



Law Society
of Scotland

Stage 3 Briefing

Cost of Living (Protection of Tenants) (Scotland) Bill

October 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Cost of Living (Protection of Tenants) (Scotland) Bill¹ (the Bill) was introduced by the Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison MSP, on 3 October 2022. The Bill's introduction follows the Scottish Government's announcement in the Programme for Government (PFG) on 6 September 2022 that emergency legislation would be introduced to implement a rent freeze for tenants in private rented and social housing, and a moratorium on evictions.

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 3 debate scheduled for 6 October 2022. Our comments are limited given the timing of introduction and the proceedings associated with the Bill.

General remarks

Access to justice

Our approach to this Bill is informed by our statutory duties and our regulatory objectives, maintaining the rule of law, promoting access to justice, the interests of consumers and the public interest. This Bill, as a significant change to the law regarding rented housing, clearly engages these objectives.

We note a significant number of requests for advice to our members and to law centres around rent increases and evictions, particularly during the period between the Scottish Government announcement and the laying of this legislation before the Scottish Parliament. While the scope of the Bill is clear, there has been some prior confusion in the rented sector around the application of provisions, the extent to which these would apply to notices already received, the level of increase permissible under tenancy agreements and the like.

¹ <https://www.parliament.scot/bills-and-laws/bills/cost-of-living-tenant-protection-scotland-bill>

Part of the challenge around clarity is that many notifications around tenancies are carried out informally, rather than through formal notification, and that processes such as application to a Rent Officer are very infrequently used. Because formal notifications and processes, which would afford the opportunity to signpost to advice services and resources, are often not used, we welcome the provisions in the Bill around the need for advice and information provision. We believe should be available to both tenants and to landlords.

It is also important to remember that access to legal advice is limited: access to legal aid may be subject to contribution, making it impractical in situations, for instance, involving rent arrears; and where issues are considered, for instance, at the tribunal stage, most tenants (and many landlords) are unrepresented.

The law must be clear to all, and this Bill includes provision for the extension of the measures for further periods if required. Should such extensions be considered, ensuring that tenants and landlords have sufficient notice of these extensions will be important. We are aware, for instance, of rent increase notifications due from April 2023 already having been issued and information and advice to tenants and landlords around the effect of notifications issued during this initial period, and their effect if an extension to the legislation is implemented, will be important to allow tenants and landlords to plan effectively.

Emergency legislation

The Bill is subject to emergency bill procedure in the Scottish Parliament. Rule 9.21 of the Standing Orders of the Parliament relating to Emergency Bills enables Parliamentary scrutiny of the Bill to be extremely curtailed. The Stage 1 debate took place on 4 October, Stage 2 on 5 October and Stage 3 fixed for 6 October.

While recognising the grave challenges for many people associated with the current 'cost-of-living crisis', we highlight the importance of scrutinising the legislation carefully and not sacrificing that scrutiny for speed. Despite the current situation, the obligation to make good law - that is clear, effective and accessible - remains. We note that a number of stakeholders have expressed concerns about the potential unintended consequences of the legislation. There should be close scrutiny of how the legislation will work in practice and it is important that mechanisms are used to ensure that scrutiny will take place in a searching and comprehensive manner. We suggest that close post-legislative scrutiny of how the Act works in practice may be merited, in addition to the review mechanisms provided for within the Bill.

Human rights

We note that the Bill's Policy Memorandum highlights at paragraph 71 that "Consideration has been given to the impact of the policies on a landlord's property rights under Article 1 Protocol 1 ("A1P1") ECHR." The Policy Memorandum sets out the Scottish Government's assessment of the engagement of A1P1 by the provisions in relation to the rent cap, moratorium on evictions, and rent adjudication.

The Scotland Act 1998 provides that Legislative and Executive competence require compliance with Convention rights contained in the ECHR. When legislating for emergency laws, it is even more important to take care that such compliance is satisfied.

Comments on the Bill

Part 1

Section 1 and Schedule 1: Rent cap for residential tenancies

Section 1 introduces schedule 1 of the Bill which makes temporary modifications in relation to rent controls in a number of specified types of tenancy.

The provisions of schedule 1 allow for a landlord to seek a rent increase above the level of the permitted rate (currently 0% as set out in the Bill) in certain circumstances. These provisions allow a landlord to seek an increase in rent to recover up to 50% of the increase in certain prescribed property costs that the landlord has incurred during a particular period. Any increase for prescribed costs will be subject to an overall limit of a maximum of 3% of the existing rent.

We anticipate that these provisions could cause difficulty in the case of some buy-to-let mortgages, where commonly a condition of the security is that the rent for the property is at least as much as the monthly mortgage payment. There could be situations where an increase in the mortgage payment for a landlord is more than the additional costs which can be covered by way of a rental increase under the provisions of the Bill. This could, in some circumstances, put the landlord (borrower) in default of their mortgage conditions as they are unable to increase the rent to be the same as, or more than the mortgage payment. It is unclear if lenders have been consulted on the effects of these provisions.

Section 2 and Schedule 2: Protection against eviction from residential properties

Section 2 introduces schedule 2 of the Bill which makes temporary modifications to the law on evictions to restrict the enforcement of various eviction orders and provides for limited exceptions to the restriction.

Part 2

Section A3: Information and advice for tenants

This section was added during the stage 2 proceedings on the Bill and provides that steps must be taken by Scottish Ministers to ensure that tenants affected by the provisions of part 1 of the Bill receive appropriate information, advice and support. We consider that it is important that landlords (particularly private individuals) who are affected by the provisions also receive appropriate information, advice and support.

As noted above, as a large number of the notifications and processes for tenancies are undertaken informally rather than through formal notification, this limits the opportunity to signpost to advice services and resources. This makes the need for effective information for all parties more important.

Sections 3 – 8

The provisions in these sections are broadly similar to those within Coronavirus legislation, including in relation to subordinate legislation making powers; powers around suspension, revival and expiry of Part 1 of the Bill; and reporting.

Section 8 requires the Scottish Ministers to review the necessity and proportionality of the provisions in Part 1 and prepare reports, to be laid before the Scottish Parliament, on the status of provisions. This is an important provision in the context of review by Ministers of the provisions and regulations made under the bill.

Part 3

Sections 9 – 10

We have no comments.

Part 4

Sections 11 – 13

We have no comments.

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