

An Evaluation of Rent Regulation Measures within Scotland's Private Rented Sector

A report to Shelter Scotland
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Contents

Executive Summary	5
1 Reforming the Private Rented Sector	7
Study aims and approach	7
Background	7
About this report	9
2 Rent Control and Rent Stabilisation	10
Brief History of the Evolution of Rent Control and Rent Stabilisation	10
Rent Control and Rent Stabilisation in Europe	11
3 Scottish Government's Policy Ambitions for Private Renting	16
Private Housing (Tenancies) (Scotland) Act 2016	16
Political Compromise and the Emergence of Rent Stabilisation	18
Rent Pressure Zones	18
Tenant's Right to Challenge a Proposed Rent Rise	20
Monitoring PRS Rents	23
Tenant's Perspectives on Rent Stabilisation	29
Procedures, Practices and Supporting Information	33
Concluding Remarks	34
4 Conclusions and Recommendations	36
References	40
Appendix 1: Official Datasets on PRS Rents in Scotland	43
Appendix 2: Individuals and Organisations, either Interviewed, or Consulted	45
Appendix 3: Individuals Contributing to the Tenant Focus Groups	46

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Executive Summary

Scotland's approach to rent regulation

Throughout Europe there is widespread concern about private rents, both from tenants and governments, especially in Europe's larger cities and their 'hot spot' neighbourhoods. This report examines how the Scottish Government has responded to this issue as part of the development of the new Private Residential Tenancy which came into effect in December 2017, thus setting this analysis within a broader review of European 'rent regulation' measures.

The term 'rent regulation' is commonly applied across Europe to refer to measures which seek to limit 'in-tenancy' rent increases, whilst leaving the rents for new tenancies free to find their place within the market. In looking to balance the interests of tenants and landlords, the Scottish Government rejected rent control across the rental market, favouring instead measures to ensure that 'in-tenancy' rent increases are not excessive and do not exceed market rates.

The Act which emerged in 2015 set out a new open-ended tenancy to replace the short-assured tenancy along with its typical fixed terms of six months. This led to concerns that unscrupulous landlords might use excessive rent rises as a means to repossess their property. The Act therefore sought to protect tenants from excessive rent increases in two ways: firstly, by allowing tenants who believe their proposed rent increase is out of step with the market to seek a formal review by the Rent Officer, and secondly through area-wide inflation-linked restrictions on rent increases through Rent Pressure Zones.

High and rapidly rising rents in Aberdeen, at the time of the Bill's passage, helped to garner political support for Rent Pressure Zones. Whilst Aberdeen's rents have now fallen back in the wake of the sharp decline in oil related activity, rents in both Edinburgh and Glasgow continue to cause concerns. The Rent Pressure Zone measures emerged relatively late in the policy-making process and therefore were not considered in much detail when the Bill was debated in Parliament. This may have contributed to the challenges now faced by local authorities seeking to utilise this measure. After scoping out and discussing these challenges, the report offers some suggestions as to how these might be best overcome.

We need much better data on private rents

The single biggest barrier to the effective operation of both 'rent regulation' provisions is the lack of robust data on the stock of private rented dwellings and the rents being charged. In particular, the ability of existing tenants to challenge a rent rise is compromised by a lack of robust evidence on actual rental market rates.

Official statistics on private rents are derived from Rent Service Scotland (RSS) Rental Market Database. According to the Scottish Government (2017), 97 percent of the 2016 data records came solely from landlord adverts. As advertised rents do not necessarily reflect the actual rents charged to tenants, the database may not fully mirror actual market conditions. The current size of the annual sample is also too small to permit private rental statistics to be produced at local authority level or, in the case of Scotland's four main cities, below local authority level.

Other than the RSS Rental Market Database, officials working in Local Government, RSS, The First-Tier Tribunal and the Scottish Government have access to few, if any, other sources of evidence on the private rental market that could be used to inform any review of rent rise appeals brought by individual tenants, or to help prepare Rent Pressure Zone applications.

The process that Rent Officers and the First-Tier Tribunal currently employ to make adjudication decisions about market rent levels, in appeal cases, is opaque. Decisions appear to rely on a mix of professional judgement and intuition, informed by selections from RSS data and/or evidence drawn from newspapers and on-line advertising. This mode of practice, which is long-standing and legally sanctioned, constitutes the framework for deciding what is a market rent in future adjudication decisions. Access to better data would assist greatly in improving procedural transparency.

The lack of robust evidence could only be overcome if there was the political will to make sufficient resources available to produce a comprehensive and regularly updated private rental database that could inform national and local government policy processes, as well as the work of Rent Officers and the Tribunal. Better data would also enhance the ability of private tenants to make an informed decision about whether they should proceed with a rent increase appeal. In addition, it would improve the quality of 'official' statistics on private rents and ensure they are 'fit for purpose'.

Ideally, a modern private rental database would capture data on rents set at the start of each tenancy and any subsequent uplifts. One step towards establishing such a database would be to secure secondary legislation that required all three Rent Deposit Schemes to register the rent paid for each property, along with defined property attributes (such as dwelling type, size, quality and location) on a common database managed by Scottish Government statisticians.

European experience of rent regulation

Private rental databases are core to the day-to-day operation of 'rent regulation' arrangements in European countries. There are competing interpretations as to why Scotland and the other UK nations have not developed a similar policy tool over the last 30 years. Whatever the reasons, the rapid growth of private renting in the last 20 years, the renewed policy interest in the sector and the new 'rent regulation' measures act to reinforce the requirement for much better information.

The largely free market approach to private rents in Scotland is in contrast to many European countries where 'rent regulation' has been employed to limit 'in tenancy' rent increases to a specified percentage. A few countries have also brought in measures to control the rent set for new tenancies in urban 'hot spots'. The effectiveness of these rent control measures is, at best, mixed. In areas where there is considerable excess demand for private tenancies, there is a tendency for landlords to circumvent or ignore these measures, especially if tenants are unwilling to exercise their rights in order to secure a tenancy. Lack of effective policing also encourages such an outcome. Lower income renters are thus the major losers within these localities as they cannot pay to stay.

Outside of highly pressured urban housing markets, 'rent regulation' appears to function reasonably well at keeping rent increases within defined limits. This may be partly because all European countries have concerns about the level of spend on housing allowances, and unlike the UK, have kept in place policy frameworks which have supported past interventions in the rental market. However, a more critical factor is having an adequate housing supply, across the market at the local level, which then reduces the incentives to circumvent 'rent regulation'. This needs to be acknowledged in policy discussions seeking to find a solution to address high private rents, including the possibility of any further 'rent regulation' or 'rent control'. 'Rent restrictions' primarily offer a useful stop gap, a breathing space, but not a long-term solution to rapidly rising private rents.

Rent regulation in Scotland: what next?

Whilst Scotland now has a private tenancy arrangement that is in line with the norm in many European countries, it has yet to fully embrace European style 'rent regulation'. The evolution of the two measures included in the 2016 Act suggests that the Scottish Government's approach to 'rent regulation' remains somewhat tentative. This may help to explain why current arrangements to support these two measures are inadequate for the task. At this early stage, it is already clear that some adjustments will be required if these measures are to prove workable and effective. These adjustments must tackle the challenges around rental data head-on, and recognise the importance of responding to pressurised housing markets through building an adequate supply of affordable housing.

Overall, the information offered in this report seeks to encourage wider debate about private rent levels and the merits, challenges and implications of the new rent regulation measures that are now in place.

1 Reforming the Private Rented Sector

Study aims and approach

This study was commissioned by Shelter Scotland to investigate the evolution of the two 'rent regulation' measures set out in the Private Housing (Tenancies) (Scotland) Act, 2016 which came into effect in December 2017. In particular, the study seeks to:

- Tease out the factors that shaped the evolution of the two 'rent regulation' measures and their incorporation into the 2016 Act
- Build up an understanding of current thinking about what the 'rent regulation' measures are intended to achieve and what successful policy implementation might look like
- Examine how the new 'rent regulation' safeguards are planned to work in practice, including the role of the Rent Service Scotland and the First-Tier Tribunal (Housing and Property Chamber), in facilitating the right of individual tenants to challenge what they consider to be an unfair rent increase
- Review the development of 'rent control' and 'rent regulation' elsewhere in Europe as well as the arrangements and information in place to support their operation, and consider the Scottish developments within that light
- Offer comment on the extent to which the 'rent regulation' mechanisms are likely to prove workable, both in terms of being feasible to implement and effective in practice

The study involved undertaking a review of research literature on recent developments in private renting and more specifically policy developments in respect of 'rent control' and 'rent regulation', as well as considering recent legislation and associated procedures and guidance.

This work also sets the Scottish experience within the wider European context, which has seen the re-emergence of 'rent regulation' and 'rent control' policies in most jurisdictions. The review of private rent policy covering six European nations, namely, France, Germany, Ireland, the Netherlands, Sweden and Denmark. This element was complemented through participation at the European Network of Housing Researchers (ENHR) Private Rented Markets Workshop, held in Lyon between the 14th and 16th of June 2017 which was considering the theme of rent controls. The report draws on a number of the papers presented at this event, which offered insight into the current PRS policies being pursued in these countries. Further, a number of the workshop participants were later contacted to provide a means of validating the information offered for their particular country in the case studies.

To better understand the specific Scottish legislative changes a series of interviews were undertaken. These included interviews with civil servants, politicians and advisory group members actively involved in the preceding policy discussions which helped frame these reforms. It also included discussions with those charged with implementing the legislation and preparing guidance. A full list of interviewees is provided in [Appendix 2](#).

In addition, current understandings and views of individual tenants in relation to their new right to challenge rent rises were explored, as well as their views on the purpose and value of RPZs. This involved:

- An on-line Shelter survey that tested basic tenants' knowledge of the 'rent regulation' measures, following on from Shelter Scotland's general awareness raising campaign about the 2016 Act
- Focus group discussions with a Shelter Scotland PRS tenants' advisory group. In particular, these discussions centred on how they envisaged the 'rent regulation' measures would work in practice, from their perspective

A list of the participants at the focus group sessions is provided in Appendix 3. We would like to take the opportunity to thank everyone who contributed to the various interviews, for without their assistance this report would not have been possible.

Background

Throughout most of the post-war period the private rented sector (PRS) in Scotland steadily declined. By the 1980s it had almost become something of a niche market, with market orientated private rents mainly catering for students and young professionals, while marginalised groups made do with poor quality low-demand accommodation.

In contrast, over the last three decades the private rental market first stabilised and then began to grow at an increasingly rapid pace, especially in the period since the 2008 global financial crash. Between 1988 and 2016 the share of households renting from a private landlord in Scotland increased by a factor of just over three, from 5 to 16 percent. This, in turn, impacted on the tenant profile and, in particular, the marked growth of younger households renting from private landlords.

This upturn has been driven by a complex mix of factors that boosted both supply and demand. On the supply side the Housing (Scotland) Act 1988, which deregulated private rents, and the short-lived Business Expansion Scheme initiative, encouraged some new investment into the sector. However, the single most significant development boosting supply was the advent of the Buy-to-Let mortgage, which eased access to capital and allowed aspiring landlords to borrow against existing property assets and/or accrued pension pots. This product has proved especially popular to individuals seeking to invest in property, encouraged by the perceived long-term poor performance of alternative pension investment products.

On the demand side, the increasing unaffordability of homeownership, the tightening of access to social rented sector homes, increasing labour market flexibility, which made incomes more uncertain and the significant growth in student debt, all encouraged households to turn to private renting and defer house purchase. Since the 2008 downturn, tougher mortgage lending criteria, and declining incomes of low-to-middle earning households have helped further fuel such demand.

The rapid growth of private renting and its re-emergence into the housing mainstream reignited policy interest in the sector.¹ Over the last six years, after a thirty-year gap, there have been three Acts of Parliament in rapid succession, each of which has had a direct bearing on the PRS. The first two, the Private Rented Housing (Scotland) Act 2011 and Housing (Scotland) Act 2014, sought to put in place a more robust regulatory regime, while also encouraging improvements in the management practices of those renting out property (whether landlords or their agents). The latest legislation, the Private Housing (Tenancies) (Scotland) Act 2016 broke new ground by introducing an entirely new tenancy regime.

The Private Residential Tenancy came into being in December 2017 and will replace both the Assured and Short Assured tenancy arrangements, the tenancy regime introduced in 1988 which brought rent regulation to an end. The new tenancy arrangements have been accompanied by what has been carefully termed ‘rent regulation’, the prime focus of this report.

The Scottish Government’s policy ambition for private renting that underpinned the 2016 Act has been to achieve a ‘balanced reform’ that seeks to enhance tenant rights and security while, at the same time, provide appropriate safeguards for landlords, lenders and investors. This aspiration is to the fore in the Scottish Government’s PRS strategy:

“A private rented sector that provides good quality homes and high management standards, inspires consumer confidence, and encourages growth through attracting increased investment” (Scottish Government, 2013, 2).

Improving the position of private tenants was an important aspect of the first two Acts, insofar as they sought to improve property management and maintenance standards as well as improve on what had been a basic landlord registration system. The 2016 Act went one stage further by introducing an open-ended, secure tenancy regime. Its key measures include:

- Improved tenant security, in respect of the tenancy period, with the abolition of both Assured and Short Assured Tenancies, the latter of which was almost universally employed given its typical six-months duration and ‘no fault’ ground for landlords gaining repossession
- Introduction of statutory repossession grounds, allowing landlords only to regain possession, via prescribed ‘reasonable circumstances’, as opposed to the previous ‘no fault’ arrangement
- Introduction of a more streamlined modern tenancy system, with no confusing pre-tenancy notices, supported by an easy-to-understand ‘clear English’ model tenancy agreement detailing all statutory rights
- A right to challenge a subsequent rent rise by requesting an independent assessment by Rent Officers
- The potential for local authorities to implement blanket restrictions on future rent increases within a defined area experiencing excessive rent increases

¹ Following rent deregulation in 1988, the sector was largely ignored and prior to that policy interventions were mainly concerned with the poor quality of much of the PRS stock: clearance provisions from the 1880s; council house construction from 1919; slum clearance housing in the 1930s; high rise housing and associated clearance in the 1960s, and then housing improvement powers from the late 1960s.

The Scottish Government believe this major reform offers private tenants greater predictability, both in terms of tenure length and security. By contrast, many lobby groups and other commentators believed that the previous Short Assured Tenancy regime, with its typical six-month duration, had acted against tenants exercising their statutory rights, because by the time they had decided to take action, their tenancy would almost be concluded. Further, given its short duration, there was also a concern that if such rights were exercised a new tenancy might not be forthcoming.

Another issue that arose from introducing an open-ended tenancy was that of rent predictability. This has two elements, the first of which affects landlords' ability to raise rents, while the other allows tenants to challenge a subsequent rent rise. The previous Short Assured Tenancy, given its six-month duration, allowed for rent increases when issuing a new tenancy, should landlords so choose. Now with an open-ended tenancy, rent rises and their timeframe needed to be set down within legislation. Consequently, under the 2016 Act, the landlord can only increase the rent annually, and any rent rise needs to be notified to the tenants, in writing, three-months prior to the date of the proposed increase.

The 1988 Act deregulated all private rents, by allowing for a 'free negotiation' of the rent between landlord and tenant. The 2016 Act does not alter this free market principle, in setting the original asking price. On saying that, it does include two rent safeguarding, or regulation measures, against what are considered to be subsequent 'excessive rent rises'.

As already noted, the first of these was introduced because there was a perception that landlords, rather than use the new prescribed statutory grounds to end a tenancy, might simply resort to a using substantial rent rise to secure that outcome. As a means to guard against this:

- Tenants with the new tenancy have the right to challenge rent uplifts and to seek a housing market adjudication by a Rent Officer
- Should the tenant be unhappy with the outcome of the adjudication, there is a further right of appeal to the First-Tier Tribunal (Housing and Property Chamber), newly constituted to consider all disputes within the PRS, where they will make a final decision

The 2016 Act also allows local authorities to make a case to Scottish Ministers, to approve at the local area level 'rent regulation' measures for specified localities where the rents for existing tenants are shown to be rising excessively fast. If this declaration, known as a Rent Pressure Zone (RPZ), is approved by Ministers and then, in turn, the Scottish Parliament, annual rent rises for existing tenants, but not the initial rental asking price, would be restricted to a specified percentage for a maximum period of five years.

About this report

Section 2 looks at the history of rent control in Scotland, detailing the various factors which brought about these two new measures. It also reviews how similar arrangements currently operate in six European jurisdictions, as a means to set the changed Scottish situation within a broader context. This comparative element outlines the nature of the private rental market in each country, the rights of tenants and the nature of the actual 'rent regulation' measures being employed. The data monitoring and adjudication procedures that support such interventions are also discussed.

Section 3 then considers, in detail, the procedures and information being called upon to support the implementation of these two measures. This includes a review of the structure and quality of available data on the private rented sector and private rents. The views and current understandings of tenants on these 'rent regulation' measures are then also brought to bear, through exploring how they as individuals might go about exercising their new right, should they consider a subsequent rent rise to be too high. The recent guidance issued to local authorities, detailing how to make a submission to Ministers to designate a RPZ, is also examined.

Although the actual details of each national tenancy arrangement differ, reflecting distinct cultural, socio-political and legal traditions nonetheless, there is a high degree of similarity, both in terms of the policy ambitions and the actual intervention measures being practiced. By carefully considering how these matters have been addressed within other jurisdictions, and then comparing them with the ambitions and procedures set down for the Scottish arrangements, a number of recommendations for further reform are offered by way of conclusion in **Section 4**.

2 Rent Control and Rent Stabilisation

Brief History of the Evolution of Rent Control and Rent Regulation

Rent controls were introduced early on in the twentieth century and initially involved putting in place a maximum price ceiling. Rent freezes, or rent capping become standard practice right across Europe, arising out of public expenditure constraints imposed by World War I. In Britain's case, rent restrictions were introduced in 1915 as a war time measure, to help control wages and thus the cost of munitions manufacture (Melling, 1983). In this instance, government fixed both rents and mortgages at their pre-war 1914 level. Such rent freezes persisted throughout the inter-war period, because of continued public expenditure constraint, the result of the vast public debt incurred through pursuing hostilities and the consequential major economic depression of the 1930s. With World War II this hard form of rent control, termed 'first-generation' rent control, persisted and lingered on long afterwards. Such controls continued in Britain right into the late 1980s.

While rent control measures were common place, throughout the first half of the twentieth century, they were progressively modified and then in many jurisdictions done away with altogether, during the later years of that century (Arnott, 1995; 2003; Turner and Malpezzi, 2003). Following the 1973 oil crisis, and the emergent rampant inflation, a 'second generation' of rent control programs emerged, which typically allowed rents to increase annually, by a certain percentage, and also generally allowed supplementary additional discretionary rises in response to some combination of landlord cost increases, in response to cash flow and/or profitability concerns (Arnott, 1995; 2013; Turner and Malpezzi, 2003). Some national programs also excluded housing constructed after the application of rent controls, as well as properties defined as being luxury housing, while others sought automatic de-control when rents reached a specified level. In other places, there was also de-control when the local vacancy rate rose above a certain threshold, or when the tenants of rent controlled property vacated. These 'second generation' rent controls, were characterised as representing a gradual relaxation, or softening of the previous long-standing hard controls.

Latterly, in what has been termed the 'post-stagflation' era, in which high interest rates and low economic growth slowly gave way to very low inflation and high growth, rent control became perceived as a less pressing housing policy issue. Some jurisdictions retained their rent control programs, but due to reduced inflation rates, rents under the guideline rent increase provisions slowly drifted upwards towards market levels. In other jurisdictions, with gradual de-control, a free market position emerged over time.

Many jurisdictions dismantled rent controls entirely, most notably the UK in 1988, while others such as those in Scandinavia changed the form of controls that previously applied. Arnott (2003) argued that this evolution was so varied it largely evaded public notice, perhaps because private renting was generally in decline, given the subsidisation of other tenures, the advent of more accessible mortgage finance and the perceived limited profitability of private renting. This led to a gradual convergence to yet another form of rent regulation, whereby rent increases are controlled, but solely within an individual tenancy, as there is no restriction on the rents being asked. These 'third-generation' rent controls, or tenancy rent control, are generally considered a form of 'rent regulation' (Sandbu, 2015). As is clear from the introduction, the Scottish Government's PRS tenancy reforms have, in effect, brought into being a variant of 'third generation rent' control, after 30-years of a free market being in operation.

As previously noted, the explanation for this change relates to the housing market repercussions falling from the 2008 global financial crisis. Predicated on poor mortgage lending practices on low value American housing, which spawned a 'property bubble' funded through mortgage-backed securities and collateralised debt obligations. The resulting crash, predicated on the failure of these lending vehicles, impacted negatively on the international mortgage lending market resulting in a marked shift back to private renting and away from home ownership in certain countries. This has, in part, been facilitated by the imposition of stricter lending requirements for first-time buyers, and the parallel utilisation of new financial products, the Buy-to-Let mortgage, which spawned an entirely new investment stream into this segment of the housing market. It was the consequences of this particular financial re-adjustment that has encouraged, right across Europe, the revisiting of 'rent regulation' measures. Thus, again the recent Scottish tenancy reforms merely reflect a broader pattern of international housing policy reform targeted at a now revitalised and in some cases burgeoning PRS.

The ubiquitous use of the term rent control acts to obscure understanding about these particular housing policy changes, because it is such a loaded and highly politicised term. For example, press cuttings about the Scottish Government's ambitions in proposing a new tenancy often implied a return of rent control and thus the setting of rent caps. Yet it is clear that what the Scottish Government sought, in terms of reform, was not rent control in the popular and politicised understanding of that term, but rather a degree of rent safeguarding, via 'rent regulation'.

Rent Control and Rent Regulation in Europe

Rent regulation and rent control measures have recently been gaining a wider currency across Europe. Given this, there was some value in undertaking a brief comparative examination of the different PRS rental systems which currently operate in six different European countries. This comparative review and critique also sought to contextualise the recent PRS policy changes in Scotland, through better understanding how rent monitoring, rent regulation and control measures have developed and altered in recent years. It was also hoped this would offer some insights into the practicalities and complexities involved in creating and managing such systems, revealing how similar issues have already been addressed within each of these different jurisdictions.

Approach adopted

All European jurisdictions have, at one time or another, intervened to control the rents charged by private landlords, through pursuing a range of different rent regulation policies that sought to assert differing degrees of control over the actual rents charged. While 'first generation' rent control measures were common place, throughout the first half of the twentieth century, they were progressively done away with in many jurisdictions during the later years of that century, as already noted. Through time, what replaced them was either a move to an outright free market in private rents, or some variation of the 'second generation' rent controls, which allowed rents to rise by prescribed amounts, while also facilitated discretionary rises related to particular landlord cost increases. More recently there was a view that rent regulation was being allowed to 'die on the vine', as many countries allowed the re-emergence of a free market, while others altered their regulation mechanisms to exercise a degree of control over the rents charged within individual tenancies, so-called 'third generation' rent control, rather than resorting to previous blanket tenure wide rent regulation. This is often characterised in the literature as a move from 'hard' to 'soft' rent regulation. However, following the financial impact of the 2008 global financial crisis, with the marked rise in private renting and move away from home ownership, resulting in an unexpected readjustment of many national housing systems, most notable of which has been new pressures for private rented housing, there has been a marked switch back to some form of overt rent regulation.

Given this study's specific focus, particular attention was paid to how these changes, whether termed rent regulation, rent regulation or rent control, have played out in different countries: namely, France, Germany, Ireland, The Netherlands, Sweden and Denmark. As is evident from the map below, all but one of the selected countries operate 'rent regulation' arrangements that seek to control both the rents being asked for by landlords and any subsequent rise in that tenancy, whereas Germany only seeks to control rent rises within the tenancy, not the initial asking price. However, as will quickly become evident each does this in quite different ways, and while there are national arrangements these can be added to, or also superseded by local arrangements within particular cities, or parts of cities, via measures that seek to address rental 'hot spots', making the notion of national patterns something of a challenge.

Consideration of the Irish system, had much to commend it given the similarities with the recent Scottish experience. Ireland has rapidly moved away from a free market, after they previously enacted a broad suite of PRS reforms. By way of contrast, Sweden still operates very traditional rent control measures, that apply equally to both public and private rented housing. Although latterly undergoing perceptible changes, the basis of this system has been in place for over 60 years. Uniquely, the Swedish system involves direct tenant participation in the actual process of rent setting. Germany, offers another perspective, in that rent control has returned to many large metropolitan areas, following concerns about rapidly rising rents. Here these rent changes were evident at the municipal scale, given there is a long tradition of collecting and regularly publishing local rent data. Similarly, France now has two major rent control areas, one covering the whole of the Paris metropolitan area and another embracing the city of Lille. Here what are termed rent observatories are used to monitor rental changes, which then informs local policy and practice. Denmark and the Netherlands offer two examples of more dramatic change from previously very tightly regulated arrangements, that set rents on the basis of property quality and location via a property amenity points system. Both are now coming under pressure in relation to deregulation of property at the executive end of the market, a pattern evident throughout Europe.

EUROPEAN PRIVATE RENTAL SYSTEM 2017					
Country	PRS as % of stock/ increasing, stable or declining	Tenancy type	Rent regulation arrangements	Rental data	Welfare type
France	20 / stable	Fixed three-year - secure	In tenancy controls + city specific rent restrictions	Local rent observatory	Corporatist welfare
Germany	40 / stable	Open –ended secure	In tenancy controls + free market at top end + city specific rent restrictions	Regular local authority listing	Corporatist welfare
Ireland	15 / increasing	Fixed four-year, moving to open- ended secure	In tenancy controls + city specific rent restrictions	Residential Tenancies Board	Liberal
Netherlands	8 / declining	Open-ended secure	Utility value points + free market at top end	Local authority	Corporatist welfare
Sweden	29 / declining	Open-ended secure	Utility value points + free market at top end Direct tenant union involvement	Local authority, plus tenants' union SABO	Social Democratic
Denmark	14 / declining	Open-ended secure	Value-based & cost-based + free market top end	Rent Tribunal	Social Democratic

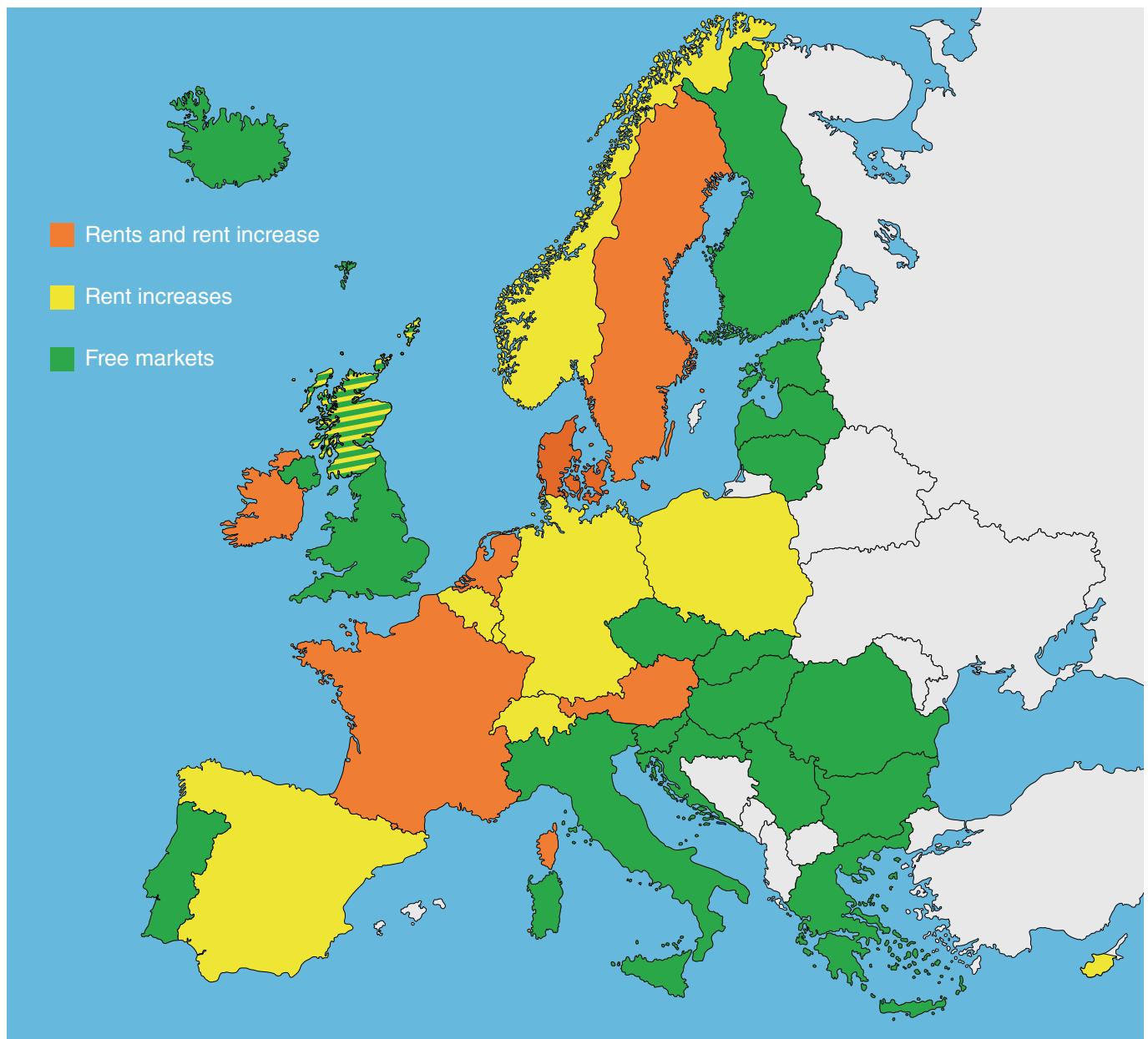
Core issues to emerge

The evidence presented from these six countries reveals that the operation of 'rent regulation' varies depending on the specifics of the national housing context, local housing market conditions, the continuing influence of past rent regulation regimes, the nature of enforcement practices, fiscal policy in respect of landlord businesses and overall land planning and property funding arrangements. Although there is little in all of this material to suggest these varied 'rent regulation' policies act to hold back the provision of new housing supply, given the arrangements being discussed are almost exclusively variants of 'rent regulation' measures and not the housing *bête noire* of rent control. Interestingly, in relation to additional measures focused on particular urban 'hot spots', there is also little evidence that such measures act to ensure such popular rented accommodation becomes significantly more affordable.

Each of the six housing national housing systems were undergoing a period of major transition. Further, each of them had witnessed a marked increase in demand for private rented accommodation, albeit that for many this had not increased overall supply, as a declining trend in private renting persists in the Netherlands, Denmark and to a lesser extent, in both Sweden and Germany. As a consequence, in some places, this has produced significant rent increases well above current inflation rates, raising serious affordability issues. It would also appear, although the specifics of intervention differ, depending on past housing practices and welfare policies, this is a trend which is affected in different ways by the housing market repercussions falling from the 2008 global financial crisis. In Ireland, with the marked collapse in the housing market, renting came under intense pressure, whereas in the Netherlands, Denmark and to lesser extent Germany, the decline in renting profitability has encouraged a switch to property selling on the part of landlords, many of whom are large businesses, and especially of the higher quality popular urban stock.

Demand for renting property has increased in certain countries as access to home ownership closed down, most spectacularly in Ireland. Whereas in other places, notably Germany, Denmark and Sweden, it is the growing market for home ownership, in countries traditionally dominated by different forms of rented accommodation, which has put pressure on the rented market because this has taken rental stock away, especially in the places experiencing increased rental demand. Although the triggers differ, all record a resulting marked jump in private rents and it is this which has produced the political response resulting in the re-emergence of some form of 'rent regulation'.

European 'Rent Control' and 'Rent Stabilisation' Arrangements 2017



Source: Adapted from Kettunen & Ruonavaara (2017)

This new phase of regulation tends to focus on subsequent annual increases, rather than the capping of rents. Typically, a benchmark rent rise figure is agreed, usually linked to inflation, which is then applied to all tenancies. In addition, within what are shown to be rental 'hot spots', through analysis of rent bid and charging data, then further additional locality specific restrictions also come into play. In some places such as Paris, Lille, Dublin, Cork, Munich and Berlin very large numbers of tenancies are affected, given such places traditionally have higher levels of renting than the national averages. The two Irish Rent Restriction Zones, Greater Dublin and Greater Cork, together embrace some 65 percent of Ireland's entire rental market. These zones were introduced, because of continued serious concerns about rapidly rising rents, despite a two-year national rent freeze being enacted in 2015. Ireland had become seriously concerned about the implications private rent rises were having on government's finances, given the high proportion of tenants in receipt of housing allowances.

To some degree, both these approaches, or elements, mirror what is about to be rolled out in Scotland. Any RPZ, if declared, would restrict subsequent rent rises for those holding that tenancy, but not what was being asked in rent for new tenancies. Outside of that specific area focus, the Scottish provisions merely try and keep any general rent rises down to market levels, given the prime concern here was to stop significant rent rises being used as a proxy for evictions.

Beyond the 'hot spots', most countries operate 'rent regulation' in many different ways, from Ireland's two-year blanket rent freeze, to sticking with tradition rental systems, such as those in Sweden and the Netherlands that employ house quality based points systems to calculate a rent which is below market rates. Both seek to exercise a downward pressure on rents. The Scottish variant on this is conceived as an individual right of appeal, should a tenant consider a proposed rent rise to be too high. Neither of Scotland's 'rent regulation' measures, from this international comparison, could be construed as constituting 'hard' rent control. Arguably, both would find themselves located at the more liberal free market end of a 'rent regulation' spectrum.

From the evidence offered up by the European comparisons, the sector wide 'rent regulation' measures can be effective, in terms of reducing tenants' rents and in the process curbing overall government spending on housing allowances. However, it is not clear how such measures act to improve matters over the long-term, especially in the absence of concerted efforts to boost additional housing supply. Overt supply-side solutions, as were used in the immediate post-war period, are no longer evident in any of the six countries examined. Thus, 'rent restrictions' primarily offer a useful stop gap, a breathing space, but not a long-term solution to rapidly rising private rents.

Another observation falling from this cross-national comparison, is that while there has been strong political pressure to return to stronger rent control measures in the face of rising demand and a limiting or limited supply, in specific urban 'hot spots', such powers have not been able to limit further rent rises. This was most evident in Ireland, Germany and also France, all of which had previously been free market jurisdictions of sorts. The reason is that landlords within these high-pressure areas locations, now subject to such restrictions, have been able to largely ignore them because tenants, keen to secure, or retain a tenancy, opt not to enforce their newly gained rights.

The overwhelming impression from considering the European evidence is that it is households on low and middle incomes that are being squeezed out of good quality rented housing within capital cities, or regional centres, and they are being replaced by those willing and able to pay the high rents. This is considered to be a new wave of gentrification, largely driven by rent changes and not, as in the past, by tenure changes. That said, in some instances tenure change is also occurring in parallel, adding further to these local housing market pressures. It is in these particular locations where private rents rise well ahead of wages, and new supply is markedly below that being demanded. This issue is less evident outside of these major capital cities, major conurbations or regional centres, although each country has its own specific localised 'hot spots'.

It is also very evident that past housing policy practices, given the power of 'path dependency', have sustained distinct policy trajectories in very particular ways. For example, the unitary housing market traditions of social democracy, evident in Sweden and Denmark, which is also mirrored in the welfare corporatism of Germany and France, has allowed for the continuation of systems that have long challenged the free reign of the market. Regulation, in one form or another, has stayed in place and still enjoys a high degree of popular acceptance. That said, it is in these countries that the pressures for change, and especially deregulation at the top end of the rental market, appear to be creating particularly acute problems. Not least through undermining of long held assumptions of what constitutes a fair rent and relatedly, security of tenure. The charging of the full cost of improvements, directly onto tenant rents in Germany, has become a displacement tool, which has forced many long-standing tenants out of secure tenancies in popular urban neighbourhoods. Such property is either rented out at a higher price, or with vacant possession sold on into owner occupation.

Scotland's inheritance is that of the free market, as was Ireland's. Perhaps because the repercussions of the crash following the 2008 global financial crisis represented such a challenge to Ireland's housing system, the move to a far more tightly regulated system has been very rapid. Scotland may have mirrored many of Ireland's tenancy reforms, but given less overt rent rise pressures, produced less of a commitment to tightening rent regulations. Scotland, as a political entity, also does not currently carry the housing allowance costs, as these are still a 'reserved matter' within the current devolution arrangements.

Finally, what does stand out in all of this is that each of these countries possess far better data on private rents, than currently exists in Scotland, and that possessing such data is critical to the implementation and operation of their particular 'rent regulation' legislation. All the countries had in place rental data sources that recorded not only asking prices being advertised, but also, critically, the rents being charged within a tenancy. Not only does this data provide far more detailed information on the actual rent being paid by tenants, but because of its policy heritage, in that it draws from past rent control traditions, it is also far more detailed in respect of property type, age, condition, amenities, useful square meterage and location. Where utility value pointing systems existed, to help set an appropriate rent, such details have always been collected. As the coverage of such data has also always been very high, given the adoption of standard agreed data parameters and collection methods, the generated information can be easily broken down to small spatial entities and tied into other local spatial planning data. There is also, generally, better data linkage in relation to the rent, property quality, the tenant, and the landlord and/or agent.

Such detail and granularity are in stark contrast to the rental market data collected managed by Rent Service Scotland (RSS), largely for Department of Works and Pensions (DWP) Local Housing Allowance (LHA) purposes. When compared with the rest of Europe, Scotland, and the rest of the UK, offers up PRS data which is both limited in its quality, information range and spatial coverage. This situation reflects a long-standing general lack of interest in this housing area, given its previous insignificance and the operation of a free market system. It is only in the last 10 years that landlord pricing information has been sought out, and that was to better control housing allowance welfare spending within the sector. Given private renting's markedly changed situation, and the international evidence offer here, such a situation is no longer sustainable.

3 Scottish Government's Policy Ambitions for Private Renting

In the Programme for Government 2015-16, within the housing section, a Private Tenancies Bill was announced, which was described as follows:

"The Private Tenancies Bill will increase security of tenure for tenants while providing appropriate safeguards for landlords, lenders and investors. This is part of the Scottish Government's broader approach to reforming the private rented sector to make it a more professionally managed and better regulated sector, that provides good quality homes, and is attractive to those who want to live, work and invest in it.

Introduce a Scottish Private Rented Tenancy to replace the current Assured system.

Remove the 'no-fault' ground for repossession, meaning a landlord can no longer ask a tenant to leave simply because the fixed-term has ended.

Provide comprehensive and robust grounds for repossession that will allow landlords to regain possession in specified circumstances.

Provide more predictable rents and protection for tenants against excessive rent increases, including the ability to introduce local rent controls for rent pressure areas.

Create a more streamlined, clearer to understand tenancy system that is fit for the modern private rented sector."

(Scottish Government, 2015, 6)

Private Housing (Tenancies) (Scotland) Act 2016

Having a new tenancy regime was the central plank of the entire legislative package. As the then Minister for Housing and Communities, Margaret Burgess reflected:

"There was a huge amount of evidence that tenants were being denied their rights. Tenants complained that they were just being asked to leave, despite having adhered to the lease. So, if tenants followed the tenancy, and did everything correctly, then only specific grounds to end the tenancy should be used"

In May 2014, the Scottish Government's Private Sector Tenancies Review Group had recommended the creation of an entirely new tenancy regime (SGPTRG, 2014a). The Private Housing (Tenancies) (Scotland) Act 2016, represented the Government's considered response. The core measures set out within this new Act included:

- Enhanced security for tenants, with the loss of the so-called 'no fault' ground, which had allowed landlords to seek possession of a property on the basis that the agreed period of let, typically six months, had come to an end
- Introduction of a model tenancy agreement with certain mandatory clauses
- Simplification of notice requirements with the replacement of Notice to Quit, Section 33 Notice and Section 19 Notice (AT6) by a new Notice to Leave with two notice periods for landlords and one for tenants and no need for the previous pre-tenancy notices
- No defined term of a lease and no minimum period of let
- New grounds for recovery of possession, some mandatory and others discretionary
- Rent increases limited to once every 12 months, and with a right for tenants to refer what they consider an excessive increase to a Rent Officer
- The opportunity for local authorities to implement restrictions on future rent increases in locations where there are excessive rent increases by the creation of Rent Pressure Zones

Opting to reform the tenancy regime constitutes a critical housing reform, given the central role tenancy plays in determining the overall functioning of this particular housing market. This legislative reform, as it worked through the Parliamentary process, also challenged the free market position, albeit that this was not the Government's intention.

The Scottish Government had always been keen to stress these reforms were about enhancing tenancy rights and as part of that ambition, introducing greater predictability. However, political pressures exercised during the passage of the Bill ensured 'rent regulation' also became part of the mix.

The new tenancy fundamentally altered the nature of the relationship between landlords and tenants, moving it decisively from a contractual to a statutory legal basis. The new Private Residential Tenancy will, over a short period of time, replace both Assured and Short Assured tenancies. Margaret Burgess considered the 2016 Act: *"necessary to rebalance the relationship between landlords and tenants"*.

As the two final bullet points above illustrate the Act also introduced a degree of rent predictability, as well as a degree of protection for tenants against excessive future rent increases. In her foreword for the *Programme for Government 2015-16*, the First Minister, Nicola Sturgeon, made a specific comment on rents, in stating that: *"The Private Tenancies Bill provides tenants with protection against excessive rent rises, while also giving clear rights and safeguards to landlords."* (Scottish Government, 2015, 1). As already noted in the introduction, given the significance of the tenancy changes, especially in relation to tenancy period and the grounds for repossession, a degree of rent protection was considered as a necessary backstop.

With the move from a short six-month tenancy period to an open-ended arrangement, there was a need to introduce a degree of rent predictability, as much for landlords as for tenants. With the advent of the open-ended tenancy regime there was a concern, both on the part of housing rights campaigners and also the government, that landlords might be tempted to use a significant rent rise as a quick and simple means of ending a tenancy. Under the previous short-assured arrangement there was an effective ending of the contract tenancy, at the end of its six-month duration, via the so-called 'no fault' ground for repossession. As Liz Ely, of Living Rent, noted: *"we had campaigned for rent restrictions, given that with the 'no fault' ground gone you could get 'no fault' de facto by rent increases"*. Rent increases, under the previous Short Assured regime were typically tied to the tenancy change, but with an open-ended tenancy arrangement now in place arrangements to allow rent increases needed to be built in. Under the Private Residential Tenancy rent rises are only permitted annually, and to be legal tenants require to be notified in writing three-months in advance. This gives both tenant and landlord a degree of rent predictability, in that rent rises will occur no more than once per year, as opposed to being random. Further, tenants can challenge what they deem to be an unreasonable rent increase, by referring the rent rise demand to a Rent Officer, who then determines the going market rent. This adjudication is also subject to an appeal to the new First Tier Tribunal (Housing and Property Chamber). It is this mechanism that is designed to challenge vexatious rent rises, although the use of the market as the means to determine an excessive rent rises, as will be argued later, may prove problematic in particular cases.

The second 'rent regulation' measure introduced into the legislation allows local authorities to make a case to have 'all or part of the authority's area' declared a Rent Pressure Zone, if they could show that a particular location had been subject to excessive recent rent increases. In order for local authorities to properly serve such a notice to Scottish Ministers they would need to provide evidence which demonstrates that:

- Rents payable within the proposed rent pressure zone are rising by too much
- Evidence that such rent rises are causing undue hardship to tenants
- Offer evidence that the local authority is coming under increasing pressure to provide housing, or subsidise the cost of housing, as a consequence of these rent rises

Unsurprisingly, strong opposition to these two rent specific additions to the original legislative package were voiced by landlords and investors. The managing director of Cullen Property ably articulated these concerns, when stating that:

"While many of the Scottish Government proposals for a new private rented sector tenancy will enhance security and flexibility for both tenants and landlords, evidence points to the fact rent controls will hinder investment in the sector, dis-incentivising small and large landlords from participating and/or maintaining their properties to a high standard. The consequences will be a drying up of supply and limiting choice for tenants, as well as a depleting the quality of the stock."

(Source: Business Insider, 2015, 14).

Housing academics, Professors Kenneth Gibb of Glasgow University and Peter Kemp of Oxford, when interviewed for this study, also both expressed the view that rent controls act to distort market signals and, as such, represent an unhelpful intervention within any housing market, the position long held by housing economists. What is argued here, however, is that this legislative change does not represent a return to 'hard' rent control, but rather the advent

of 'rent regulation' (Arnott, 1995). As will be illustrated through an in-depth consideration of the legislation and its supporting guidance, these two positions are subtly different. Characterising these changes as 'hard' rent control is therefore inaccurate and unhelpful.

Political Compromise and the Emergence of Rent Regulation

Both these 'rent regulation' measures did not constitute a significant part of the policy work which led up to the introduction of the Bill in October 2015. The Private Rented Sector Tenancy Review Group's recommendations and subsequent public consultation exercise had focused solely on changing the nature of the tenancy, while studiously avoiding any mention of rent control or rent restrictions (SGPTRG, 2014a). Proposals on 'rent stabilisation' were introduced relatively late in the day, in the second of the Scottish Government's consultation exercises on what form the new tenancy should take. Warnings that any attempt at rent restrictions would most likely reduce future investment by landlords and investors had held great sway throughout the initial policy formation stage (see SGPTRG, 2014b). Their inclusion within the 2016 Act thus offers an illustration of how the clear aims and ambitions of any Government, in respect of legislative reform, is often required to bend in response to the political realities inherent when pursuing legislative change.

Rent Pressure Zones

The RPZ, which gave local authorities the power to make a case to Ministers to declare such a measure, came about via political trade-offs and compromises which were made more significant by Ministers also coming under internal pressure from their own grassroots members at the SNP annual conference. This pressure was further reinforced by certain MSPs voicing deep concerns about rapidly rising rents in places such as Aberdeen. Ministers and MSPs were also subject to intense lobbying by the tenants group Living Rent, which had mounted a campaign to bring about rent control. As John Blackwood, of the Scottish Association of Landlords and also a Private Rented Sector Tenancy Review Group, member recounted:

"There was pressure coming from Labour and the Greens, given that in London there was much talk about the need for rent control. The SNP Government said it would consult, but had no plans to control rents. Rather what it wanted was greater predictability for tenants. The Greens crucially wanted greater security of tenure first, and then rent control"

The recent guidance (Scottish Government, 2017a) clarifies that local authority RPZs applications will only be considered valid if they provide sufficient evidence to demonstrate that a). rents are rising excessively in a particular area; b). these rent increases are causing undue hardship to existing tenants and c). rents are having a detrimental effect on the authority's broader housing services. The guidance also confirms that the locus of such a Zone is to be tightly specified such that:

- Any designated RPZ will only protect existing tenants who have a Private Residential Tenancy from rents rising by too much. The RPZ provisions do not extend to any other private tenants that live in the zone but have a Short Assured tenancy, and Assured tenancy or a regulated tenancy (a private tenancy which began before 2 January 1989)
- Any approved rent rise cap will only apply to rent increases for existing tenants in the zone for up to five years. It will not apply to initial rents for new tenancies, which will continue to be market-led
- The spatial coverage of a RPZ is intended to cover distinct localised areas as opposed to the whole local authority area

"The area to be designated might, for example, be a street(s), a postcode sector or a datazone. The data and evidence provided to support the application must match the area chosen. For example, if a street is proposed, evidence must be provided at street level. Therefore, when choosing the extent of the proposed RPZ, local authorities need to give careful consideration as to how they will collect the required data and evidence for that area in a way that is robust. The provisions in the Act on rent pressure zones address the problem of rents rising by too much in hot-spot areas and they are not intended to be applied to a whole local authority area. The RPZ provisions have been designed in such way as to prohibit the introduction of blanket national rent capping."

(Source: Scottish Government, 2017, 1)

Proof of evidence

The Guidance details nine criteria that outline the requirements that a local authority application for a RPZ must address in order to be considered valid.² These criteria are listed in **Appendix 1**. Four criteria focus on 'proof of evidence' and are discussed in detail below. The other criteria are of a more procedural bent, or seek to ensure those affected are properly informed of what is happening.

Excessive rent rises (criteria 3): According to criteria 3, the evidence required to show rents payable within the proposed RPZ are rising by too much are:

- A profile of PRS property characteristics (e.g. house type, size, age, location) and details of any changes to this profile impacting on rent changes
- Time series administrative, survey or other data showing the size of the rent increase, for existing tenants in the same properties, in a range of property types, sizes and ages
- Information on sample used to demonstrate the rent increase (e.g. sample frame, sample size, sampling approach, non-response rates, sample error or biases and coverage issues such as efforts made to increase coverage)
- Details of the methods used to analyse this evidence
- A statement based on this evidence (and any other evidence gathered) to explain why the local authority believes that rents are rising by too much in the proposed RPZ

It also makes clear:

“Rent data must be collected from existing tenants who have had a rent increase (in the same properties) and be representative of the PRS profile of the area. Other rent data (i.e. new lets) can be used as context only and cannot be used as supporting evidence as they may not represent the rents of existing tenants”

(Scottish Government, 2017, 8)

Causing tenants undue hardship (criteria 4): Guidance does not prescribe specific methods or data sources for assessing tenant hardship. However, it does require local authorities to submit details about the sources of evidence used and the methods employed for collecting and analysing this evidence. The guidance also reiterates that data on new lets will not be accepted as core supporting evidence because it may not necessarily represent what existing tenants are experiencing.

Adding to pressure to provide housing (criteria 5): As well as stressing the methods used to gather, collate and analyse evidence are transparent, the guidance asks local authorities to ensure applications are accompanied by supply plans, policies or strategies to help demonstrate how the proposed the RPZ ties into the overall strategic ambitions for housing.

Proposed annual rent uplift (criteria 7): Local authorities are asked to propose and justify the percentage point (X) that should be added to the proscribed CPI + one percentage point base, when calculating a new maximum rent increase within the RPZ, by demonstrating its impact on tenants, landlords and other relevant parties. This cap has been set has to be at least CPI, plus one percent so that, as the guidance states: *“investors will feel confident when planning their investments.”* (Scottish Government, 2017, 2). Moreover:

- Ministers have the power to add an additional percentage to the figure proposed by the local authority, if they consider it appropriate
- Private landlords, within any declared RPZ, will be able to apply to Rent Service Scotland, for a determination of a specific additional rent amount, to reflect any improvements made to their property, via the Improvement Cost guideline figure
- Discretionary powers exist to exempt individual properties from the specified cap, if they have undergone improvements

Early draft guidance proposals that local authority submissions should provide evidence of the impact this change would have on at least six businesses likely to be affected by the proposed RPZ were dropped.

² The guide also offers technical advice on quantitative and qualitative evidence that might be marshalled by a local authority, including a six-page annex that offers advice on methods, data analysis, sampling and conducting interviews.

In light of the implications for both tenants and landlords affected by a RPZ declaration, and the fact any declaration could be challenged in Court, it is not surprising the RPZ criteria are both detailed and extensive. However, for any local authority to meet all the specified criteria would represent a very big ask, given much of the evidence demanded is not readily accessible.

Challenges of meeting proof of evidence

For local authorities seeking to apply for a RPZ, the ability to measure and monitor local private rental market developments will become all important. With the new tenancy only coming into effect on 1 December 2017, and as the supporting evidence requires to be based exclusively on the rent paid by existing tenants, who have a Private Residential Tenancy, it could take upwards of three years before the evidence base to make an application is available. This timeframe reflects the time needed to pass before a sizable number of the new tenancies are in place to ensure a statistically valid sample of in tenancy rent increases.

There are currently no private rents data sources that would provide the evidence needed to support a RPZ application. As the guidance confirms, RSS rental data, which is the source for official statistics of private rents, is only considered useful when setting the broader context, given it is not designed to provide robust information below the BRMA area. The Scottish Government, also confirmed in written correspondence, that local authorities will need to gather additional information on RPZ rents.

Any local authority data gathering exercises would require to be on-going exercise, in order to build up information that tracks annual rent increases to both inform any application process and, thereafter, to police RPZ adherence. Local authorities may also lack sufficient intelligence to specify precisely the spatial boundaries of a RPZ in advance of data collection. Data gathering exercises may, therefore, need to be conducted over a somewhat wider area in order to later firm-up the proposed RPZ spatial boundaries. Cutbacks mean that local authority in-house research capacity is now thin on the ground, so authorities would more than likely need to commission consultants to gather and analyse the necessary data, which is likely to add the cost of what will inevitably be very challenging and speculative endeavour.

More generally, given the purpose and criteria that require to be met in order to even establish a RPZ, it would be disingenuous to characterise this measure as rent control as it is commonly perceived. Reflecting back on the frenetic discussions which led up to the introduction of the Bill to the Scottish Parliament, Margaret Burgess observed:

“We should take a lot of time to think about it, given things don’t always work out as you expect, the significance of unintended consequences. ... We need to be careful about interfering in the market. Tenants being unable exercise their rights is one issue, rent control is a quite separate area and it needs a lot more research.”

Arguably, such sentiments are reflected within the strict published guidelines. The ability to secure a RPZ declaration is perhaps in stark contrast with the ambitions set for it by Living Rent, as articulated by Liz Ely:

“High rents are an issue, so we were keen on RPZs, and from our point of view they were a good result. We see them as a good means to build local campaigns, and the Glasgow Group is currently working on having one declared for Glasgow.”

Tenants’ right to challenge proposed rent rises

The second ‘rent regulation’ measure, which is directly open to all tenants, in possession of the new Private Residential Tenancy and the Short Assured Tenancy, is the right to challenge a proposed rent increase by requesting it be adjudicated by a Rent Officer by applying to the RSS. Part of the policy rationale to include this in the new tenancy was to put in place a ‘back stop’ to curb the potential for landlords to use an excessive rent rise to circumvent the new statutorily defined repossession grounds.

Through section 32 of the 2016 Act, the RSS are required to determine the ‘open market rent’, should a tenant opt to challenge the landlord’s proposed increase on the new Private Residential Tenancy. The Act specific section reads as follows:

32. Determination of open market rent

- (1) *“Where an order maker is to determine the rent under section 25(1) or (as the case may be) 29(1), the determination is to be made on the basis that the property in question would be let by a willing landlord to a hypothetical willing tenant under a new tenancy which would –*
 - (a) *be a private residential tenancy,*
 - (b) *begin on the date on which the rent would have been increased in accordance with section 22(4) had a referral to a rent officer not been made,*
 - (c) *have the same terms as the tenancy to which the referral or (as the case may be) appeal relates.*
- (2) *In determining the open market rent of the property under subsection (1), the order maker is to disregard –*
 - (a) *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,*
 - (b) *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.*
- (3) *In a case where two or more persons jointly are the tenant under a tenancy, a reference to the tenant in subsection (2) includes any one of them.”*

When a tenant takes a case to the Rent Officer, then they are obliged to accept their decision, or if unhappy with it they can then appeal to the First-Tier Tribunal, whose decision will be final. Interestingly, the benchmark set here is specified as the ‘open market rate’. So, if a tenant considers their proposed rent rise to be too high, then the appeal process defines that as being above the ‘open market rate’. The ‘open market’ measure might not immediately be the one tenants take to be the determinant of an excessive rent rise request. It would also be hard to construe this particular intervention measure to be rent control as it is most commonly understood. Commenting on this change, John Blackwood, Scottish Association of Landlords, observed:

“Individual challenges to their rent rise, go straight to the Rent Officer, and there is no requirement to provide any justification. So, Rent Officers are likely to get bombarded with requests and then Rent Officers will, in effect, set these rents”.

This then begs the question just how do Rent Officers go about determining whether a proposed rent rise is excessive, that is more than the open market rate?

Role of Rent Service Scotland

To gain a clear understanding of the role of the Rent Service Scotland (RSS), both in terms of setting rents and their role in the administration of this new ‘rent regulation’ measure, an interview was conducted with Christopher Donaldson, Head of Rent Service Scotland. The first port of call should a tenant considers a subsequent proposed rent rise to be too high will be the RSS. Rent Officers will be charged with making an ‘open market rent’ determination, and that will be compared against the landlord’s proposed increase.

RSS has 60 years’ experience of undertaking rent adjudications, initially for Fair Rents, introduced under the Rent Act, 1965, and then from April 2008 they were asked, as part of the Housing Benefit reforms, to set local benchmark rents for the Local Housing Allowance (LHA), for private rented properties, where the tenant is in receipt of Housing Benefit.

That organisational and operational legacy, feeds directly in the Rent Officer’s new rent determination task. To determine the ‘open market rent’ will involve extracted relevant comparable rent evidence from their Market Evidence Database, and then applying their own professional knowledge and intuition. In time, once the new Private Residential Tenancy beds in, tenants will start appealing rent rises if they consider them to be ‘excessive’, and then the Rent Officer will be tasked to adjudicate. RSS anticipates they might have to process some 1,600 adjudications in the first year, but the assumption is that this will progressively fall back over time. The basis for that working assumption is not at all clear, given the growth in Private Residential Tenancies over time, and increased understanding of the system on the part of tenants might equally generate more appeals.

Alternatively, given the benchmark is set at a market rate, this might actually discourage appeals as the final rent may well be higher than the rent rise they are appealing against. Clearly, the day-to-day workings of local rental markets will also be the crucial factor here, in that this will determine rent levels and what landlords consider to be an appropriate rent.

Role of the First-Tier Tribunal

As noted earlier, tenants, or for that matter landlords who disagree with the rent set by the Rent Officer can appeal to the newly created First-Tier Tribunal (Housing and Property Chamber). This takes over from the Private Rented Housing Panel (PRHP), established after the Housing (Scotland) Act 2006 to consider repairs matters within the sector which, in turn, took over from the Rent Assessment Committee that had been set up under the Rent Act 1965 to support the, then, Fair Rent system. It inherited all the PRHP's previous responsibilities, these also include applications for rent determinations by tenants with an Assured or Short Assured tenancies and the factoring registration and appeals issues dealt with by the Home Owner Housing Panel (HOHP). More generally, the new Tribunal will also deal with applications from either tenants or landlords, where they consider the terms of the new Private Residential Tenancy are not being met.³

Rent rise appeal cases will be considered by two people, a Surveyor Member and an Ordinary Member, and they will take place throughout Scotland. In considering any such appeal they will have the rental figure supplied by the Rent Officer in making the adjudication, and can then supplement this with additional information, such as directed on-line property searches, the locus of which would draw on their own professional expertise and intuition. In the case of a two-bedroomed flat in the Govanhill district of Glasgow, they are likely check data on two-bed flats from the same post code area, over the previous six-month period. This exercise would provide a range of rents, so then the issue of compatibility would then come into play. Are the properties all flats, or are some houses? Are the advertised amenities similar, or are there noticeable differences, such as the quality of kitchen and bathroom fittings, or the presence or absence of central heating or double glazing. Supplementary targeted on-line searches might require to be added, within Govanhill and its wider surrounds. The Surveyor Member, undertaking this work, will also inspect the actual property, given there can be specific issues pertinent to the dwelling that might have a bearing on its rent. That level of detail, it was explained, is not something current Rent Officers' procedures facilitate.

In hearing the case the Tribunal can also consider direct written and verbal representations from either the landlord, the tenant, or both. Interestingly, the Rent Officer who makes the original adjudication is not asked to appear. Given what has been said, there does appear to be some degree of leeway open to Tribunal members when considering a rent appeal, given they can avail themselves of additional and specifically targeted information, as well as testimony from the contesting parties and an actual property visit. The appeal procedure is thus far more involved than the work undertaken when the Rent Officer considers an appeal application.

This is, of course, entirely new territory, for although the Tribunal builds on from its original Rent Assessment Committee architecture, first hearing Fair Rent appeals under the 1965 Rent Act, later amended under the Rent (Scotland) Act 1984, assured and short assured tenancies under the Housing (Scotland) Act 1988 it now has to build up cases under the new provisions of the Private Housing (Tenancies) (Scotland) Act 2016. Each appeal is particular, given the specific requirements set down in legislation. The Fair Rent provisions of the 1984 Act, (s.48(1)) are, however, important in relation to the issue of comparability, as they specify that Rent Officers and the Tribunal must have "*regard to all the circumstances (other than personal circumstances) and in particular ... To apply their knowledge and expertise of current rents of comparable property in the area ... having regard to the age, character and locality of the dwelling house in question ... its state of repair ... quality, quantity and condition of furniture [provided for use under the tenancy]*". David Bartos, Advocate describes collecting the evidence for such appeals as being a 'composite task', drawing this terminology from the *Western Heritable Investments v. Hunter* case (Scottish Courts, 2004).

Interestingly, rent determinations and rent appeals have also always exhibited a degree of serendipity. As a long-standing Housing Panel member commented: "*I have served on the PRHP [now the First-Tier Tribunal] for 20 years now, and much of that time served on the rent committee. I still have no idea how the Rent Officers come to a determination*". Similarly, Rent Officers are never very sure just how rent appeal decisions were arrived at, either through the Rent Assessment Committees, or the succeeding PRHP. No doubt the same will be true for the Tribunal. Clearly, there have long been different ways of undertaking what is, in effect, the same task, that of setting a rent.

³ The First-Tier Tribunal for Scotland (Housing and Property Chamber) will deal with a range of determinations (see <https://www.housingandpropertychamber.scot/who-we-are>). It will take on the functions which previously were carried out by the Private Rented Housing Panel (PRHP) and the Homeowner Housing Panel (HOHP). This includes factoring adjudications.

Given the 30-year period when there was a free market in private rents, there was no real incentive, or requirement to build up a comprehensive dataset on private rents. The 2016 Act changes that, and for all those involved in supporting the Act's provision, the requirements that fall from the new Act will represent something of a learning curve. The way both parties, RSS and the Tribunal go about that process will be interesting to observe, especially in relation to the interplay of the data they use and their respective practices. Rent setting and adjudication, from reviewing the evidence, would appear to be more of an art than a science.

Monitoring PRS Rents

As noted earlier, in the comparative section, good quality rental information is a standard requirement for supporting any 'rent regulation' policy across Europe. An important issue for this research was, therefore, to consider what evidence currently exists to monitor private rental trends and the movement of private rent levels over time. Of particular interest is whether such data provides the quality of evidence required to make these two new 'rent regulation' measures workable.

There are six 'official' sources of evidence which relate to private renting, albeit that three draw from a single data source, namely the RSS Market Rental Database which, as was noted earlier, was created to determine annual LHA levels for DWP administration of the housing subsidy system, Housing Benefit. Rental information for this database comes from a variety of sources but, in the main, it is the rent being asking for via published landlord advertising.

The Scottish Government's Private Rented Sector Statistics is, in effect, the annual reporting of this database, so it provides average monthly rental figures, by property, by bedroom size, for each of the DWP's defined BRMAs. The ONS Index of Private Housing Rental Prices also draws on the RSS database to construct its Scottish component. This developmental project seeks to gain a better understanding of rent rise patterns right across Britain, which seeks to better inform national calculations underpinning the CPI Index, the new national guide to inflation. There has long been a concern, that because of poor PRS rent data, this critical element of household expenditure, which now includes a significant and ever increasing proportion of the population, is effectively ignored when calculating CPI. For rent comparison purposes, as an index measure it does not offer hard information on actual rent levels, so can be discounted in this context.

The other three datasets are the Scottish Government's Scottish Household Survey (which now includes the House Condition Survey), the DWP's Family Resources Survey (which includes the Households Below Average Income Dataset) and DWP administrative data, accessed via Stat-Xplore. While the first two surveys provide useful insights at the Scotland-wide level, they cannot support any robust analysis of the private rental market and conditions within the sector at local or small area level. Likewise, Stat-Xplore can be employed to offer some useful insights on the rent paid by households claiming Housing Benefit, but it predominantly covers the lower end of the private rental market.

Consequently, although each of these sources offer an insight into the rents being paid, as opposed to those being asked for, their limitations in terms of sample size, specific focus, information content, geographic scale and accessibility ensures they can offer little to support the 'rent regulation' measures as neither individual tenants, nor local authorities could use them to better inform their decision-making.

As the RSS Market Rental Database constitutes the sole source of Scottish PRS rent data, then it clearly demands closer inspection.

RSS Market Evidence Database

As noted already, the prime function of the RSS Market Rental Database is to determine annual LHA levels. The information collected is also employed to inform RSS's long-standing Fair Rent review work and will, in future, provide data to inform all Private Residential Tenancy rent increase adjudications. The Scottish Government have, however, made it clear that in relation to RPZ applications, this data can only be employed to set out the local housing market context, but cannot be used to indicate rent level changes, because it primarily covers rental asking prices not what is being paid within tenancies (Scottish Government, 2017, and see Appendix 2). Local authorities are, therefore, expected to commission their own local rent surveys to furnish such data. The other problem with this data set is that given its sample frame, which is driven by the BRMA, it cannot offer robust average rent level data, below that regional geographic scale.

To meet the BRMA requirements set for Scotland, a 'representative sample' of around 10 percent of all private lets, for each house type, defined by bedroom size, in each of the 18 BRMAs is collected annually. The PRS population for each of the BRMAs is calculated from a combination of local authority landlord registration records and the Census returns. With the sample size agreed, then annually local rental data for each of the property types, as defined by bedroom size, is collected. Christopher Donaldson, Head of RSS explained: *"Rent data comes from estate agents, letting agents, adverts in shop notices and printed adverts, as well as Facebook and Gumtree. Information is also taken from both Zoopla, and City Lets, although we don't take direct feeds. Over time we have changed the mix of sources, so more data comes from landlords via links with Scottish Association of Landlords and the various local authority PRS forums. This was largely done to reflect the changes in internet use within the PRS"*

Rent data may be sourced in a wide variety of ways, but in the end 97 percent of the rent information comes directly from advertised rents (Scottish Government, 2017b). Rent Officers are expected to continually evaluate the composition of the rent lists used for LHA purposes, and where necessary, based on their professional expertise and intuition, divert resources from their regular data collection instruments to targeted returns in order to provide additional information which addresses any perceived weaknesses in the current data. Given the scale of material coming solely from advertising sources it is not clear just how regularly collected and special targeted data collections are organised to deliver a 'representative sample' for each property type, defined by bedroom size, for each of the 18 BRMAs.

Collected data is required to cover all private lets, but excludes 'mid-market' rents, student halls of residence and private tenancies, subject of Housing Benefit claims and any regulated tenancies. Data includes a minimum level of address, property attributes and tenancy details. Rents relating to studio or bedsit properties, properties with five or more bedrooms, and Bed and Breakfast lodgings though collected, are not published, given their small sample sizes. Similarly, rents for bedrooms in shared properties are presented as a 'rent only' figure, thus excludes the cost of shared services.

While the information gathered is then employed internally by RSS to calculate the LHA rates for Housing Benefit, within each BRMA, by house size, and also provide evidence to help inform Fair Rent adjudications, it is also published annually by the Scottish Government (2017b). As such this document constitutes the only publically accessible source of statistical information covering private sector rent levels for Scotland. The reporting is, however, constrained by the way the data is constructed, so the findings are on a Scotland-wide and BRMA, by bedroom size only basis.

The latest report thus noted that:

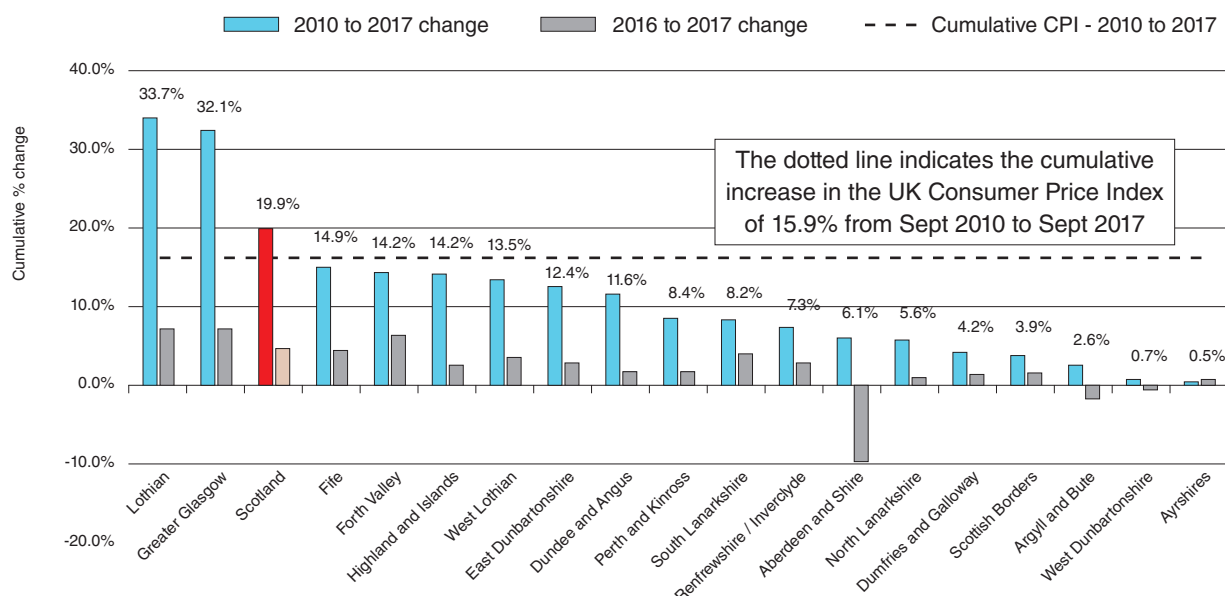
"15 out of 18 areas of Scotland saw increases in average 2-bedroom private rent levels between 2016 and 2017 (years to end Sept), ranging from 7.0% in Greater Glasgow to 0.7% in the Ayrshires. Rents for 2-bedroom properties in Aberdeen and Shire fell by 9.6%, the third consecutive annual decrease.

These regional trends combine to show a 4.4% increase in average 2-bedroom monthly rents at a Scotland level from £616 in 2016 to £643 in 2017.

At a Scotland level there were also increases in rents for 1-bedroom (4.0%), 3-bedroom (4.6%), 4-bedroom (4.9%) and 1-bedroom shared properties (3.0%).

These increases compare to UK CPI inflation of 3.0% in the year to Sept 2017.

CHART 1: Cumulative % Change in Average (mean) Rents from 2010 to 2017 (years to end-Sept), by Broad Rental Market Area - 2-Bedroom Properties



(Source: Scottish Government, 2017, 1)

Main findings for average rent changes between 2010 and 2017

Average rents have increased above the rate of inflation between 2010 and 2017 across all property sizes in both Lothian and Greater Glasgow.

East Dunbartonshire, Fife, Forth Valley, and Perth and Kinross have seen average rents rise above the rate of inflation for 3-bedroom, 4-bedroom and 1-bedroom shared properties.

Argyll and Bute, Dumfries and Galloway, and West Dunbartonshire have seen average rents rise less than the rate of inflation, or have seen average rents fall, for all property sizes between 2010 and 2017.”

As is evident from the above, RSS data is very broad brush, given the sample size does not allow for reporting below BRMA, to either local authority or below local authority scale. Not only that, but the Scottish Government urges some caution: “the Private Sector Rent Statistics for Scotland publication allows an assessment of market-evidence average rents, along with changes over time at a BRMA level and by property size, although some caution is needed in interpreting the results given that the composition and quality of private rental stock can vary by area and can change over time.” (Scottish Government, 2017, Annex D). Its value in supporting the policy ambitions of the ‘rent regulation’ is, therefore, highly questionable, and this relates to three technical concerns: the construction of the baseline figures, both nationally and locally, sampling sizes and procedures and, finally, the quality of the collected data.

Baseline calculations

Calculating the overall baseline figure for the number of private rented properties in Scotland is not an easy task. Although it is a legal requirement for landlords to register their rented properties with the local authority not all do so, despite the risk of incurring a £50,000 fine. Further, not all local authorities share their landlord registration data, so Census data is drawn upon to supplement local information, even though the Census by now is quite out-of-date. The date of the last Census was 2011, and there has been a marked increase in private renting since then. Both qualifications mean that the baseline employed could be significantly under estimating the actual size of Scotland’s current PRS market. This is important as it determines the sample sizes then employed within each BRMA. In response to these concerns, the overall sample size for Scotland was recently increased from 27,000 to 30,000, which set at 10 percent of the overall stock size, puts the PRS at some 330,000 dwellings. Yet, industry experts still consider that figure to be an underestimate.

Dropping down the scale, the **Rent Officer Handbook** states that a BRMA is an area: “*within which a person could reasonably be expected to live having regard to facilities and services for the purposes of health, education, recreation, personal banking and shopping, taking account of the distance of travel, by public and private transport, to and from those facilities and services*”. Further, the BRMA is subject to two further conditions:

- “1. *It must contain residential premises of a variety of types, including such premises held on a variety of tenures.*”
- “2. *There must be sufficient numbers of PRS premises to ensure that, in the Rent Officer’s opinion, the local housing allowance for the categories of dwelling in the area for which the Rent Officer is required to determine a local housing allowance is representative of the rents that a landlord might reasonably be expected to obtain in that area.*”

(Source: Valuation Office, 2017)

How the BRMA boundaries are arrived at still remains clouded in some mystery, and is one of the least transparent aspects of the current Social Security system. Christopher Donaldson explained that: “*The BRMA in Scotland are larger than those in Northern Ireland and Wales, but the Scottish Government has no say in their size, as these are defined by the DWP for LHA payments*”. That said, it is the case that RSS were asked to recommend BRMAs, based on the above objective criteria, so the boundaries were not imposed.

While the setting of BRMA boundaries is not a central concern of this research, it has some relevance given the current geographic unit employed cannot support statistical reporting at local authority and small area level as this would be helpful to those, whether individuals or local authorities, when deciding whether to utilise the new provisions open to them under the 2016 Act.

At their current scale, the Lothian BRMA for example, averages the rents for the 2-bedroom accommodation across the whole of the Lothians, thus Edinburgh’s Marchmont, Old Town and New Town districts, which currently experience high demand, are combined with areas with less demand such as Dalkeith, Roslyn and Penicuik in Midlothian. So, does the Lothian figure get pulled up by Edinburgh rents, or pulled down by Midlothian’s? While this currently has a bearing on the Lothians’ LHA determination, and thus local affordability issues for those claiming Housing Benefit, in future it effectively makes it impossible to draw on this data to decide whether or not your rent rise in Marchmont is too high. The Lothians figure is next to useless, given the high-demand being currently experienced in that particular locality.

BRMAs are ultimately defined by Rent Officer judgement, which within Scotland, appears unduly weighted towards the number of cases needed to feed their Market Rental Database, especially outside of the four main cities. Further, it was not evident how, or even if, Rent Officers employ the 2011 Census as a benchmark to help them ensure a proportionate spread of data, by property type and geography. Further, it is also not clear if sufficient consideration is being given to the other factors which Rent Officers are specifically asked to take account of in undertaking this exercise. Northern Ireland, which already operates much smaller BRMAs, is currently undertaking a review of their size to better fit the requirements of their LHA determinations. That would suggest the current size of the Scottish ones should also be reviewed, especially given the additional demands now being placed upon them in Scotland. There is a wider problem here, and the noticeable lack of Scottish Parliamentary scrutiny in respect of this seemingly technical matter, which highlights a more serious gap in both housing and welfare policy. As welfare powers are retained under the devolution settlement the Parliament has tended to ignore their operational architecture. That said, given the imminent increase in Social Security powers this is likely to change. It is also worth remembering that the Smith Commission (2014) talked about the Scottish Government taking powers to vary LHA rates and, although this has not happened, there is now an increasing interest in welfare matters by Scottish politicians. The large size of BRMAs has always caused major problems within high rent pockets in otherwise low market areas. A good illustration of this is provided by high Arran rents sitting within the wider Ayrshires BRMA, producing a LHA rate that fails to match the actuality of rents being advertised on the island (Craigforth Consultancy, 2013).

Sampling size and procedures

There are two sampling concerns which fall on from this, namely the size of the sample and the use of the so-called ‘combined approach’ to achieve that sample, across house types within each BRMA. The 10 percent sample can only ever represent a ‘guide figure’ at BRMA level, argued RSS, not a definitive number. As noted earlier, to address these potential weaknesses the local knowledge of Rent Officers is brought to bear, through confidence testing and the interpretation of other available data to refine the sample guide level. In this way, a ‘representative sample’ for each property size, as defined by the number of bedrooms, is eventually worked through for each of the 18 BRMAs.

In terms of the broad number of cases being sought, assuming an equal split per BRMA the number of cases averages just over 1,660, and that then is further divided by the 4-bedroom sizes. While the different BRMAs will clearly differ in size, depending on the scale of local private renting, it is also clear that the cases numbers, per property type, could be quite small indeed, and thus run the risk of skewing the generated average rent figure.

In England, the Valuation Office considers a 20 percent sample to be appropriate within BRMAs, double the current Scottish sample. In England, all but one region has equivalent effective sample of over 44,000. The Scottish sample, as noted above, was recently raised to 30,000. In the North East of England, the final sample is just 24,000, whereas each of the other regions (excluding both North East and London/South East) have a sample base of over 100,000. Why a 10 percent sample threshold is used in Scotland, while a sample double that is expected in England is not clear, nor from what has already been said, justifiable.

Further, in the absence of a robust up-to-date baseline or sample frame, conventional sampling techniques such as quota and random sampling are not possible. As a result, RSS rely on an approach which combines the use of both regular and specifically targeted data sources on rents. Certain techniques employed to capture additional rental data appear, if anything, somewhat haphazard. As Liz Ely noted: *"RSS asked Living Rent to get information on the rents charged to tenants, but we did not think it was our job to try and get members to provide that information"*. Whereas, when John Blackwood, of the Scottish Association of Landlords, was asked to do the same: *"As landlords we supported the RSS ..., by sending out their rent data forms to all our members – both landlords and agents - and encouraged them to fill them in and return them"*. Such data additional collection instruments appear problematic, in that quality control in relation to data accuracy is hard to achieve, and the obvious imbalance in returns from landlords and tenants merely further acts to skew the data towards landlord sources.

It is also surprising no attempt has been made by Scottish Government statisticians to provide a case-matched, tracked-sample, or weighted-index approach to better monitor changes to rent levels over time. It is technically possible, as the ONS currently do this for their rental index which draws from the same Scottish data sources. Perhaps scaling up might introduce concerns about repeat cases being present within the dataset. Finally, constantly altering the data sources must have some impact on the actual quality of the data, and thus its accuracy.

Data quality

As presently framed, the RSS database does not attempt to record rents being paid by tenants, rather the database records locally advertised rents, by the bedroom size of that property. As is made very clear in the latest official publication on private rents: *"The rental information contained in the market evidence data base is largely based on advertised rents, therefore it is important to note that the statistics presented in this publication do not represent rent increases for existing tenants"* (Scottish Government, 2017, 2).

There are two dimensions to this issue, one relates to rent rise lags and the other, as to whether the asking price recorded is the actual rent achieved. Dan Cookson, a housing data expert raised the first issue point: *"So has there been a rent change over the three or four years the tenancy has run? Over a long time, there may not have been any rent rise. Rents tend to change at a tenancy change over. If tenants were deemed 'good', then landlords were happy not to increase the rent. When they go, the place gets freshened up, and a higher rent is then asked for. If there is high demand and a limited supply, then this rent will be realised. But measuring what rents are actually being paid, as opposed to be asked for is, therefore, a real challenge"*. Anecdotal evidence from Liz Ely further illustrates that point: *"Tenants don't always know what the going rate is. I rented a flat for a long time and the monthly rent was £450. When I left it was advertised at £650"*. Consequently, the rents being recorded on the RSS database may not reflect what is actually being paid by this who currently hold a tenancy.

This then leads into the potential disparity between what is advertised and what is achieved. As Dan Cookson observed: *"A substantial amount of that rent data now comes from portals, and what is never asked is whether that rent is achieved. So, we do not have a handle on what actually happens within the tenancy. With advertised rents, prices change and inflation also plays a part so what is advertised, it's not always a true reflection of what is actually happening in the market"*.

John Blackwood offers a useful insight into the rental disparity issue: *"Aberdeen was the big pressure area when the Bill and RPZ was progressing through Parliament. But now rents paid are anything between 30 and 50 percent below the advertised. Landlords in the city are trying to ... stop rents falling below the 30 percent less figure."* Aberdeen and Shire BRMA, had long been the classic 'hot market', before witnessing a recent downturn in oil related activity. Last year, rents fell by 9.6 percent, the third consecutive fall in the last three years (Scottish Government, 2017). However, given the above observation, just how accurate is that figure? While the portal generated data from Aberdeen based letting organisations will record these asking prices for new lets, were they

achieved, or were landlords happy to accept a lower price? And what was happening within existing Aberdeen tenancies? Given the dramatically changed circumstances within the local market were existing tenants able to negotiate a reduced rent?

By contrast, within Scotland's two current 'hot markets', Edinburgh and Glasgow, rental asking prices are likely to be achieved. As Liz Ely, of Living Rent noted: *"You know what people are paying in the local area through friends' knowledge, or by doing a bit of a recce on local adverts, Gumtree or City Lets. Ok these are bid prices, but that is what they get in Glasgow and Edinburgh, where I have some knowledge, you'll never get it for less"*. So, in some parts of the country assumptions about the advertised asking price can be taken to be a proxy for the going rate, but in other places this may well not be the case. Currently, given the nature of the data collection instruments it is bid price rents that are captured, and not what people are actually paying. Other surveys record this, as we have noted, but the scale is country wide, so again of little help to those who might think about utilising the new 'rent regulation' powers of the 2016 Act.

Official concerns about overall data quality are also exposed by the technical endorsement of this statistical source. The Private Rent Statistics publication states: *'Official and National Statistics are produced to high professional standards set out in the Code of Practice for Official Statistics. Both undergo regular quality assurance reviews to ensure that they meet customer needs and are produced free from any political interference'* (Scottish Government, 2017). However, on inquiry, while this document is an Official Statistics publication, it does not carry the classification of National Statistics. National Statistics is a term used for statistics publications that have been assessed by the UK Statistics Authority (UKSA) and certified as being compliant with their Code of Practice. The Private Rent Statistics Bulletin is produced to comply with the standards, as set out in the Code of Practice, however, the output has not been assessed by UKSA, therefore, only the Official Statistics classification was deemed to be the appropriate quality descriptor.

A changed situation for rental data

Recording what is actually being paid by tenants will become a more pressing matter, following the implementation of these new tenancy provisions. This is because one of the unintended consequences of this new tenancy package is that it will alter the existing pattern of rent rises. As John Blackwood, observed:

"The new legislation is interesting as it implies landlords will raise rents annually, but I don't know landlords that automatically do this presently... I ask landlords when did they last increase the rent and they say, I don't put up rents. They say the rent comes in, and they look after the place, so I don't bother"

However, he went on to suggest that by: *"Setting down a law that states you will have rent rises each year, will produce more rent rises ...annual rent rises will become automatic"*.

While landlords might take time to adjust their practice, agents who typically work on the basis of a percentage fee, are more likely to get tuned into this change and automatically build in annual rent increases. There was a view expressed that tenancy 'churn' was financially advantageous to agents, given the fees charged by agents to secure a new tenancy. With the advent of more secure tenancies, and as a result less turnover, then there will be an incentive on the part of agents to replace that loss of 'churn' income. This further adds to the case for having more accurate information on local rent level being charged rather than what is being asked for.

As such a dataset does not currently exist to provide that information its worth quickly considering how we might achieve this. As Blackwood argues: *"We do need to get to a better idea of the market"*. The ultimate system would be to get access to all the rental data, on both new and existing lets, and structured in such a way to allow for the calculation of rent rises. So how exactly could that information be secured?

Commercial rent data sources, such as Zoopla, City Lets and Letting Web could be combined to offer one single data source, but as has already been argued that data solely provides advertised rentals, not necessarily the rent finally agreed, and it says nothing about the rent being charged for an already existing tenancy. While some of this information currently feeds into the Rental Market Database it is also worth considering the small number of cases each of these sites record, within any period, when compared to the scale of the overall private rented market. The tail in this instance is wagging the dog.

Agents and property managers are another obvious source of rental data, but there would be major challenges accessing consistent data from these varied sources. Each agent collects rental information for their clients as well as for their own commercial purposes and that is not something they are likely to share. They are also likely to employ different software packages, and use varied information parameters that vary depending on their requirements. It is also the case that such entities are not in the business of collecting information for others to use.

Crucially, no one is offering them a payment for that data. Clearly, left to its own devices the market could piece all this data together, but only if they saw some value in it for themselves, and that is hard to see. The accessibility of advertised rent data is commercially useful, as it helps frame both landlord and tenant expectations. A data set that reflects the rents actually being paid might be seen to be a means of suppressing rental expectations.

Are there other existing 'official' vehicles that could generate a live, accurate, current and geographically specific dataset on PRS rents? In Ireland, because landlords are required to register all rents with the Residential Tenancies Board, such a dataset has been generated through the provisions of the landlord registration system. That said, it is interesting to note that only 85 percent of 'actual' activity is officially recorded, for a variety of reasons. Rental arrangements turn out to be both varied and complex when you dig down. Further, in Ireland although the Residential Tenancies Board holds the rental data, they would not share it with officials from either Dublin or Cork when they were preparing Rent Pressure Zone applications because they considered that to be a breach of their data sharing protocols. That information could then only be secured via the Department of the Environment.

Within Scotland, landlord registration powers lie with the country's 32 local authorities, and presently there is no single shared database, so each operate to their own arrangements. Data compatibility and protocol issues would thus also arise. Another possibility to source such data would be via the three approved rent deposit schemes operating in Scotland, but to ensure taking on such a function would not commercially compromise operators, all would have to agree to undertake this task. As they already collect quite a lot of relevant information on the tenancy adding the rent figure would not constitute an onerous task. This could be best achieved by using secondary legislation, as trying to get each of the three providers to agree a format themselves voluntarily might be difficult to achieve, given competing business competition issues. The only limitation with this approach is that the rental data captured in this way would likely be limited to actual initial rents, the risk being that this data then becomes dated. However, as the Scottish Government's chief housing statistician made clear in correspondence: "*The Scottish Government has no plans to improve the quality of this data in the near future*".

Tenants' Perspectives on Rent Regulation

The PRS tenants' consultation element of the study focused on their understandings of both 'rent regulation' measures, then exploring as to whether they would make use of these measures. The focus of the questioning drew on the initial detailed consideration of both measures which emerged from undertaking the first phases of the study. In the week that the on-line questionnaire ran a total of 12 people completed it. The on-line study was designed to be part of the first phase of a Shelter Scotland's public awareness campaign, designed to draw peoples' attention to the powers contained within the 2016 Act and coincided with the official introduction of the Private Residential Tenancy in December 2016. Given this tie in, it is likely to have attracted people who had an active interest in these reforms. Two-thirds of the participants were current private renters, and one other had recently been, and planned to rent again in the near future. The other three contributors were non-renters, but had an interest in the legislation, and although the question was not asked, they may well have been landlords.

In terms of what is of major importance when renting it was clear price was most significant, and then how that figure linked to the number of rooms and its location. Both the quality of accommodation and the nature of the heating system were secondary considerations. Tenancy periods ranging from six weeks to 28 years. Interestingly, given that the Short Assured tenancy was designed to run for a six-month period, the majority of these respondents had tenancies running into years, rather than months, perhaps vindicating the switch to an open-ended tenancy regime.

Reflecting the tenancy periods, there was an even split in their experience of rent rises, with half having not had a rent rise, while the other half had. That said, given the long length of tenancy periods, it would have to be said there was no pattern of substantive rent increases, with the percentage rises over time being very small, suggesting an intermittent pattern of landlords seeking to raise rents. That said, inflation had not been a significant factor in recent years. Given what has been said previously about the new Act, about changing landlord culture in relation to rent rises, this is an interesting finding.

Perhaps reflecting the survey's tie in with the Shelter public awareness campaign, all but two of the respondents were aware of the advent of the new tenancy, its annual rent rise stipulation and the tenant's right to challenge any proposed increase, if they considered it too high. Interestingly, all respondents who were renting, or thinking of renting, stated they would be confident about challenging what they considered to be an unacceptable increase. When asked why they would pursue such an action, two noted they had past experience of exercising tenancy rights, with some success. In one of these cases, this had resulted in the installation of double glazing to improve the insulation standard within their flat. Two other mentioned they had recently undertaken basic housing law training, so also again felt confident. Another mentioned that they thought the new Tribunal would be supportive of

their decision. By contrast a few mentioned concerns about possible landlord intimidation, if they pursued such an action. These responses suggest that the participants are people with an interest in such matters and thus perhaps better informed about the law and their rights than the general public.

When exploring what would be considered to constitute an excessive rent increase, most people thought anything beyond the current rate of inflation, though two proffered a 10 percent rise as being the excessive maximum. In exploring what information, they would draw on to help them to decide whether they should appeal against a rent increase, no one made mention of the only official data set on private rents. Most considered local knowledge of rents and recent increases to be critical here. One person mentioned checking with Shelter, while a few others mentioned rent equivalents within the social rented sector, as well as other comparable private rents in the local area, but not one was able to make it clear how such information would be secured. All however were aware of on-line sites such as City Lets and Zoopla. The problem here, as has been argued above, is that these sources provide rental asking prices, bid rents, which are not indicative of the rent people are really paying.

In relation to how they would go about making an appeal only one person mentioning approaching a Rent Officer. Everyone else only had a very basic understanding, with two mentioning seeking advice for a Citizens Advice Bureau, Shelter or their landlord. Another said they would check on-line, or consult the actual legislation.

In relation to the question about their knowledge of RPZs, three-quarters said were aware of them, but a quarter had no idea as to what they were. Opinions about them varied from: *"A daft idea from daft politicians (sorry all politicians are daft, some are just dafter than others)"*; to *"tenants can appeal to local authorities to apply for Rent Pressure status if rent increases are deemed to be unreasonable"*. Some were clear that they had been devised for: *"Areas where rent is determined by demand"*, and where a *"lack of availability, creates demand, a bidding war"*. For those who knew what they were, half of them thought a RPZ should apply in the area where they currently resided.

When asked how they would go about taking forward the idea of a RPZ again views varied: *"I wouldn't try because it's a daft idea which will cause more harm than good"*; to a commitment to: *"Refuse to pay excessive rent levels, and to be the victim of extortion by unscrupulous private landlords"*; to: *"putting pressure on my local authority"*; or simply: *"speak to my local councillor"*.

In exploring what they considered to be the advantages of a RPZ the notion of rent control was very much to the fore: *"Knowing that rent rises will be capped"*. That said, another offered a broader perspective: *"Get a better mix of community, rather than it becoming a zone for exclusive groups"*. Similarly, one respondent offered a more analytical, personal perceptive: *"If it's a RPZ it's likely to be central, or well-connected and, therefore, within a commutable distance of lots of workplaces. An RPZ may make it easier for me to stay put for longer, but time will tell"*. While there was some understanding that a RPZ was not just about stabilising the pressures arising from rising rents, one respondent also saw it as offering a curb on the 'gentrification' of some neighbourhoods. This implies wider concerns about the perceived broader social changes presently occurring, as a result of rent rises, given previously 'gentrification' was primarily considered to be caused by the influx of homeowners into a what had previously been a predominantly rented area. There was also a concern that a RPZ could make matters worse, in that: *"It may mean less private rentals are available, if a landlord no longer makes the vast profits they did previously"*. Overall, there were mixed views about the potential impacts of RPZ, and a noticeable lack of understanding about what the actual powers and guidance determines they will be.

The notion that RPZs are about rent control is, as has been shown earlier, somewhat misplaced, but does play to a very strong private renting narrative. Again, this lack of understanding was surprising, given these respondents though small in number were interested in the reforms and thus were reasonably well informed. Again, this would suggest that the public information program is currently falling short.

The follow-up focus group work involved two separate group discussions, one held in Edinburgh on the 8th of November and another, in Glasgow the following week, on the 15th of November 2017. Both sessions involved engaging with a mixture of invited participants, from established tenants' groups, in the main drawn from the Living Rent Campaign and Shelter Scotland's Private Tenants Forum. In total 16 people participated, and the listing of participants can be found in [Appendix 3](#).

Again, the core consideration being explored was what do tenants actually know about the new tenancy provisions, and how exactly would they envisage going about challenging a subsequent rent rise under the new tenancy arrangement, should they considered it to be excessive? A critical point here, is what do tenants consider to be an excessive increase, and how would they come to such a conclusion. While the question structure was identical to the on-line survey the focus group format allowed for more in-depth questioning of the participants.

With no cap being applied to the initial asking rent, what is commonly understood as rent control is not being introduced, yet this was not really appreciated. Publicity about RPZs had raised the profile of rent control, even although, as was discussed earlier, the locus of the rent elements in the 2016 Act focus on 'rent regulation', which applies solely to any subsequent rent rise. This caused some confusion on the part of participants, and thus underlined the need for clear information on what impact the RPZ policy will have on private renters.

The opening discussions focused on what factors tenants considered as a priority when looking to secure a new tenancy. As with the on-line participants, the cost was the number one issue, the rent level and associated Council Tax payments. For most, being on a limited income, largely determined what they could afford. For one participant, currently in receipt of Housing Benefit, this meant they were now unable to continue living in their preferred city centre location and were now having to consider viewing new flats some 50 miles away. Being under 35, the LHA figure they were working to was just £267 per month. As they want to live alone, the only properties available at that price, within Glasgow, were described as being quite awful, hence the pressure to relocate.

While mention was made of a play-off between being in a central location, and the cost of transport when living further out, convenience meant city centre locations were always preferred in both cities. That said, the focus group population was primarily under 30. For students, in particular, the size of accommodation, in terms of the number of bedrooms was also important, as that then determined how many people could stay, and then what the rent figure could be divided by. They reported that large flats of five bedrooms and a large kitchen, in the Marchmont district of Edinburgh, were now costing £700 per room, per month. Previously, the going rate there for students had been £500 a month. The explanation given for the marked jump in price was put down to the plethora of new commercial student flats and the rents they were charging. Landlords, or their agents were now looking to match these figures. Interestingly, in that discussion, it was also said to be common for foreign students to be asked by some agents to pay the entire six-months rent up-front, as well as provide a deposit.

In terms of internal amenities: *"If would be nice if the flat was well insulated and there was a good gas central heating system, but the bottom line is the rent"*. Much comment was made about the inadequacies of almost ubiquitous electric heating systems and, in one case, someone had actually viewed a flat which did not appear to have any heating. As a few participants were disabled, and thus spent a great deal of time in the property, heating was considered very important, but in the end not a deal breaker.

Landlord reputation in choosing a property was not considered an issue, in that it was not always clear who the actual landlord was, and most people only dealt with agents. That said, agent reputation did play a part, with some people explicitly saying they would not look at properties marketed by certain well-known agents, given either past experiences, or their poor reputation.

The landlord registration system was considered to be of some value, as they were assured there was a system in place. Participants also said they make use of the local landlord registration database to check whether the property was registered. Worryingly, in respect of professional practice, when one participant mentioned to the agent that the property being marketed was not registered, they had replied that was okay. In general, however, people were not clear as to how you would find out about a landlord's reputation, given there were now just so many of them.

Given the provisions of the 2016 Act, and encouraged by the business models employed by certain landlords and their agents, annual rent rises could become the norm so exploring experiences of rent rises, within existing SAT tenancies was of interest. The discussion then moved onto gauging tenant views about what potentially could be a very major change in tenancy practices and costs.

Experiences of rent rises presented quite a mixed picture. Given the number of tenancies individuals had held, seeing any consistent rent rise pattern proved challenging. For one participant, who resided in the same place for three years, at every six-month period when the tenancy rolled on, the rent would increase. Two people mentioned that their rent had increased twice within the tenancy, so that was twice within a six-month period. But many had not experienced a rise during the entire tenancy period, which was in one case three years and in another ten years. In that case, this was because the property was old and needed work carried out on it. Rent increases, however, only really featured when they secured a new tenancy. In terms of the actual amount, rent rises were always referred to in cash terms, an extra £150 a year, rather than in percentage terms. Percentage increases were thus not part of the tenants' current vocabulary on rents. That said, one participant stated: *"From my experience, letting agents tend to go with inflation, and while that seems ok my wages have not kept up with inflation"*.

Bearing in mind these tenants were, in the main, active in the tenants' movement, or had direct contact with Shelter, in the main, they possessed quite a basic knowledge of the new tenancy arrangements. Most, for example, did not realise they would, in future, be able to challenge a rent rise if they considered it too high. That said, as already noted, the official publicity about these new tenancies was only just emerging, albeit a good 18 months after the Act had been passed.

A few participants knew that under the new tenancy arrangements the fixed end date was about to go and in its place, was to be a new open-ended tenancy, that could only be ended through recourse to a legally prescribed set of repossession grounds. Knowledge about these grounds was also patchy, although a few did think that the right for landlords to end the tenancy if they decided to sell, was likely to be widely abused. As one person commented: *“they could just say they wanted to sell, but then just re-let and then say, it didn’t sell”*.

Two participants had direct experience of property sales, during their tenancy, with one having the tenancy extinguished, while the other was required to pay a higher rent to the new landlord. In addition, there was a concern voiced that access to the new tenancy might actually be denied them, if the landlords, or their agents, opted keep them on a rolling six-month contract, tied to the original SAT.

Improved security of tenure was welcomed by everyone, but whether this would result in tenants feeling empowered to assert their tenancy rights met with a mixed response. As one participant said: *“I’ve never complained about anything, because I feel you might just get kicked out”*. Another said, they would challenge issues because that needed to be done. They went on to qualify this by stating that the tenants’ union would undertake challenges in order to set down some parameters. However, for one participant such discussion felt a bit unreal: *“It’s just so far from my reality. I’m not challenging the landlord on the basics, even now. The information is not there. I’m just managing to get by, so its unimaginable to take that on”*. This participant felt there was a serious gap in a general understanding these new rights, with the most vulnerable people being well outside this loop.

There was a strongly expressed view, at both meetings, that the real villains of the piece in tenancy matters were letting agents, and not landlords. Most participants took the view that agents were keen to end tenancies, because they wanted ‘churn’, given it generated additional fees and, with the potential for annual rents rises, an increase in their income, given they worked on a percentage fee basis. Further, as one student participant noted: *“although tenancy fees are illegal, and that was clarified in the last Housing Act [2011] they are still being charged by agents”*. This raises questions about enforcement powers, and the willingness and capacity of regulators to actually enforce the legal requirements.

Having clarified that tenants in future can challenge the rent rise, questioning moved onto just how exactly individuals would go about doing that, and also what would stop them for exercising that right? As with the on-line discussion, this revealed a range of understandings.

In terms of checking whether their proposed rent rise was out of kilter with local rents, mention was made of Googling Zoopla, City Lets and the estate agents Rettie & Co. and Coulters. Shop window adverts were also mentioned, as was asking friends and neighbours in the neighbourhood or stair. The only ‘official’ data mentioned by anyone, and this was a minority, was the LHA rate. But then that was felt to be quite unhelpful in terms of getting any handle on local rent levels. As one Glasgow participant noted: *“the LHA figure for a one bedroomed flat in the city is £370 per month, for that it would likely be a complete wreck”*.

There was a general feeling that on-line access to current the rents being asked for new tenancies was helping to further drive up rents. When the ‘official’ rental data sources were introduced into the discussion, again these were not generally known. National ‘official’ rent data sources were thus, for the most part, invisible.

One participant made the point that unless future rent rises could be broken down into percentage increases, then pitching one rent against the another was always going to be a fraught and subjective exercise. Differences could easily be put down to location, or the quality of the property in question, its décor and furnishings, rather than being out of kilter with local rates. Another noted that if no improvements had taken place, then why should a rent have to rise. They again made the point that inflation rises were hardly acceptable if your wages had stayed fixed for years. Those active in Living Rent took the view that if enough people in one area started complaining, then it might act as a counterweight to ever increasing rents, although they also acknowledged that current Edinburgh rent rises were perhaps a very unique Scottish situation.

This then led into a broader discussion about RPZs, which was generally considered a useful development given accelerating rents in both Edinburgh and Glasgow. That was not surprising given the activist composition of these two groups. That said, no one had seen the guidance covering such declarations, although to be fair it had only just been issued. In discussions about the data requirements and technicalities set out in that guidance, there was some surprise about the amount of information demanded, to ensure the issue was considered by Ministers. Further, if a RPZ was declared, they did not quite follow that a cap on new rents would not apply, and that a rent increase block was to be set at a minimum of CPI plus one-percent, which to them hardly constituted a rent increase restriction. One participant also thought the improvements opt out ensured there was always a way for individual landlords

to avoid any rent control measures. However, participants were not at all concerned about the technicalities of declaring a RPZ, but rather saw them primarily as a focus for local campaigning activity, the means to highlight what they felt were wide-spread concerns about high rents and the need for some form of rent control.

Overall, these discussions revealed real concerns about rent rises within popular inner-city locations, especially in Edinburgh, and about the social changes they were causing. It was also clear that while these reforms very welcome there was a concern that the new powers might be avoided by more unscrupulous landlords, and more so by their agents, given the rule breaking that is currently taking place in relation to deposits and fees. It was also evident that the new 'rent regulation' measures had insufficient publicity and even housing activists were poorly informed about the nature of these new powers and the official procedures put in place to support them. The most striking finding was that no one really had any appreciation or understanding as to how they would judge whether a rent rise was too high. An above inflation rise was the most preferred measure of an unacceptable increase. Crucially, the legal basis for determining a rent rise appeal through a Rent Officer was not well understood. Finally, official rental data was largely unknown.

Procedures, Practices and Supporting Information

As is clear from all this discussion, rent adjudication is likely to become a larger task than it has been the case in recent years. Once core to the work of RSS, in respect of setting Fair Rents, over the last 30 years that task declined markedly as these old tenancies worked themselves out of the system. Now RSS is working on the presumption that, in the first year of these powers coming into place, some 1,600 rent rise appeals might need to be processed.

Adjudication, as a process, has long proved to be a contentious issue. The procedures and process involved in this activity are, therefore, worth exploring, given it brings together all the elements that have been discussed above: the legislation, the bodies charged with regulating the system, their practices in light of that, and the tenants who could pursue such an adjudication.

This was demonstrated recently following a Fair Rent case which was appealed to the Inner House of the High Court of the Judiciary (Scottish Courts, 2017; Upton, 2017). Here the PRHP was asked to adjudicate a Fair Rent⁴ case appeal by the tenant who was dismayed at the substantial rent rise set by the Rent Officer. The rent had risen from £3,504 per year (£292/mth) to £4,788 per year (£399/mth), an increase of 37 percent. While these types of tenancies are now relatively rare and the Fair Rent determination procedure is unique in nature, how these cases proceeded illustrates well how the rent adjudication process works.

In the rent determination appeal the Committee set the rent at £6,204 per year (£517/mth), a 77 percent increase on the original rent. In coming to this decision, the Committee considered Fair Rents for comparable properties but had then chosen to exclude them, as they did not consider that they provided the best available evidence. Instead the committee relied on evidence sourced from internet searches for full market private rental properties in the area. This produced a figure of £7,800 per year (£650/mth), with deductions for the state of repair and the tenant's improvements giving the final Fair Rent of £6,204 per year (£517/mth).

In the appeal to the Inner House the court ruled that the Committee had given due regard to the registered Fair Rents, for comparable properties, but had exercised its judgment, by preferring the evidence afforded by the 'open market rents'. As has been noted earlier, judgement or intuition has long played a part in such rent determinations and subsequent adjudications. It was also made clear earlier that the various pieces of rent setting legislation argue that in any adjudication procedure a composite of rent data is required in order to come to a final determination. However, the most interesting matter to arise out of this decision was the Inner House's refusal to acknowledge any difference between social and private rented sector housing, for the purposes of determining a Fair Rent. Lord Drummond Young, in the appeal ruling states: *"in my opinion privately rented housing and social housing cannot be said to form two wholly distinct markets, they rather form different aspects of a single market in low – or moderate-cost rented housing."* (Scottish Courts, 2017, para 17).

⁴ Fair Rents are a kind of controlled rent for private and social rented sector dwellings which were let out before 2 January 1989. The Rent Service Scotland provides valuations for tenants and landlords and keeps a register of Fair Rents. (Scottish Government, 2018)

The appellant had invited the Court to find that there was a distinction between the rents in those two sectors, and to hold that 'comparable' properties ought to be from the same sector. This was rejected by Inner House ruling. In setting out the legal background Lord Drummond Young, stated there was in his opinion:

"no warrant for treating houses let by housing associations in a fundamentally different manner from other rented property for the purpose of fixing a fair rent under section 48. Thus, in setting a fair rent for property owned by a housing association or other social landlord, a committee may have regard to evidence both of registered rents, including obviously those where the landlord is a social landlord, and of rents fixed by the market in the private sector so far as those are comparable."

(Scottish Courts, 2017, para 15)

The Court went on to state that, in exercising judgment, the Rent Officer or Committee can elect to put greater emphasis on rents charged to properties in the social rented sector, than in the private rented sector, given that those properties appear more directly comparable, but that is a decision for the Committee. Again, judgement in such cases involves drawing on a mix of evidence, to produce a 'composite', to again quote the Advocate David Bartos, and that demands professional judgement and discretion.

Two issues arise from this case which are pertinent to the considerations of this report. The first is the marked disparity in the rents the two adjudication approaches produced. While the focus in this instance was on setting a Fair Rent, the underlying mechanics of the process mirror what which will apply in Private Residential Tenancies appeals, given determining the 'open market rent' was central in both instances. Within a year, RSS will be asked to set the 'open market rent', where there is a disagreement on the between the landlord and tenant, while the Tribunal will be asked to adjudicate on that revised figure, if the first-stage outcome is subsequently appealed.

As matters currently stand, neither the Rent Service Scotland nor the Tribunal's Rent Assessment Committee provide transparency as to the method they employ to undertake that process, so it is quite unclear why their respective rental outcomes were so markedly different. A 21 percent discrepancy between their respective adjudicated market rent demands some explanation. The earlier observation that rent setting is more of an art than science does resonate loudly here. In undertaking this study, it was evident that neither RSS nor the Tribunal had any real understanding or appreciation as to how each went about undertaking their rent adjudication task.

The second point here, which directly relates to the first, is the significance accorded to professional, expertise come intuition, and the differences that apply in this regard in both rent adjudication process. The difficulty here is that such discretion appears to be applied in two quite different ways, by these two official bodies, hence, the markedly different rental outcomes.

Concluding Remarks

Overall, from undertaking this review of Private Housing (Tenancies) (Scotland) Act 2016 we see tenants' rights being enhanced, as a result of having a new tenancy that is open-ended and not, as in the past, time limited. This new tenancy should result in greater security, both as a consequence of the tenancies open-ended nature and the advent of prescribed statutory repossession grounds for landlords. Because of the tenancy's open-ended nature 'rent regulation' provisions needed to be added, so tenants were given the right to challenge what they considered to be a significant rent rise. At face value, this seems both appropriate and proportionate, given concerns that the new statutory repossession grounds could perhaps be circumvented by landlords simply demanding a significant rent increase. In addition, the new Private Residential Tenancy also insists that all previous tenancy rights provisions are clearly stated within the tenancy document issued by landlords, which enhances tenants' rights, while also ensuring landlords fully understand their legal responsibilities when renting a property. To help in this task the Scottish Government has provided a 'model tenancy agreement'.

The Scottish Government was also minded to show concern about significant rent rise 'hot spots', largely centred on Aberdeen at that time, and bowed to the pressure to introduce RPZs, which secured the Bill's passage into law in its entirety. The recent RPZ guidance sets down the detailed case local authorities are required to produce, involving amassing both quantitative and qualitative information, in order for such a designation to be approved by Ministers. Given the implications of such a declaration to landlords, and those investing in private renting, such rigour has some justification.

At the same time, the legislation allows individual tenants to challenge what they consider to be an excessive rent rise. In this case tenants are not asked to make a case themselves, but rather refer the proposed rent increase, in the first instance, to a Rent Officer to have a market rent set. As noted earlier, there is a serious concern that a proposed rent increase may be considered excessive by the tenant, but may well still be less than the going 'market rent' determined by RSS. On receipt of the appeal the Rent Officer will consult the 'official' PRS rental database, for comparable properties, and then drawing on their professional judgement determine what the 'open market rent'

should be. Should that not be accepted by the tenant, or for that matter the landlord, either can then apply to the First-Tier Tribunal (Housing and Property Chamber) for a final adjudication. In this instance, the 'open market rent' will again be independently arrived at, albeit through undergoing a different procedure, given that submissions from both parties are permitted, and a professional assessment of the property in question is undertaken by a Surveyor Member of the First-Tier Tribunal. In looking for comparable rents the intuition and professional judgement of the Tribunal members is drawn upon when constructing a composite of appropriate rental comparisons. Again, given the implications for both tenants and landlords a rigorous appeals procedure feels appropriate, albeit that concerns about the role played by professional judgement in setting an 'open market rent' do arise.

The real problem identified in all of this is the quality of data being drawn upon to make such decisions, and the lack of transparency which surrounds such processes. The Rental Market Database, which is the mainstay of RSS adjudications was created for a very specific purpose, namely to generate LHA rates, at a time when the PRS was quite small. It employs rent data essentially drawn from landlord advertising, which raises questions about its validity as a measure of current market conditions. It is also collected over very large geographic areas, by bedroom size, so cannot offer a local data set that is helpful to those interested in pursuing such a case. As the Scottish Government makes clear, in the RPZ Guidance: *"Rent data must be collected from existing tenants who have had a rent increase (in the same properties) and be representative of the PRS profile of the area. Other rent data (i.e. new lets) can be used as context only and cannot be used as supporting evidence as they may not represent the rents of existing tenants."* (Scottish Government, 2017, 8).

As a result, within a RPZ the only 'official' information collected on rents is deemed invalid, because it does not represent rents being paid by existing tenants, a valid criticism, but in the case of deciding whether individual tenants' rents have been set too high by their landlord, it will be the sole statistical tool employed to inform that first adjudication. This does appear peculiar. For local authorities to make their 'rent regulation' case, bespoke, spatially specific, individual tenancy data noting rent rises within the tenancy is demanded. Whereas, when RSS is asked to adjudicate on tenant rent rise appeals, that very same dataset is deemed adequate. That is not a sustainable position. Further, the First-Tier Tribunal when considering market rent appeals, rather than resorting to a data base of rents constructs a bespoke rental composite every time. How this is achieved will vary, depending on the professional judgements of the two people charged with that task, one of whom is a professional surveyor. The rent data selection is both particular and limited, and in most cases would not be considered statistically valid. Here the approach adopted is data light, and is too heavily skewed towards professional intuition. Access to a systematically generated and comprehensive data set on properties, their attributes and the rents charged would go some way to addressing these concerns.

4 Conclusions and Recommendations

The following conclusions and recommendations endeavour to facilitate wider discussion about what might help improve the operation of the 'rent regulation' measures established by the Private Housing (Tenancies) (Scotland) Act 2016. Hopefully it will also encourage a wider debate about private rents and why most European countries still see much merit in practicing 'rent regulation', despite the many challenges this throws up.

Free market approach to 'rent regulation'

The two 'rent regulation' measures, as the report makes clear, were not a central part of the Government's thinking in relation to reforming the private tenancy. The Government's ambition was to set in place a modern tenancy, as a means of consolidating the regulatory and management reforms they had introduced in two previous Acts. The resulting 2016 Act enhanced tenant security and delivered a set of statutory provisions that are standard throughout Europe, as the report's comparative section illustrates. However, the Act also brought into being a degree of 'rent regulation', something the Government was initially quite wary of.

The introduction of an open-ended tenancy, over a fixed term one, ensured the need for rent appeals to allay a fear that landlords would simply resort to rent hikes as a simple means to breach the new statutory repossession grounds. In addition, strong cross party-political pressure voicing concerns about localised rental 'hot spots' delivered the RPZs. As RPZs were not originally designed to be part of the reform measures, this perhaps explains the apparent light touch subsequently adopted in respect of administering 'rent regulation'. Scotland, perhaps uniquely in Europe has offered up an almost free market approach to 'rent regulation'.

Rent Pressure Zones represent much work for little gain

In reflecting on the legislation and supporting guidance for RPZs, the specified requirements needed before any application can be considered by Ministers represents a big ask for any local authority. Collecting unique data on rent increases within the Private Residential Tenancy will take years to work though, given the tenancy has only recently been introduced. Collecting the required individual household data will be technically challenging and time consuming, thus a potentially expensive exercise. The other contextual elements demanded present equally technical challenges, again requiring significant resources, both in terms of time and money.

Then having invested time, effort and considerable money in drawing up the application, there is then no guarantee of Ministerial, or Parliamentary approval. These procedures contrast starkly with the approach employed in Ireland where, if the defined criteria are met, the RPZ is automatically approved. Finally, if approved then the rent rises of CPI plus whatever percentage addition Ministers set, will then be a need to be monitored and policed over the five-year period.



The complexity, high costs and uncertainty associated with making an RPZ application means that local authorities will need to think very carefully about whether the perceived benefits are likely to outweigh the costs.

And fundamentally, as currently constituted RPZs are not actually about rent control, but rather a curb on outright profiteering. High rents can still be demanded, it is only the subsequent rent rises that will be tied to a rate a few percentage points above inflation. The Government's reasoning here is quite explicit: it does not want to see any loss of investor confidence. Protecting tenants from exploitation was secondary and consequently the impact of the RPZ measures is limited.

Given all this, it seems likely that most local authorities will not consider a RPZ to be an attractive, or necessary intervention to pursue. While it is right that the Scottish Government insists that local authorities must provide a robust and compelling case for a RPZ, given the potential risk of creating further market distortions, the requirements set out in the guidance are exceptionally challenging. Whether by design, or otherwise they may very well effectively curtail consideration of this measure.

Rental 'hot spots' hit the poorest households hardest

Across Europe presently there is strong political pressures to increase or, in some cases re-introduce greater 'rent regulation'. Rents, especially in capital and regional cities are rising fast, in the face of rising demand and a limited supply of rented accommodation or, in some instances, even a decline in supply. Although the catalyst for these changes was put down to the 2008 global financial crisis, and the varied housing market repercussions that fell from

that, the marketisation of the housing system is ultimately the driver of this change, and this was a process already well entrenched before that particular financial rupture.

“ The European evidence also suggests that ‘rent restriction’ powers offer up something of a mixed bag.

In some cases, Ireland, Denmark and Germany, the area targeted rent restriction powers were found to be having a limited impact, because within rental ‘hot spots’ landlords were largely able to ignore the measures, given that tenants, keen to secure or retain a tenancy, and with the income to do so, choose not to exercise their newly acquired rights. Those without such financial power in these localities often found themselves displaced, ejected from neighbourhoods where they had long resided, from properties they had assumed were their home given the secure tenancies they possessed.

Affordability issues demand supply side interventions

In other countries, France, the Netherlands, Sweden, but also in other parts of both Denmark and Germany long established ‘rent regulation’ measures continue to blunt market forces, to a degree.

“ Ultimately, it is supply-side policies, embracing both land-use and the financing new social rented housing, that will have a much bigger and more positive impact on the affordability issues impacting on lower income groups within society.

Public policy-makers came to this conclusion a century ago, and it still has great resonance to this day (Royal Commission, 1917).

Greater clarity is needed in respect of rent rise appeals

The other ‘rent regulation’ measure, that of giving individual tenants the right to appeal a rent increase, should they consider it ‘excessive’, is more likely to be used. However, the report has highlighted several issues that will require careful consideration to ensure this measure is workable and functions properly. Perhaps the first thing to make abundantly clear, is that this provision has not been seen as an instrument to limit annual rent increases, but rather as a means to protect the tenant’s security of tenure, given substantial rent rises could be used as a means to force people out, rather than going through the statutory repossession provision.

The tenant receives notice of a rent rise, and if they consider it too high, they can appeal to the Rent Officer for an adjudication. But, in effect, that decision subjects their proposed rent to market testing. The tenant might be seeking to limit the annual rent uplift, but the rent being suggested might well be below the market rate. In setting the process in motion they are agreeing to accept the market figure which could well be higher than the rent rise being asked for. There is a real danger, that in the mind of tenants these two separate issues then become conflated. Reviewing an annual uplift was designed to ensure tenants do not face undue financial pressure, in any given year, which might make them consider rescinding their tenancy. It is not about whether the rent level is above, or below the market rate.

The official thinking here does need revisiting, and the Scottish Government should issue guidance to RSS and the First-Tier Tribunal clarifying this difference, given the potential dangers in conflating the two issues. One unintended consequence of the move to open-ended tenancies is the prospect of annual rent increases. Having a rent rise appeal system that acts to impose a default market rate may add further to the upward pressure on rents. Public information about this provision is only now starting to emerge. Feedback from tenants made it abundantly clear that much remains to be done to properly publicise and explain this particular provision within the Private Residential Tenancy regime.

Private Rental Market data is inadequate and not fit for purpose

There is a glaring need to improve the quality of rent information available to tenants, so they can check whether any proposed rent rise is too high.

“ What is quite surprising, given this new right for private tenants right, is that there is currently no accessible, reliable public dataset on private rents and annual rent uplifts.

Evidence drawn from the tenant focus group sessions revealed the haphazard way people might go about seeking out such information, none of which offered a substitute to being able to access robust local rent information. ‘Official’ rent information, which draws directly from the RSS, was not known about. In the event, however, it cannot

offer any guide to local rents levels, given the sampling frame was designed solely to serve the DWP requirements for calculating LHA, within Scotland's 18 BRMAs, and thus cannot be scaled to support information at either a local authority or neighbourhood scale.

Then, there is the central issue as to how Rent Officers objectively go about determining 'the' market rent? The study revealed that the data drawn upon to undertake this exercise is not fit for purpose. The robustness of the 'official' data source, the RSS Rental Market Database was called into question given how it is compiled, the sampling frame adopted, data thresholds and the quality checks employed. Given such concerns, it is worth noting that the sample figure employed for English BRMAs is 20 percent of rents, twice that expected for Scotland. That then led into a definitional debate about what constitutes the market, and whether the RSS database provides an accurate reflection of the market.

Information on the rents being asked for by landlords, drawn largely from adverts, dominates the RSS database, whereas the rents being paid by tenants barely feature. These two rent figures can be quite far apart, given the time lag effects in relation to rent rises, given the previous SAT displayed a more random pattern of rent increases over time, as highlighted by both landlord and tenant evidence. Given the poor quality of rental data currently held, there is actually no evidence to confirm, or refute that actual rents differ substantially from advertised rents. Indeed, anecdotal feedback suggested there is no difference in Edinburgh and Glasgow, currently the country's most robust markets. Aberdeen, of course, given the recent collapse in the market, offered a quite different pattern, in that anecdotal evidence suggests agreed rents are below those advertised. That said, the number of tenants with a shortfall in Housing Benefit, as result of cuts to LHA, suggests this gap may be more theoretical than real. More worryingly, if actual rents were included and these were indeed lower than advertised, then LHA rates would fall, causing further affordability problems.

Good data is essential to protect tenants' rights

The lesson from Europe here is that good data is central to effective implementation of tenants' rights and an essential tool in ensuring 'rent regulation'. Yet, this part of the equation is completely lacking in the Scottish Government's approach to date.

“ The 'rent regulation' measures may not have been their preferred approach, but now they are set in legislation it is critical that a proper set of mechanisms are in place to support them, and one of these must be high quality data on private rents.

Given the Scottish Government is demanding that local authorities, in taking forward a RPZ application, need to provide information on house type, size, age and location for the local private market being considered for such a designation, it is odd that they do not expect the data they collect to similarly conform. However, it is clear from correspondence with the Scottish Government there are no current plans to improve on this poor state of affairs.

One relatively straightforward means of securing such information would be to require the capture of specified data fields from the three bodies that currently operate Scotland's Tenancy Deposit Schemes. In holding the tenant's deposit they already collect a range of information on each individual letting. This could be standardised and expanded to cover: the nature of accommodation (size, bedrooms, basic dwelling type, age and crucially amenities), its location, council tax payable, the landlord, the agent (if appropriate) and landlord registration number. One challenge here would be to find a means whereby rent increases are recorded on the data set. To take this matter forward the Scottish Government should constitute a short-life working group to review this issue and sort out the related data protection, access, usage and sharing issues.

Good data critical in supporting the 2016 Act provisions

Having a quality private rental data set, is not just a concern for tenants concerned about rent rises, but must also be a prime consideration for those now being asked to adjudicate on such matters. As was fully discussed, Rent Officers reach their decisions on what constitutes a market rent primarily by drawing on their rental market database. Further, as the recent case law illustrates appeal adjudicators draw from range of other sources, influenced by professional discretion, to produce a unique 'composite' in order to arrive at their view as to what the market rent for a specific property should be. The wide variations in the resulting market rents, thrown up by this particular case, acts to reinforce the need to have a more systematic, consistent, rigorous and transparent method of reaching such decisions. A robust private rental dataset would be of great value here. It is time Scotland, like other European nations, made rent setting more of a science and less of an art.

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Appendix 1: Official Datasets on PRS Rents in Scotland

Source / Title	Author	References / Link	Comments / Observations
Rent Service Scotland Market Evidence Database	Rent Service Scotland	http://www.gov.scot/Topics/Built-Environment/Housing/privaterent/tenants/Local-Housing-Allowance/figures	A more detailed description of the methodology employed to create this database is provided in Appendix 4. This information comes from Annex C of the Scottish Government's Statistics Report on Private Sector Rent, http://www.gov.scot/Resource/0052/00527494.pdf . There are also a detailed set of tables showing sample sizes (numbers of properties' rents recorded) on the database, for each BRMA and property size grouping. This data is only publically accessible through the annual statistical analysis (see immediately below).
Private Sector Rent Statistics	Scottish Government Housing Statistics	http://www.gov.scot/Resource/0052/00527494.pdf	The publication only offers an annual statistical analysis. The rent data drawn from the RSS Market Evidence Database is solely published by BRMA areas only because the number of cases collected on the database are, in most contexts, is too small to support any geographical analysis at a scale lower than BRMA.
Index of Private Housing Rental Prices	Office for National Statistics	https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/	<p>This is a quarterly experimental price index designed to track private rental prices paid by tenants in Great Britain and its constituent countries. Although derived from the RSS Market Evidence Database, there are important differences as to how the ONS process and use that data:</p> <p>“The ONS Index uses the rental data to create a matched-sample dataset to ensure that only like-for-like properties are compared over time.</p> <p>The ONS matched-sample dataset retains rental records for a period of time (an assumption based on average tenancy length), and it is therefore an attempt to measure rental price changes for all rents and not just a measure of recent rental market evidence.</p> <p>The ONS Index is mix-adjusted in that it uses expenditure weights to adjust to the overall distribution of types of properties in the rental market (by expenditure).</p> <p>The Index does not provide any information on actual rental levels, and the Index values provided are not available at a sub-Scotland basis.”</p> <p>What it provides is a Single Index figure, the baseline (100) for which starts at January 2011, which allows rent rises overall to be understood within a common single measure. Full details of the methodology employed to calculate the IPHRP are published by the ONS (ONS, 2013). Further, the ONS have also recently produced an article on comparing measures of private rental growth in the UK (ONS, 2017).</p>

Source / Title	Author	References / Link	Comments / Observations
Scottish Household & House Condition Surveys	Scottish Government Housing Statistics	https://discover.ukdataservice.ac.uk/series/?sn=2000048 Case level data from the survey are available through the UK Data Archive	While SHS collect rental data, the actual amount is removed from the UK Data Archive dataset, for 'disclosure control purposes'. An alternative expression was expressed, namely that a lack of resources ensures the data is not cleaned. However, if for whatever reason, the collected rent data could be accessed, the small sample size ensures its unsuitability for tracking local rent changes over time. The 2014 'sample survey', covers just 1,184 respondents renting from a private landlord, & another 200 renting privately from an employer, family member, &/or organisation. At this scale, small area analysis would not be possible.
Family Resources Survey & Households Below Average Income datasets	Department for Work and Pensions	https://discover.ukdataservice.ac.uk/series/?sn=200017 Case level data are available through the UK Data Archive	Good quality data on incomes and rents, but again the sample size is very small for Scotland. In 2015-16 FRS Scottish sample recorded only 379 respondents who rented privately. Data combined over a number of years might give useful insights into the broad all-Scotland picture. There is a BRMA variable in the survey list, but this is missing from the actual UK Data Archive dataset (all values show up as zero). Given the small sample size the variable would probably be next to useless in any case.
Stat_Xplore	Department for Work and Pensions	https://stat-xplore.dwp.gov.uk/webapi/info/frontpage.htm Scottish data are available at Datazone (coded to Datazones at the time of the 2011 Census, based on the address of the claimant household)	Designed by DWP as a user friendly, on-line tool, to produce Housing Benefit statistics and some other benefits. Its main limitation is that it covers only the lower end of the private rental market, renters in receipt of Housing Benefit. Details the banded amount of Housing Benefit, household type, whether the claimant is employed, and whether rent is paid directly to landlord or tenant. While Eligible Rent is part of the dataset, it is not currently a variable in the database, but no explanation is offered as to why it is not included. As a result, this data set offers good quality, low level geographic data (subject to some random perturbation to preserve confidentiality); but shows only benefit amounts, which will be low for those on partial Housing Benefit and covers only lower end of the market, because of LHA restrictions. So, overall, it can only provide indirect evidence.

Appendix 2: Individuals and Organisations, either Interviewed, or Consulted

Robert Aldridge, formerly Homeless Action Scotland, Edinburgh

Hans Skifter Andersen, Danish Building Research Institute, Aalborg University

David Bartos Advocate, Edinburgh

James Battye, Shelter Scotland, Edinburgh

John Blackwood, Scottish Association of Landlords & First-Tier Tribunal for Scotland (Housing and Property Chamber), Edinburgh

Nick Bailey, Big Urban Data Centre, University of Glasgow

Rosemarie Brochie, Shelter Scotland, Edinburgh

Margaret Burgess, formerly Housing & Communities Minister, Scottish Government, Edinburgh

Andrew Cowan, T.C. Young, Solicitors, Glasgow

Dan Cookson, Housing Data Consultant, Cupar

Aileen Devany, First-tier Tribunal for Scotland (Housing and Property Tribunal) Glasgow

Christopher Donaldson, Rent Service Scotland, Edinburgh

Liz Ely, Living Rent Campaign, Glasgow

Kenneth Gibb, University of Glasgow

Florence Goffette-Nagat, Groupe d'Analyse et de Théorie Economique, University of Lyon

Duncan Gray, Shelter Scotland, Edinburgh

Susan Gilroy, Scottish Government, Edinburgh

Aideen Hayden, formerly Irish Senate Member & Residential Tenancies Board member, Dublin

Kenny Haycox, Edinburgh City Council

Joris Hoekstra, Delft University of Technology, Delft

Mariell Juhlin, formerly Swedish Tenants Association, Stockholm

Peter Kemp, Oxford University

Stefan Kofner, University of Applied Social Research, Zittau Görlitz

Adam Krawczyk, Scottish Government, Edinburgh

Anne Laferrère, Institut national de la statistique et des études économiques, Paris

Barry Stalker, Scottish Government, Edinburgh

Appendix 3: Individuals Contributing to the Tenant Focus Groups

Diane Adams

Penny Anderson

Jon Black

Rebecca Chan

Emma Craig

Liam Don

Scott Donohoe

Gerry Kielty

Tamara Mulherin

Jen Parker

Emma Saunders

Mike Williamson

Pauline Hay (Shelter Scotland)

Jen Leonard (Shelter Scotland)

Annie Mackenzie (Shelter Scotland)

Stephen Wishart (Shelter Scotland)

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