rising above zero) are also relevant to the proportionality of the moratorium. When considered as a

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package, the safeguards ensure that the moratorium is a proportionate interference with the property rights of landlords and, importantly, ensure that private landlords are not trapped in loss-making leases, or unable to live in the let property where they need to do so due to financial hardship.

Unlawful evictions

76. The proposed amendments to the process for claiming damages where an unlawful eviction occurs do not engage A1P1 as they amend the levels of compensation and actions taken in respect of unlawful eviction, rather than introduce a new penalty. The proposed amendments do engage ECHR Article 6 insofar as they concern the determination of a civil right, this being a right to adjudication by an independent tribunal.

77. Here the function of the First-tier Tribunal (or the Sheriff Court in social housing cases) is to ensure that the correct level of damages is levied against the landlord in accordance with their jurisdiction under the 1988 Act. The Tribunal/Court is independent and impartial, so provided a hearing is held within a reasonable time, the Article 6 rights of the landlord and tenant would be respected.

78. The fixing of damages by reference to the rent paid for the property ties the level of damages into the value of the rented property and this is the current basis for the calculation of damages. Under these provisions the Tribunal/Court is given significant discretion to award damages up to the maximum limit and, where circumstances warrant it, below the stated minimum and can therefore arrive at a level of damages which adequately reflects the circumstances of the case.

Rent adjudication

79. The conferral of the powers to modify rent adjudication provisions in schedule 3 of the Bill engages A1P1, but the conferral of the power is not incompatible with A1P1. The exercise of the regulation-making powers provided for would constitute a control of use of property for the purposes of A1P1 and requires to be exercised in way that is compatible with A1P1.

80. The Scottish Government considers that a power to modify the rent adjudication processes in the 1988 and 2016 Acts could be exercised in a such a way as to balance the competing interests of tenants and landlords, respecting the A1P1 rights of both. It is proposed that this power will be subject to the affirmative procedure, thus ensuring appropriate Parliamentary scrutiny; and provide that, in exercising the regulation making power, the Scottish Ministers must consult such bodies as they consider appropriate.

Island communities

81. A full Islands Community Impact Assessment (ICIA) has not been prepared. The Scottish Government considers that there are unlikely to be significantly differing impacts for island communities as a result of the temporary emergency measures, and that the emergency housing measures are likely to affect landlords and tenants equally both in island communities and in communities on the Scottish mainland.

82. A Scottish Government report from 2021 estimates that cost of living in remote and rural Scotland including the islands is between 15% and 30% higher than urban parts of the UK.¹⁵ The evidence available does suggest that the impacts of the cost crisis may be higher in island communities, due to the already higher cost of living and the higher prevalence of fuel poverty experienced in these communities.

83. However, the provisions within the Bill will help to stabilise housing costs to support people to stay in their homes, and provide more time to access support and find alternative accommodation. While it may be even more necessary to mitigate the effects of the cost crisis than in many communities on the Scottish mainland, particularly those in more urban areas, The Scottish Government anticipates that these outcomes will be similar across Scotland.

84. The proposed provisions would also provide assurance to students from island communities and residing in college or university accommodation or PBSA student accommodation that there will be no in tenancy rent increases or evictions.

85. Whilst there is the potential for adverse effects such as a reduction in supply or in investment in property quality and energy efficiency measures, the Scottish Government is of the view that this is mitigated by the temporary nature of the measures and the safeguards set out above. The Scottish Government will also work with housing providers in the social sector to endeavour to provide certainty on the future level of the cap on the sector from 1 April 2023, and to establish if there are any additional safeguards that should be put in place.

Local Government

86. The provisions within the Bill will help ensure people who rent their home have additional protections relating to rent increases and eviction during the ongoing cost crisis. These measures are likely to help ease the pressure on local authority homelessness services, providing local authorities more time to support tenants into suitable alternative accommodation and manage demand for temporary accommodation during a time of acute pressure on services¹⁶.

87. The measures will also give local authorities as landlords more time to work with their tenants to access all of the benefits and financial support they are entitled to,

¹⁵ [Supporting documents - The cost of remoteness - reflecting higher living costs in remote rural Scotland when measuring fuel poverty: research report - gov.scot \(www.gov.scot\)](#)

¹⁶ [Homelessness in Scotland: 2020 to 2021 - gov.scot \(www.gov.scot\)](#)

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helping them to prevent or stop further arrears building up and thereby protecting both the local authority and their tenants from the impact and cost of eviction, wherever possible, in the longer term.

88. In relation to the rent cap provisions, there will not be any immediate impact on Registered Social Landlords. However the Scottish Housing Regulator (SHR) has estimated that if the provisions were extended at a 0% cap in 2023/24, it will remove at least £50 million in income in that year from the business plans of Registered Social Landlords, and at least £230 million over the four years to March 2027. This is based on financial projections provided to the SHR by landlords last year. However these will have changed, or will be changing, to reflect the significant changes in RSLs operating context. This will almost certainly result in projections that would deliver a higher figure than this current estimate. There will also be an impact on Local Authority investment plans and Housing Revenue Accounts if a 0% cap was applied in 2023/24. ALACHO have indicated that any shortfall in revenue income could likely be offset in the short term from Local Authority general funds.

89. Furthermore, the measures provide assurance for student tenants in college or university accommodation or PBSA with regard to in tenancy rent increases and evictions. This would have a positive effect on local government in providing more time to support the prevention of homelessness and easing pressure on local government services.

Sustainable development

90. A pre-screening report was undertaken and submitted to the Strategic Environmental Assessment Gateway in September 2022, seeking views on whether the duties in the Bill would have a significant environmental effect and whether a Strategic Environmental Assessment is required. It was determined that a Strategic Environmental Assessment was not necessary and that the provisions are therefore deemed to be exempt from the strategic environmental assessment under section 7(1) of the Environmental Assessment (Scotland) Act 2005.

91. Although the measures will provide assurance to people who rent their home during economically challenging times, consideration should be given, in subsequent reviews of the measures, to its impact on investment plans around new build developments in the private, social and PBSA sectors, as growth of these sectors is an important element in the provision of housing and local regeneration.

92. The policy objectives of the Bill are consistent with 'Leave No One Behind' the central, transformative promise of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals. In particular, taking action to meet the Goals for No Poverty, Zero Hunger, Good Health and Wellbeing and Sustainable Cities and Communities is directly related to the policy intention.

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Crown consent

93. Paragraph 7 of schedule 3 of the Scotland Act 1998 requires that Crown consent be signified to the Parliament if the same Bill would need such consent were it passed by the UK Parliament. Crown consent is therefore required where a Scottish Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign. As regards the Bill as introduced, it is the Scottish Government's view that, in order to comply with Rule 9.11 of the Parliament's Standing Orders, Crown consent will be required because it is considered that the provisions in the Bill affecting private residential tenancies could affect residential tenancies on the His Majesty's private estates and those on land forming part of the Scottish Crown Estate.

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Cost of Living (Tenant Protection) (Scotland) Bill

Policy Memorandum

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