

PRIVATE HOUSING (TENANCIES) (SCOTLAND) ACT 2016

EXPLANATORY NOTES

STRUCTURE AND SUMMARY OF THE ACT

Part 4 – Rent

Chapter 1 – Restrictions in relation to rent and other charges

36. **Section 19(1)** provides that the rent payable under a private residential tenancy may not be increased more than once in a 12 month period. Accordingly, there is no restriction upon when the first increase may take place (subject to giving the necessary notice and any appeal) but there will always be a minimum of 12 months between increases. Subsection (2) provides that where a tenant has made a referral to a rent officer for rent adjudication, the 12 month period is to be regarded as commencing on the date on which the rent would have been increased had the adjudication process not been invoked (which will usually be the date specified in the landlord’s rent-increase notice, but see section 22(4)). This means that an annual cycle of rent reviews is not disrupted by a delay in an appeal being processed.
37. **Section 20** makes it an offence to charge or receive any premiums or to require the making of any loan as a condition of the grant, renewal or continuance of a private residential tenancy. Restrictions are also placed on the sums which can be charged when a tenancy is assigned. Any charge made in breach of these rules is recoverable by the tenant. A “premium” means any sum or pecuniary consideration other than the rent and a refundable deposit (not exceeding two months’ rent), and includes any fine or administration fee.
38. **Section 20** also prohibits rent being charged before the beginning of the rental period to which it relates – or, if rent is payable less frequently than once every six months, a more restrictive bespoke rule applies. The effect of the prohibition in section 20 is that, for example, a tenant who pays rent in advance on a month-to-month basis cannot be required to pay more than one month’s rent at a time, and nor can the tenant be obliged to pay the first month’s rent before the lease commences. Where a tenant has been required to pay advance rent, the sum is recoverable by the tenant provided that he or she exercises the right of recovery within two years of the payment.
39. **Section 21** provides that where a debt for a rent payment or a rent liability exists, a landlord can only take debt recovery steps (in the form of carrying out diligence) against the tenant or former tenant where the Tribunal has first given its consent. A rent liability is a liability which has arisen under section 31 as a result of the tenant’s rent being increased following a process of rent adjudication.

Chapter 2 – Rent variation instigated by landlord’s notice

Process by which rent may be varied

40. **Section 22** sets out how a landlord must notify a tenant of an increase in rent.
41. **Section 22(2)** provides that the rent-increase notice given by the landlord to the tenant must specify the rent that will be payable once the increase takes effect, the day when the increase is to take effect, and must comply with any other requirements that may be set out by the Scottish Ministers in regulations. Ministers can bring forward regulations which specify the information to be included in the rent-increase notice, the form the notice should take and the way in which the notice must be served on the tenant.
42. **Section 22(3)** provides that the rent increase will take effect on the effective date unless before that date the landlord withdraws the notice, or the tenant makes a timeous referral to a rent officer for rent adjudication.
43. **Section 22(4)** defines the ‘effective date’ as the later of either the day specified in the rent-increase notice or the day after the day on which the minimum notice period ends. This means that where a landlord fills in the rent-increase notice with the required minimum notice period in mind, the effective date will be the date specified by the landlord. However in a case where, for example, the tenant can show that the notice was delayed in the post or where the landlord has calculated the minimum notice period incorrectly, the notice will still take effect but will do so only after the conclusion of the minimum notice period.
44. **Section 22(5)** provides that the minimum notice period is three months or whatever longer period has been agreed between the landlord and tenant. It begins running on the day the rent-increase notice is received by the tenant. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out (rebuttable) presumptions as to when a document that has been served by post or electronically is deemed to be received.
45. **Section 22(6)** provides that the reference to a period of three months in subsection (5) means either the same day three months after the month in which it began or, if the month in which the period ends has no such day, the final day of that month. For example if the start of the three month period was 4 March the last day of the three month period would be 4 June, and if the start date was 30 November the last day would be 28 or 29 February, depending on whether or not it was a leap year.
46. **Section 23** enables the landlord and tenant, by agreement, to change the proposed new rent and to change the date specified in the notice (although the date that the notice takes effect remains subject to the minimum notice period due to the operation of section 22(4), so an agreed change could not dispense with the minimum 3 months’ notice). For example, this ability to agree a change would allow the parties to agree to a lower rent than in the notice, or allow the parties to come to a compromise whereby a higher sum is to be paid, but, as a trade-off, the effective date is postponed. Because any such agreement is dealt with by an amendment to the existing notice rather than the service of a new notice, it does not trigger the running of a new minimum notice period. Section 23(2) outlines that if a tenant and landlord had agreed to change what is in the rent-increase notice but the tenant reconsiders and subsequently refers the notice for adjudication within the permitted time period, the referral to the rent officer will proceed as if no such agreement to modify the notice had been made. This will be of relevance when the order-maker requires to know the date on which the increase would have taken effect had a referral not been made.
47. **Section 24** provides that within 21 days of receiving a rent-increase notice, a tenant can refer a case to a rent officer for adjudication (provided that the property is not in a rent pressure zone).
48. **Section 24(3)** requires that an application to a rent officer be in the prescribed form and accompanied by the prescribed fee (if any). The tenant must also notify the landlord in

the prescribed manner that the case has been submitted for adjudication. Section 24(4) enables the Scottish Ministers to set out in regulations what the prescribed form, manner of notification and fee are.

49. On receipt of a rent adjudication referral, section 25(1) gives a rent officer the power to set the open market rent for the property. In doing so, the rent officer has the power to vary the rent upwards or downwards. The assumptions to be applied when calculating the open market rent are set out in section 32.
50. [Section 25\(2\)](#) stipulates that the date on which the new rent (as set by the rent officer) takes effect will be either the date that the rent increase had originally been due to take effect (if that date is still at least 14 days in the future), or, if it is too late for that, it will be the first rent payment date falling at least 14 days after the day on which the rent officer makes the order. However, where the rent officer's determination is made too late for it to take effect on the original rent increase date, section 31 will also operate in order to put the parties in the same financial position they would have been in had the order been made earlier.
51. [Section 25\(3\)](#) provides that when making an order, a rent officer must record the amount of rent that covers the provision of services, unless these costs are negligible.
52. [Section 26](#) provides that, before issuing a final order, a rent officer must issue a provisional order which specifies the amount of rent to be paid, including any amount attributed to service costs. If a landlord or tenant is dissatisfied with the rent officer's proposal, he or she can ask the rent officer to review this before the final order is issued. Any review request must be made within 14 days of the provisional order being issued.
53. [Section 27](#) enables a rent officer to correct an error in an order which determines the open market rent by issuing a new order.
54. [Section 28](#) provides that where a rent officer has made an order, the landlord and tenant will have a final course of redress to the Tribunal, if they wish. Any appeal to the Tribunal must be submitted within 14 days of the rent officer's final decision. Submitting an appeal to the Tribunal will render the rent officer's decision ineffective.
55. On receipt of an appeal, section 29 provides that the Tribunal must make an order setting the tenant's rent at the open market rent for the property. In doing so, the Tribunal has the power to vary the current rent upwards or downwards. Subsection (2) stipulates that the effective date from which the new rent set by the Tribunal applies will be either the date the rent increase had originally been due to take effect (if the Tribunal makes its order on or before that date), or, if it is too late for that, it will be the first rent payment date falling on or after the day on which the Tribunal makes its order. However, where it is the latter date, section 31 will operate to put the parties in the same financial position they would have been in had the order been made earlier. Subsection (3) of section 29 provides that when making an order, the Tribunal must record the amount of rent that covers the provision of services, unless these costs are negligible.
56. [Section 30](#) provides that the Tribunal's decision is final and there is no further course of appeal to the Upper Tribunal. However, the Tribunal has the ability to review its order and correct any minor errors.
57. [Section 31](#) deals with what is effectively an overpayment or underpayment of rent which arises where the effective date of the rent officer's or the Tribunal's decision is later than the date that the rent increase had originally been due to take effect. Throughout the adjudication, the tenant will continue to be liable to pay the existing rent as usual. Once the new rent has been determined, any necessary backdating is dealt with as follows:
 - Subsection (2) provides that if the rent is decreased as a result of the adjudication process, the landlord must pay the tenant the difference between the new rent over the relevant period and the rent that was actually paid over the relevant period. The relevant period is the period between the original rent increase date and the date

on which the new rent actually takes effect. If the landlord fails to pay the tenant, the tenant can withhold rent that is due in order to recover the overpayment or can raise an action for recovery with the Tribunal.

- Subsection (3) provides that if the rent is increased as a result of the adjudication, the tenant must pay the landlord the difference between the old rent over the relevant period and the new rent over the relevant period. Again, the relevant period is the period between the original rent increase date and the date on which the new rent actually takes effect. This subsection is concerned only with the distinct liability which arises due to the rent increase: if the tenant has failed to pay the landlord the old rent in full during the adjudication period, the amount of that shortfall is a separate liability. As far as the tenant's section 31 liability is concerned, the tenant will have 28 days within which to pay the landlord the full amount due. If the tenant fails to pay the landlord within this timescale, on day 29 the sum is treated as rent arrears for the purpose of that eviction ground and as having been rent arrears from the date that the final rent determination was made.
58. **Section 32** sets out how rent officers and the Tribunal are to determine the open market rent of a property. What constitutes "rent" is defined in section 78, and the open market rent is to be determined without reference to the current tenant (since it is a determination of the amount that the property could be rented for on the open market). However, subsection (2) provides that when making the determination, any work voluntarily paid for or carried out by tenant will be disregarded. This means, for example, a tenant who was permitted (but not obliged) to fit a new kitchen will not have to pay more as a result of the increased rental value of the property which is attributable to the improvements that he or she has made. Conversely, any failure by the tenant to comply with the terms of the tenancy is also disregarded. For example, if the tenant has damaged the furnishings in breach of the lease, the tenant will not benefit from a reduction in rent as a result: instead, the rent will be calculated as though that breach had not occurred. In both cases, the rule applies to acts by a predecessor under the same tenancy as well, meaning that it would cover acts by a tenant who assigned the tenancy to the current tenant, or acts by a person from whom the current tenant inherited the tenancy.
59. **Section 33** sets out what happens when a tenant withdraws his or her referral to a rent officer or when a tenant or landlord withdraws his or her appeal to the Tribunal. In such circumstances, the rent officer or Tribunal must issue an order stating that the rent payable from the effective date is either the amount specified in the original rent-increase notice or any other such amount as may have been agreed between the tenant and landlord. The effective date is calculated in accordance with the section that the order is made under (i.e. section 25 where the order is made by the rent officer, or section 29 where it is made by the Tribunal). Section 31 will operate as usual in cases where the effective date falls later than the date that the rent increase had originally been due to take effect.
60. Any order made by virtue of section 33 can only be made following the expiry of any period in which the other party may still appeal, or earlier where the other party has also waived his or her right to appeal. Under this section, no provisional order is required and the order does not need to specify the amount of rent that is fairly attributable to the provision of services.

Information about open market rent determinations

61. **Section 34** provides that rent officers and the Tribunal must make information available on the rents they have taken into account in determining open market rents and the rents they have determined. The Scottish Ministers have the power to specify in regulations the information to be made available, the manner in which it is to be provided and set fees which may be charged for supplying that information.

Chapter 3 – Rent pressure zones

Designation and effect of rent pressure zone

62. **Section 35** provides that a local authority may make an application to the Scottish Ministers requesting that all or part of the authority's area be designated as a rent pressure zone. Subsection (2) states that an application will only be valid if it fulfils any requirements which, prior to the application being made, the Scottish Ministers told the local authorities an application must fulfil in order for it to be valid.
63. **Section 36** provides that within 18 weeks of receiving a valid application, the Scottish Ministers must lay before the Scottish Parliament either draft regulations designating a rent pressure zone or a document explaining why they have not done so.
64. **Section 37** specifies that after receiving an application from a local authority, the Scottish Ministers may bring forward regulations which would designate an area as a rent pressure zone and specify the percentage, which includes zero and fractional parts of a whole number, that should be inserted into the formula set out in section 38(1) and used when calculating the rent increase cap in that area.
65. **Section 38** provides that any rent-increase notice issued for a private residential tenancy within a rent pressure zone cannot increase the rent payable under the tenancy to more than the amount calculated in accordance with that section. The calculation produces an amount which is the current rent, increased by the consumer prices index, plus one percentage point plus the number of percentage points (if any) specified in the regulations under section 37(1)(b). In addition to that amount, the rent may also be increased by an amount set by a rent officer under sections 42 and 43 to reflect improvements made to the let property.
66. **Section 39** provides that the Scottish Ministers cannot designate an area as a rent pressure zone without receiving an application from the local authority. An area can only be designated as a rent pressure zone once on the basis of the same application and the regulations designating the zone will cease to have effect after five years unless they, or another enactment, provide that they cease to have effect sooner or unless they are revoked.
67. **Section 40** outlines the procedure for designating a rent pressure zone and requires the Scottish Ministers to consult persons representing the interests of landlords and tenants within the local authority's area prior to laying before the Scottish Parliament any draft regulations designating an area as a rent pressure zone. Alongside draft regulations designating a zone, the Scottish Ministers must also lay before the Scottish Parliament a document which sets out a summary of the consultation responses and the evidence which leads them to believe that in the proposed area: rents are rising too much; the rises are causing undue hardship to tenants; and the rises are having a detrimental effect on the local authority's broader housing system.
68. **Section 41** enables the Scottish Ministers to amend section 38, so that instead of referring to the consumer prices index it refers to some other measure of inflation.

Improvements to let property

69. **Section 42** allows the rent of a let property within a rent pressure zone to be increased to reflect improvements made to the property. It specifies that only property improvements completed after the tenancy was granted, or (where applicable) since the date of the last rent review, will be considered by the rent officer. And no increase will be allowed for work paid for (in whole or part) by the tenant. Repairs, maintenance and decoration do not constitute improvements for which a rent officer can allow an increase in rent under section 42.
70. **Section 43** outlines the process that should be followed by a rent officer when considering an application under section 42. It requires rent officers to follow any

*These notes relate to the Private Housing (Tenancies) (Scotland)
Act 2016 (asp 19) which received Royal Assent on 22 April 2016*

guidance published by the Scottish Ministers on what constitutes an improvement and the amount that can be charged in respect of improvements. When considering an application, the rent officer must have regard to any timeous representations made by the landlord and the tenant. Section 43 also gives the Scottish Ministers the power to make regulations prescribing the form by which applications to a rent officer under section 42 are to be made.