

# **COST OF LIVING (TENANT PROTECTION) (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **INTRODUCTION**

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders, in relation to the Cost of Living (Tenant Protection) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 18–EN);
- a Financial Memorandum (SP Bill 18–FM);
- a Policy Memorandum (SP Bill 18–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 18–LC).

3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

### **OUTLINE OF BILL PROVISIONS**

4. The purpose of the Cost of Living (Tenant Protection) (Scotland) 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 powers to temporarily reform rent adjudication until at least 31 March 2024. The intended effect of the Bill is to:

- a. protect tenants by stabilising their housing costs;
- b. 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
- c. 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. The Bill covers a range of issues, with much of the detail set out in schedules, as follows:
- rent controls in respect of private residential tenancies (including PBSA) and the social rented sector;
  - an evictions moratorium, where an order or decree for eviction from residential property cannot be enforced within 6 months of the issue of the order;
  - powers for the Scottish Ministers to modify the rent adjudication process, and
  - changes to the assessment of damages for unlawful eviction.

## **RATIONALE FOR SUBORDINATE LEGISLATION**

6. The Government has had regard, when deciding what subordinate legislation powers and respective Parliamentary procedures are appropriate for the Bill and whether provisions should be in primary or in subordinate legislation, to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time; and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

7. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

### **Section 5(1) – Power to suspend and revive provisions of this Act**

|                                 |                                                                                                      |
|---------------------------------|------------------------------------------------------------------------------------------------------|
| <b>Power conferred on:</b>      | <b>the Scottish Ministers</b>                                                                        |
| <b>Power exercisable by:</b>    | <b>regulations made by Scottish statutory instrument</b>                                             |
| <b>Parliamentary procedure:</b> | <b>negative, or affirmative where used to add to, replace or omit any part of the text of an Act</b> |

### ***Provision***

8. Section 5(1) provides that the Scottish Ministers may by regulations suspend the operation of any provision under Part 1 of the Bill and revive any provision that is suspended. This power may be exercised more than once. Regulations made under section 5(1) may make different provision for different purposes, consequential provision and transitional, transitory or saving provision.

### ***Reason for taking power***

9. This power is needed as the impact of the cost crisis may vary over time. The intention is that a provision of the Bill should only be in force where this is necessary and proportionate, and this provides flexibility where provisions are not needed temporarily but may be needed again.

That transitional, transitory or saving provision can be made to allow for appropriate arrangements to be made when suspending or reviving provisions.

### ***Choice of procedure***

10. It is considered that the negative procedure is appropriate given that the Scottish Parliament has considered the provisions in the Bill and this power would not change the content of those provisions. The use of the negative procedure will allow flexibility for adjustments to take place whilst providing scrutiny by the Scottish Parliament. It is considered that where regulations add to, replace or omit any part of the text of an Act, as may be the case where consequential or transitional provision is made, then the appropriate procedure is affirmative.

### **Section 6(3) – Expiry of Part 1**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

### ***Provision***

11. Part 1 of the Bill expires on 31 March 2023. This provision allows the Scottish Ministers to make regulations amending the expiry date to 30 September 2023 and to further amend this to date to 31 March 2024. Regulations further extending the expiry date to 31 March 2024 can only be made after 31 March 2023.

### ***Reason for taking power***

12. The Bill contains measures required to respond to an emergency situation. Whilst the provisions in Part 1 of the Bill are considered to be appropriate and proportionate, many are far-reaching and will have a significant impact on those whose rights are affected as a result. As one of the safeguards, Part 1 of the Bill expires automatically on 31 March 2023. It is recognised that it could be appropriate to extend this by two further periods of six months but that this should only be done with the approval of the Scottish Parliament. At the same time as laying a draft of the regulations the Scottish Ministers must lay before the Scottish Parliament a statement of their reasons why the regulations should be made.

### ***Choice of procedure***

13. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation and have the effect of extending Part 1 of the Bill.

## **Section 6(7) – Expiry of Part 1**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative, or affirmative where used to add to, replace or omit any part of the text of an Act

### ***Provision***

14. Section 6(7) provides that the Scottish Ministers may by regulations make transitional, transitory or saving provision in connection with the expiry of any provision of the Act.

### ***Reason for taking power***

15. Where provisions of Part 1 of the Bill expire then it may be that appropriate arrangements are needed to bridge how the emergency provisions in the Bill are ended. The type of arrangements that are appropriate may depend on various factors and so the flexibility is needed.

### ***Choice of procedure***

16. The negative procedure is considered appropriate to allow for flexibility whilst providing scrutiny by the Scottish Parliament. It is considered that where regulations add to, replace or omit any part of the text of an Act, as may be the case where consequential or transitional provision is made, then the appropriate procedure is affirmative.

## **Section 7 – Power to bring forward expiry of Part 1**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative, or affirmative where used to add to, replace or omit any part of the text of an Act

### ***Provision***

17. The Bill contains a sunset clause whereby the provisions in Part 1 of the Bill expire on 31 March 2023 unless extended in accordance with section 6. Section 7 enables the Scottish Ministers to make regulations providing that any provision of the Bill can be expired early (including earlier than set out in previous regulations made under section 6). Such regulations can make different provision for different purposes, consequential provision and transitional, transitory or saving provision. Section 7(2) requires the Scottish Ministers to bring forward regulations under this section or section 5(1) to expire or suspend any provision which is no longer necessary or proportionate in connection with the cost of living.

### ***Reason for taking power***

18. This power provides one of the important safeguards in ensuring that the measures included in the Bill are not in force once they are no longer considered necessary or proportionate. Taking this power will enable the Scottish Ministers to expire provisions earlier than provided for by the

sunsetting of Part 1 of the Bill under section 6. If needed to provide for a smooth transition transitional, transitory and saving provision can be made.

### ***Choice of procedure***

19. It is considered that the negative procedure is appropriate to enable the Scottish Ministers to respond quickly and with sufficient flexibility to changing or unforeseen circumstances which may necessitate the early expiry of provisions. It is not intended to keep provisions of the Bill in force any longer than is necessary. The negative procedure still ensures appropriate scrutiny by the Scottish Parliament. However, it is considered that where regulations add to, replace or omit any part of the text of an Act, as may be the case where consequential or transitional provision is made, then the appropriate procedure is affirmative.

### **Section 10(2) – Expiry of section 9**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

### ***Provision***

20. Section 10 expires the power to modify the rent adjudication process at the end of 31 March 2024. Section 10(2) provides that Scottish Ministers may, by regulations, amend the expiry date of the power to modify the law in relation to rent adjudication for a period of not more than one year from the original expiry date. Section 10(3) allows Scottish Ministers to amend the expiry date more than once.

### ***Reason for taking power***

21. Following the expiry of section 9, a power is required to ensure a smooth transition coming out of emergency measures. The power would ensure that provision can be made for this transition beyond the original date for the expiry of section 9. Given the uncertainty around how long the cost crises may last, a power is required for Scottish Ministers to adjust the expiry of this transitional power. At the same time as laying a draft of the regulations the Scottish Ministers must lay before the Scottish Parliament a statement of their reasons why the regulations should be made

### ***Choice of procedure***

22. Section 10(4) provides that regulations made under subsection (2) regarding the expiry of the power are subject to the affirmative procedure and must be made before the power to make the regulations expires. It is considered this is appropriate as the power amends primary legislation.

## **Section 12(1) – Ancillary provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative or affirmative where used to add to, replace or omit any part of the text of an Act

### ***Provision***

23. Section 12(1) provides that the Scottish Ministers may by regulations make freestanding ancillary provision, namely incidental, supplementary, consequential, transitional, transitory or savings provision which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the Bill or provision made under it.

### ***Reason for taking power***

24. It is appropriate to take a power to deal with anything that might emerge in the course of implementing the Bill, for example unexpected interaction between modifications made to secondary legislation. Without the power proposed it would be necessary to return to Parliament to deal with a matter that is clearly within the policy intentions of the Bill, which would not be an effective use of parliamentary or government resource or timely given the need to act quickly to deal with the cost crisis.

25. It is considered that such matters are best addressed through subordinate legislation. The power is restricted in that it can only be used for the purposes of, in connection with, or for the purpose of giving full effect to the Bill, or provision made under it.

### ***Choice of procedure***

26. It is considered that the negative procedure is appropriate given that the Scottish Parliament has considered the provisions of the Bill and these regulations are concerned with making provision for the purposes of, or in connection, with giving full effect to the Bill or provisions made under it. However, it is considered that where regulations add to, replace or omit any part of the text of an Act, then the appropriate procedure is affirmative.

## **Section 12(2) – Power to make transitional, transitory, or saving provision in connection with the coming into force of any provision of the Bill**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** laid, no procedure

### ***Provision***

27. This provision enables the Scottish Ministers to make transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill.

***Reason for taking power***

28. The Bill comes into force on the day after Royal Assent. The power in section 12(2) may be needed to enable a smooth commencement of, and transition to, the coming into force of the provisions of the Bill.

***Choice of procedure***

29. As is usual for regulations relating to commencement, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. This is considered appropriate as the regulations will be making provision to smooth commencement of provisions that have already been considered by the Scottish Parliament during the passage of the Bill.

**Schedule 1, paragraph 1(4) – (the new section 19(4) Private Housing (Tenancies) (Scotland) Act 2016) – Power to amend frequency with which rent may be increased**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

30. This provision inserts a new section 19(4) into the Private Housing (Tenancies) (Scotland) Act 2016 which provides that Scottish Ministers may amend section 19(1) to permit a second rent increase in a twelve month period in certain circumstances.

***Reason for taking power***

31. Section 19(1) of the Private Housing (Tenancies) (Scotland) Act 2016 sets out that a landlord may only increase rent once in the course of any twelve month period. This power will allow Scottish Ministers to permit a second increase in a 12 month period if they deem appropriate. The reason for this power would be to maintain the integrity of the prescribed property cost landlord safeguard in the event that the permitted rate is raised by Scottish Ministers above 0%. In the event that a landlord made a successful application to raise rent due to prescribed property costs, this would represent their single opportunity to raise rent in a twelve month period. Only landlords that had not already raised rent in the preceding twelve months would be able to make use of this safeguard. If the permitted rate was then raised above 0% (less than twelve months after their successful prescribed property cost application) that landlord would not be able to also increase rent in line with the (increased) permitted rate. Whereas, a landlord with no prescribed property costs who was ready to make their annual rent increase, would be able to. If an increased permitted rate would allow a rent increase in excess of that permitted by the safeguard, this would diminish the operation of the prescribed property costs process as a safeguard. In those circumstances Scottish Ministers may wish to allow those landlords that had made a successful prescribed property cost application to make one further rent increase in line with the permitted rate. This power would enable provision to be made to achieve this.

***Choice of procedure***

32. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, paragraph 1(5) (inserting a new Section 21A(3)) – Power to amend the rent cap (private residential tenancies)**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

33. This provision allows Scottish Ministers to amend the ‘permitted rate’ (the rent cap).

***Reason for taking power***

34. The reason for taking this power is to enable Scottish Ministers to operate the permitted rate which is a mechanism to control rent increases. The permitted rate is initially set at 0% which means that it will operate as a rent freeze. Once this is no longer proportionate, Scottish Ministers must amend the permitted rate. The permitted rate will be monitored by Scottish Ministers on an ongoing basis against the background of the cost crisis to ensure that it continues to strike an appropriate balance. Having powers to vary the rate is essential to this process. This percentage forms part of the package of rent control measures, and as such, will be considered and calibrated in its collective context of the other variable provisions in the Bill.

***Choice of procedure***

35. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, paragraph 1(17) (inserting Section 33A(5)) – Power to modify the list of ‘prescribed property costs’**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

36. This power allows Scottish Ministers to amend the list to amend, remove or add to the matters for the time being mentioned in the list of ‘prescribed property costs’.

***Reason for taking power***

37. The Bill allows a safeguard for landlords to apply to raise rent in excess of the permitted rate, if they can demonstrate that they have had an increase in ‘prescribed property costs’ in a preceding six month period. The list of prescribed property costs is defined in the Bill at section

33A(4). This power will enable Scottish Ministers to amend what is on the list of prescribed property costs which affords a degree of flexibility enabling a proportionate response to the cost crisis and a safeguard that is tailored accordingly.

***Choice of procedure***

38. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Section 33F(1) – Power to modify the percentage of the increase in prescribed property costs that a landlord can apply to raise rent to recover**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

39. This power enables Scottish Ministers to vary the percentage of the increase in prescribed property costs that a landlord can apply to raise rent to recover.

***Reason for taking power***

40. The percentage of the increase in prescribed property costs that a landlord can apply to raise rent to recover via the safeguard has initially been set at 50%. In order to maintain a proportionate response to the cost crisis it is necessary for Scottish Ministers to have the power to amend this as appropriate. This percentage forms part of the package of rent control measures, and as such, will be considered and calibrated in its collective context of the other variable provisions in the Bill. Providing power for Scottish Ministers to vary this percentage is essential to ensure flexibility and proportionality.

***Choice of procedure***

41. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Section 33F(2) - Power to modify the percentage of the maximum permissible increase in rent in relation to a prescribed property costs application by a landlord**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

42. This provision enables the Scottish Ministers to change the cap on the maximum permissible increase available to landlords via the prescribed property cost safeguard. That cap sets a ceiling on the amount by which rent could be increased as the rent payable under the tenancy as increased by 3%.

***Reason for taking power***

43. The prescribed property cost safeguard (as explained in relation to section 33F(1)) allows for landlords to make an application to increase rent in excess of the permitted rate. There exists, however, a maximum cap on the amount that a landlord could increase rent by when using this safeguard. This power enables Scottish Ministers to vary this maximum permissible increase cap. This percentage forms part of the package of rent control measures, and as such, will be considered and calibrated in its collective context of the other variable provisions in the Bill. Providing power for Scottish Ministers to vary this percentage is essential to ensure flexibility and proportionality.

***Choice of procedure***

44. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, para 2(3) – the new section 23A(3) - Power to amend the rent cap (assured tenancies)**

|                                 |                                                          |
|---------------------------------|----------------------------------------------------------|
| <b>Power conferred on:</b>      | <b>the Scottish Ministers</b>                            |
| <b>Power exercisable by:</b>    | <b>regulations made by Scottish statutory instrument</b> |
| <b>Parliamentary procedure:</b> | <b>affirmative</b>                                       |

***Provision***

45. This provision allows Scottish Ministers to amend the ‘permitted rate’ (the rent cap).

***Reason for taking power***

46. The reason for taking this power is to enable Scottish Ministers to operate the permitted rate which is a mechanism to control rent increases. The permitted rate is initially set at 0% which means that it will operate as a rent freeze. Once this is no longer proportionate, Scottish Ministers must amend the permitted rate. The permitted rate will be monitored by Scottish Ministers on an ongoing basis against the background of the cost crisis to ensure that it continues to strike an appropriate balance. Having powers to vary the rate is essential to this process. This percentage forms part of the package of rent control measures, and as such, will be considered and calibrated in its collective context of the other variable provisions in the Bill.

***Choice of procedure***

47. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, paragraph 2(4) (new section 24(4A))- Power to amend frequency with which rent may be increased**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

48. This provision inserts a new section 24(4A) into the Housing (Scotland) Act 1988 which provides that Scottish Ministers may amend permit a second rent increase in a twelve month period in certain circumstances.

***Reason for taking power***

49. Section 24 of the 1988 Act sets out that a landlord may increase rent in accordance with the provisions of the Act. This power will allow Scottish Ministers permit a second increase in a 12 month period if they deem appropriate. The reason for this power would be to maintain the integrity of the prescribed property cost landlord safeguard in the event that the permitted rate is raised by Scottish Ministers above 0%. In the event that a landlord made a successful application to raise rent due to prescribed property costs, this would represent their single opportunity to raise rent in a twelve month period. Only landlords that had not already raised rent in the preceding twelve months would be able to make use of this safeguard. If the permitted rate was then raised above 0% (less than twelve months after their successful prescribed property cost application) that landlord would not be able to also increase rent in line with the (increased) permitted rate. Whereas, a landlord with no prescribed property costs who was ready to make their rent increase, would be able to. If an increased permitted rate would allow a rent increase in excess of that permitted by the safeguard, this would diminish the operation of the prescribed property costs process as a safeguard. In those circumstances Scottish Ministers may wish to allow those landlords that had made a successful prescribed property cost application to make one further rent increase in line with the permitted rate. This power would enable provision to be made to achieve this.

***Choice of procedure***

50. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, paragraph 2(5) (new section 24E(5))- Power to modify the list of ‘prescribed property costs’**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

51. This power allows Scottish Ministers to amend the list to amend, remove or add to the matters for the time being mentioned in the list of ‘prescribed property costs’.

***Reason for taking power***

52. The Bill allows a safeguard for landlords to apply to raise rent in excess of the permitted rate, if they can demonstrate that they have had an increase in ‘prescribed property costs’ in a preceding six month period. The list of prescribed property costs is defined in the Bill at section 24E(4). This power will enable Scottish Ministers to amend what is on the list of prescribed property costs which affords a degree of flexibility enabling a proportionate response to the cost crisis and a safeguard that is tailored accordingly.

***Choice of procedure***

53. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, paragraph 2(5) – (new section 24J(1))- Power to modify the percentage of the increase in prescribed property costs that a landlord can apply to raise rent to recover**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

54. This power enables Scottish Ministers to vary the percentage of the increase in prescribed property costs that a landlord can apply to raise rent to recover.

***Reason for taking power***

55. The percentage of the increase in prescribed property costs that a landlord can apply to raise rent to recover via the safeguard has initially been set at 50%. In order to maintain a proportionate response to the cost crisis it is necessary for Scottish Ministers to have the power to amend this as appropriate. This percentage forms part of the package of rent control measures, and as such, will be considered and calibrated in its collective context of the other variable provisions in the Bill. Providing power for Scottish Ministers to vary this percentage is essential to ensure flexibility and proportionality.

***Choice of procedure***

56. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, paragraph 2(5) (new section 24J(2)) - Power to modify the percentage of the maximum permissible increase in rent in relation to a prescribed property costs application by a landlord**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

57. This provision sets a cap on the maximum permissible increase available to landlords via the prescribed property cost safeguard. It sets a ceiling on the amount by which rent could be increased as the rent payable under the tenancy as increased by 3%.

***Reason for taking power***

58. The prescribed property cost safeguard (as explained in relation to section 24J(1)) allows for landlords to make an application to increase rent in excess of the permitted rate. There exists, however, a maximum cap on the amount that a landlord could increase rent by when using this safeguard. This power enables Scottish Ministers to vary this maximum permissible increase cap. This percentage forms part of the package of rent control measures, and as such, will be considered and calibrated in its collective context of the other variable provisions in the Bill. Providing power for Scottish Ministers to vary this percentage is essential to ensure flexibility and proportionality.

***Choice of procedure***

59. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, paragraph 3(2) (section 24A(3)) – Power to amend the rent cap (social sector)**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

60. This provision allows Scottish Ministers to amend the ‘permitted rate’ (the rent cap).

***Reason for taking power***

61. The reason for taking this power is to enable Scottish Ministers to operate the permitted rate which is a mechanism to control rent increases. The permitted rate is initially set at 0% which means that it will operate as a rent freeze. Once this is no longer proportionate, Scottish Ministers must amend the permitted rate. The permitted rate will be monitored by Scottish Ministers on an ongoing basis against the background of the cost crisis to ensure that it continues to strike an appropriate balance. Having powers to vary the rate is essential to this process.

***Choice of procedure***

62. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 1, paragraph 4(5) - Power to modify the percentage of the maximum permissible increase in rent in relation to a prescribed property costs application by a landlord for a student residential tenancy**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

63. This provision allows Scottish Ministers to amend the ‘permitted rate’ (the rent cap).

***Reason for taking power***

64. The reason for taking this power is to enable Scottish Ministers to operate the permitted rate which is a mechanism to control rent increases for student residential tenancies. The permitted rate is initially set at 0% which means that it will operate as a rent freeze. Once this is no longer proportionate, Scottish Ministers must amend the permitted rate. The permitted rate will be monitored by Scottish Ministers on an ongoing basis against the background of the cost crisis to ensure that it continues to strike an appropriate balance. Having powers to vary the rate is essential to this process. This percentage forms part of the package of rent control measures, and as such, will be considered and calibrated in its collective context of the other variable provisions in the Bill.

***Choice of procedure***

65. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation.

**Schedule 2, paragraph 1(7) – power to amend circumstances in which paragraph 1(1) or (2) of schedule 3 apply**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

***Provision***

66. Paragraph 1(1) provides that no decree for removing granted in proceedings raised after the paragraph comes into force may be executed, nor may a charge for removing in respect of the decree be served. Sub-paragraph (2) contains equivalent provision for a decree granted in proceedings raised before this paragraph comes into force in relation to an eviction notice served on or after 6 September 2022 or, where no eviction notice is required, in proceedings raised after this date (and before the paragraph comes into force). The restrictions in sub-paragraphs (1) and

(2) do not apply in the circumstances provided for at sub-paragraphs (4) and (5). Paragraph 1(7) provides that the Scottish Ministers may modify paragraph 1 to add, amend or remove circumstances in which sub-paragraph (1) or (2) do not apply.

### ***Reason for taking power***

67. It is considered appropriate to take the power in order to provide for flexibility as to the types of evictions which should be exempted from the moratorium as the cost crisis develops. The Scottish Ministers consider that, in order to properly take account of the impact of the moratorium on landlords, it may be appropriate to exempt additional eviction grounds. Equally, as the cost crisis develops, Ministers may wish to provide additional protection to tenants by reducing the exemptions from the moratorium. It is considered that the power is an appropriate safeguard to ensure the continuing proportionality of the provisions in the Bill.

### ***Choice of procedure***

68. Since the power will be used to amend primary legislation (in this case, the Bill), it is considered that the appropriate procedure is affirmative.

### **Schedule 3, paragraph 1(2) & 2(2) – power to modify rent adjudication process**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

### ***Provision***

69. Schedule 3 confers on the Scottish Ministers the ability to temporarily modify the law in relation to rent adjudication. Paragraph 1 of Schedule 3 sets out the power to modify rent adjudication in relation to private residential tenancies. It introduces a new section 34A to the Private Housing (Tenancies) (Scotland) Act 2016. Under this power the Scottish Ministers may modify provisions in connection with the determination of rent payable under a private residential tenancy by a rent officer or First-Tier Tribunal. Section 34A(2) provides that the regulations under subsection (1) may include provisions limiting the rent that may be determined to an amount that is no more than the amount specified by the landlord in the original rent increase notice, provisions modifying the basis upon which rent may be determined by a rent officer or First-Tier Tribunal which may include any matters to be taken into account, disregarded or any assumption to be made in determining the rent, and provisions relating to the procedure relating to referral to a rent officer or appeal to the First-tier Tribunal. Section 34A(3) confers a duty on the Scottish Ministers to consult individuals who represent the interests of tenants and landlords under private residential tenancies and any other persons that they consider appropriate, before regulations are made.

70. Paragraph 2 of schedule 3 applies the same provisions to assured and short assured tenancies and in doing so introduces a new section 25ZA to the Housing (Scotland) Act 1988.

### ***Reason for taking power***

71. With the introduction of emergency legislation to protect tenants by freezing rents and imposing a moratorium on evictions until at least 31 March 2023, there are concerns that following

the end of the proposed measures, this will lead to a spike in landlords raising rents to compensate for the freeze. Given rent adjudication is currently based on open market values, any determination by rent officers at that time will reflect the potentially high rents being charged by landlords following the rent restrictions. Therefore, a power is required for the Scottish Ministers to amend the rent adjudication process in connection with the determination of rent to manage the anticipated significant increase in rents during the transition out of the emergency measures. The broad application of the power will ensure that unforeseen scenarios which may arise following the expiry of the emergency measures are catered for under this power.

### ***Choice of procedure***

72. It is considered that the affirmative procedure is appropriate as the power contained within schedule 3 allows Scottish ministers to amend primary legislation, that being the Private Housing (Tenancies)(Scotland) Act 2016 and the Housing (Scotland) Act 1988. Before making regulations under schedule 3, Section 34A(3) and Section 25ZA(3) requires the Scottish Ministers to consult individuals who represent the interests of tenants and landlords under private residential tenancies and assured and short assured tenancies, and such other persons as the Scottish Ministers consider appropriate. The inclusion of a consultation requirement provides a safeguard to ensure that landlord and tenant representatives have an opportunity to make representations to the Scottish Ministers.



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

# **COST OF LIVING (TENANT PROTECTION) (SCOTLAND) BILL**

## **DELEGATED POWERS MEMORANDUM**

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