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## **COST OF LIVING (TENANT PROTECTION) (SCOTLAND) ACT 2022: CONSULTATION ON SUPPORTING A TRANSITION AWAY FROM THE EMERGENCY MEASURES**

We previously wrote to you on April 21, 2023 regarding the Cost of Living (Tenant Protection) (Scotland) Act 2022, which came into force on 28 October 2022, to explore the initial options for how Scottish Ministers could implement temporary changes to the approach to rent adjudication, as part of the transition away from the temporary, emergency measures.

In September this year, the Scottish Parliament approved regulations to extend the remaining provisions within the Act for a further and final six month period to the end of March 2024. At the current time the emergency rent cap under the Act remains in force but given the temporary nature of the Act it cannot continue beyond 31 March 2024, we are considering how best to transition away from the rent cap.

In the accompanying documents published alongside the emergency Act, we acknowledged that suspension or expiry of the rent cap may lead to significant and unmanageable rent increases for tenants, if rents moved immediately back to open market rent. It was noted that in these circumstances, the existing rent adjudication process, based on comparison to market rents for similar properties, would not provide a suitable mechanism for determining a reasonable rent increase. The emergency Act therefore contains a power to modify the basis on which rent is determined when there is adjudication of rent disputes. The power can be used on, or in anticipation of, the expiry or suspension of the temporary rent cap.

The emergency Act requires that, prior to laying regulations to modify the rent adjudication process, the Scottish Ministers must consult such persons as appear to them to represent the interests of tenants and landlords under private residential tenancies, short assured and assured tenancies, along with any other person they consider appropriate.

In April this year, we sought initial views from stakeholders on high level proposals setting out what that process could look like and we now invite further comment on a more detailed proposal currently being considered, as set out in **Annex A**.

We have included some questions on these proposals in Annex A and would be grateful for your views.

Should you wish to respond to this consultation, please submit your views, in writing, to [housing.legislation@gov.scot](mailto:housing.legislation@gov.scot) by **4pm** on **Wednesday 10 January 2024**.

A handwritten signature in black ink, appearing to read 'Patrick Harvie', written in a cursive style.

**PATRICK HARVIE**

## PROPOSED APPROACH TO MODIFYING THE RENT ADJUDICATION PROCESS

### *Powers under the Cost of Living (Tenant Protection) (Scotland) Act 2022 to amend rent adjudication*

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 may be cases where the proposed increase is considered by the tenant to be unreasonable.

The emergency Act provides Scottish Ministers with the ability to temporarily modify how rent increases referred by a tenant are adjudicated<sup>1</sup>. Any proposed modification would be subject to the approval of the Scottish Parliament. 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.

Under the emergency Act Scottish Ministers may:

- make provision about the basis on which the rent is to be determined by a rent officer or the First-tier Tribunal, which may include (but is not limited to) matters to be taken into account in determining the rent, matters to be disregarded in determining the rent, and/or assumptions to be made in determining the rent by the Rent Officer or Tribunal.
- limit the rent that may be determined by a Rent Officer or the Tribunal to an amount that is no more than the rent specified by the landlord in the rent-increase notice
- make provision about the procedure relating to referral to a Rent Officer or appeal to the First-tier Tribunal.

The transitional measure put in place using these powers would last for a maximum of one year and would be subject to regular review to determine whether it remains appropriate. It would be possible to seek extension for a further period of up to one year at a time, but any extension would be subject to Parliamentary approval.

**Question 1: What are your views on the principle of amending the approach to rent adjudication as part of the transition away from the emergency rent cap measure?**

### *Proposed transitional measure*

As set out in Annex C, 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

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<sup>1</sup> A summary of the existing rent adjudication regime is set out in **Annex C**.

whether a rent increase is reasonable. This determination is based on comparison with the rent for other properties in an area (open market rent).

It is proposed that, when the emergency rent cap is removed, the rent adjudication process would be amended to require a rent adjudication determination to be based on the lowest of three comparators:

1. open market rent;
2. the new rent proposed by the landlord; and
3. a maximum 'reasonable' increase for that tenancy, to be defined by reference to a new 'taper' that supports a transition away from the rent cap

We would anticipate that, in many cases, the gap between the current rent and the open market rent would not represent an unreasonably large rent increase and the amended adjudication process would allow for these increases to take place. Allowing proposed rent increases to be applied in full in these cases seeks to deliver a balanced approach that is in keeping with the principle of transitioning out of the emergency measures.

The third comparator would apply in cases where the proposed rent increase is above a certain level when compared to the gap between current and open market rent that it represents. In those cases, there would be a tapered approach whereby only a specified proportion of the proposed increase would be applied to the rent.

Application of such an approach means that market rents would continue to be taken account of in rent adjudication whilst allowing for moderation where the move back to current market rent in a single rent increase would be a significant increase for a tenant.

**Question 2: If rent adjudication is to be amended, should the 'taper' only apply to rent increases where the difference between the tenant's current rent and open market rent exceeds a certain level?**

#### *Proposed new 'tapering' approach*

The proposed new 'tapering' approach would be based on a percentage which would apply in cases where the rent increase proposed by the landlord was assessed as unreasonable in the context of the:

- i) gap between existing rent and open market rent, and
- ii) the percentage of the tenant's current rent which the increase would represent.

The value of the comparator applied in each specific case would be calculated based on the gap between the existing rent for a tenancy and the open market value of similar tenancies in similar properties (market rent).

A reasonable 'tipping point' at which tapering would start to apply would be set, defined as the point where the difference between the tenant's current rent and market rent is higher than a certain percentage.

If the point at which the taper starts to apply was to be set at 6%, then tapering would be applied to any rent increase where:

- the difference between the tenant's current rent and open market rent exceeds 6%

This would mean that if the difference between the tenant's current rent and market rent was 6% or less, then the proposed rent increase would be allowed in full in rent adjudication, as long as it did not exceed market rent. Rent increases above this level would still be allowed, but the tapered approach would apply, to prevent a tenant receiving a steep rent increase. No rent increase would be permitted that exceeds the market rent for similar properties in the same locality.

Under the CoL Act landlords can apply to Rent Service Scotland for a rent increase above the cap at a level up to 6% of the existing rent. Annual CPI inflation dropped to 4.6% in October 2023 and the Bank of England forecasts published on 2 November projected that CPI inflation would fall further to 3.6% in Quarter 2 of 2024. In addition, a range of indicators shown that incomes in Scotland are now growing faster than inflation.

In the context of the transition away from the emergency rent cap setting the level below which rent increases can go ahead without modification at 6% seeks to deliver a balanced approach, preventing steep increases for tenants whilst supporting the transitional approach back to market rent.

**Question 3: If rent adjudication is to be amended, what are your views on having no restrictions on rent increases where the difference between the current rent and open market rent level is below a set percentage, as long as the new rent does not exceed the open market rent?**

**Question 4: If all rent increases are to be unrestricted where the difference between the current rent and open market rent level is below a set percentage, what is your view of setting this percentage at 6%?**

As part of the tapered approach, an upper limit would also be set, which represents the percentage increase beyond which rents could not rise if adjudicated. In setting an upper limit it would be important to strike a balance between the current figures for open market rents for new tenancies which have been unconstrained by the current emergency measures and allowable rent increases. A number of factors could be considered in relation to setting an upper limit for the taper in addition to open market rents, including inflation and overall trends in household incomes in comparison with inflation.

The upper limit will apply where the gap between the proposed rent and the market rent is more than a set level. So an upper limit of 10% could be triggered for all tenancies where the market rent is 20% or more above the current rent. For an upper limit of 15%, this could be triggered for all tenancies where the market rent is 30% or more above the current rent.

The findings of the Private Sector Rent Statistics Scotland, 2010 to 2023, which were published on 28 November. These showed that average 2 bedroom rents in ten Broad Rental Market Areas of Scotland increased by more than 10%, ranging from a 10.7% increase in Ayrshire up to a 22.3% increase in Greater Glasgow. In seven of these areas, the average increases represented an increase of 15% or more.

A chart and table that illustrate what rent increases, set by rent adjudication, could look like with a lower limit of 6% and an upper limit of 10% and 15% can be found in **Annex B**, along with descriptive scenarios of how the tapered values could work when applied to different levels of rent increase.

**Question 5: If rent adjudication is to be amended, what are your views on limiting all rent increases at an upper percentage level, as long as the new rent does not exceed the open market rent ?**

**Question 6: If rent increases were to be limited at an upper percentage level, what is your view of setting this level at 10% or 15%? If there is an alternative figure that you would propose, please explain your reasons.**

**Question 7: If the upper limit were to be triggered where the gap between the proposed rent and the market rent is more than a set level, what is your view of setting this level at 20% where a 10% upper limit applies or 30% where 15% a upper limit applies?**

As we navigate the complexities of the housing market, it is crucial to strike a balance between protecting tenants from very high rent increases triggered by the end of the rent cap and providing a route back to open market rent. The proposed taper mechanism, which would be activated when the difference between the current rent and the open market rent exceeds a set percentage, is designed to achieve this balance.

The Scottish Government remains committed to adapting and responding to the changing economic environment, and intends to consider appropriate percentages for the proposed upper and lower taper limits in light of responses to this consultation paper and the latest economic analysis available prior to the introduction of the regulations.

**Question 8: If rent adjudication is to be amended, what are your overall views on the proposed approach of the application of a tapering mechanism based on setting lower and upper percentage levels as described?**

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.

**Question 9: In light of the risk of significant and unmanageable rent increases for tenants on the expiry of the rent cap that were acknowledged in the accompanying documents published alongside the emergency Act, what are your views on the impact of the proposals set out in this paper in terms of your cost of living?**

## ANNEX B

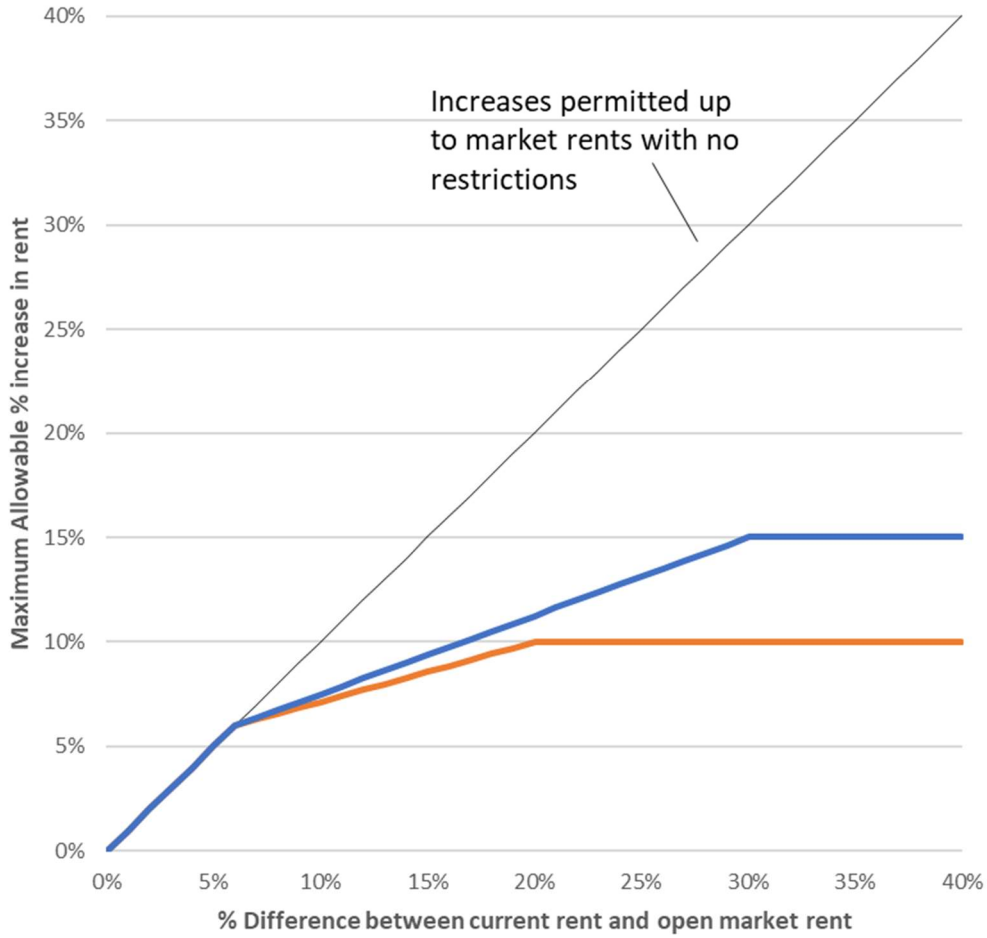
The chart and table below illustrates what Rent Adjudication rent increase limits would look like under two tapering scenarios. In both these scenarios, landlords would be able to increase rents by up to 6% of the tenant's current rent, as long as this does not take the rent above the market value. In addition:

- Under Scenario 1: Rent increases are limited to between 6% and 10%. These limits apply to existing tenancies where the difference between current rent and market rent is between 6% and 20%. For all other existing tenancies where the difference between the current rent and the market rent is above 20%, rent increases would be limited to 10% .
- Under Scenario 2: Rent increases are limited to between 6% and 15%. These limits apply to existing tenancies where the difference between current rent and market rent is between 6% and 30%. For all other existing tenancies where the difference between the current rent and the market rent is above 30%, rent increases would be limited to 15%

Under scenario 1, if the proposed increase is above 6%, landlords would be able to increase rents by approximately 0.29% for every percentage point that the market rent is above the tenant's current rent, up to the upper limit of 10%. For any cases where the market rent is more than 20% above the existing rent then a fixed 10% increase would apply.

Under scenario 2, if the proposed increase is above 6%, landlords would be able to increase rents by approximately 0.38% for every percentage point that the market rent is above the tenant's current rent , up to the upper limit of 15%. For any cases where the market rent is more than 30% above the existing rent then a fixed 15% increase would apply.





- Maximum Allowable Increase in Rent under proposals - Scenario 1 - 6% to 10% Tapering, 6% to 20% gap between existing and Market rent
- Maximum Allowable Increase in Rent under proposals - Scenario 2 - 6% to 15% Tapering, 6% to 30% gap between existing and Market rent

<b>Difference between current rent and open market rent</b>	<b>Maximum Allowable Increase in Rent under proposals - Scenario 1 - 6% to 10% Tapering, 6% to 20% gap between existing and Market rent</b>	<b>Maximum Allowable Increase in Rent under proposals - Scenario 2 - 6% to 15% Tapering, 6% to 30% gap between existing and Market rent</b>
0%	0.0%	0.0%
1%	1.0%	1.0%
2%	2.0%	2.0%
3%	3.0%	3.0%
4%	4.0%	4.0%
5%	5.0%	5.0%
6%	6.0%	6.0%
7%	6.3%	6.4%
8%	6.6%	6.8%
9%	6.9%	7.1%
10%	7.1%	7.5%
11%	7.4%	7.9%
12%	7.7%	8.3%
13%	8.0%	8.6%
14%	8.3%	9.0%
15%	8.6%	9.4%
16%	8.9%	9.8%
17%	9.1%	10.1%
18%	9.4%	10.5%
19%	9.7%	10.9%
20%	10.0%	11.3%
21%	10.0%	11.6%
22%	10.0%	12.0%
23%	10.0%	12.4%
24%	10.0%	12.8%
25%	10.0%	13.1%
26%	10.0%	13.5%
27%	10.0%	13.9%
28%	10.0%	14.3%
29%	10.0%	14.6%
30% and above	10.0%	15.0%

## **Illustrative Worked Examples**

Below are a selection of illustrative worked examples. They present different hypothetical scenarios of rent increases under scenario 1 proposed above (6% to 10% rent increase limit on existing tenancies where the difference between current rent and open market rent is between 6% and 20%). Each example considers what would happen were a tenant to take the case to rent adjudication.

The examples are intended to provide a guide on how the tapering mechanism would operate and do not specifically illustrate what the rent paid under scenario 2 would be where rent increases are limited to between 6% and 15%.

### *Example 1*

A landlord sets a new rent which is 5% higher than the current rent. The landlord believes the difference between current rent and the open market rent is 5%. Applying the scenario 1 rent increase limits, rent increases up to and including 6% are permitted, as long as the new rent does not exceed the open market value. The landlord believes they have therefore set the new rent within the permitted limit. If the tenant took the case to rent adjudication and the open market rent value was confirmed at this 5% level or above, then the rent increase of 5% would be approved. If the rent adjudication concludes the open market rent is lower than the rent proposed by the landlord, rent would be set at the open market level.

### *Example 2*

A landlord sets a new rent which is 8% higher than the current rent. The landlord believes this 8% increase would bring the rent up to the open market value. Under the scenario 1 proposals, rent increases are subject to a taper if the proposed rent increase is between 6% and 10%. Applying the scenario 1 rent increase limits, if the gap between the current rent and open market rent is 8%, then the rent increase is capped at an increase of 6.6% of existing rent. If the tenant took the case to rent adjudication and it was confirmed that the gap between the current rent and the open market rent was 8%, then the allowable rent increase would be set at 6.6%.

### *Example 3*

A landlord sets a new rent which would be an increase of 15% of existing rent. The landlord believes the open market value is 25% above the current rent. Under the scenario 1 proposals, rents cannot rise by more than 10%. Applying the scenario 1 rent increase limits, if the gap between current rent and open market rent is more than 20%, rent increases are capped at 10% of existing rent. This means the maximum increase in rent for this tenant would be 10% of existing rent. If the tenant took the case to rent adjudication and it was confirmed that the open market value was 20% or more higher than the current rent, then the rent increase would be set at 10% of existing rent.

#### *Example 4*

A landlord sets a new rent which is 15% higher than the current rent. The landlord believes the open market value is 15% higher than the current rent. Under the scenario 1 proposals, rents cannot rise by more than 10%. Applying the scenario 1 rent increase limits, if the gap between the current rent and the open market rent is 15%, then the rent increase is capped at 8.6% of existing rent. If the tenant took the case to rent adjudication and it was confirmed that the open market rent was 15% higher than the current rent, then the allowable rent increase would be confirmed 8.6% of existing rent.

### *Existing rent adjudication processes*

Under the Private Housing (Tenancies) (Scotland) Act 2016 ('the 2016 Act'), tenants with a private residential tenancy may make an application to a Rent Officer (Rent Service Scotland) for a rent adjudication assessment if they feel a rent increase is not reasonable. A Rent Officer will make a determination on what the rent for the property should be, by comparing the rent to market rent for similar properties in the same locality ('open market rent').

Whilst the emergency Act is in force, this process has temporarily been stopped.

The 2016 Act sets out that the determination of market rent should be made on the basis of the property in question being let by a willing landlord to a hypothetical willing tenant under a new tenancy which would:

- be a private residential tenancy,
- begin on the date on which the rent would have been increased had a referral to a Rent Officer not been made,
- have the same terms as the tenancy to which the referral or (as the case may be) appeal relates.

The 2016 Act sets out that, in determining the open market rent of the property, the Rent Officer should disregard the following:

- any positive effect on the rental value of the property that is attributable to work paid for or carried out by the tenant or a previous tenant under the same tenancy, unless the work was paid for or carried out pursuant to a requirement under the terms of the tenancy,
- any negative effect on the rental value that is attributable to a failure by the tenant or a previous tenant under the same tenancy to comply with the terms of the tenancy.

Under the 2016 Act, a Rent Officer can decrease, maintain or increase the rent that was proposed by the landlord. If landlords or tenants do not agree with the outcome of adjudication they can appeal to the First-tier Tribunal for Scotland Housing and Property Chamber ('the Tribunal').

A similar rent adjudication process exists for tenants with assured tenancies and short assured (under the Housing (Scotland) Act 1988 ('the 1988 Act')), although applications are made to the Tribunal rather than to a Rent Officer.