



Legislative Proposals

for the introduction of

Rent Certainty Measures



LEGISLATIVE PROPOSALS FOR THE INTRODUCTION OF RENT CERTAINTY MEASURES

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INTRODUCTION

Threshold is a registered charity which aims to secure the right to housing, particularly for those experiencing the problems of poverty and exclusion, helping some 20,000 people with housing problems annually.

Threshold welcomes the announcement by Alan Kelly TD, Minister for the Environment, Community and Local Government, of his intention to bring proposals to Cabinet for the introduction of rent certainty measures. Threshold has long recognised the need for such measures in the light of an exponential increase in rent levels, particularly in urban centres, which is undermining security of tenure and putting individuals and families at risk of homelessness.

The current legislative framework for regulating rent, as provided for by Part III of the Residential Tenancies Act 2004 ('the 2004 Act'), merely prohibits the setting of rent at a level which is greater than the market rent for a comparable property. The obvious limitation associated with this model of rent regulation, in the context of a crisis in the supply of housing and a resulting inflation in rents, is that landlords may lawfully review the rent payable under a tenancy without any restriction as to the rate of increase in rent. This may ultimately result in the tenant's eviction for non-payment of a dramatically increased rent.

Threshold makes the following proposals for the introduction of rent certainty measures by way of amendment to the 2004 Act with a view to providing certainty for landlords and tenants as to the rent payable during the lifetime of a tenancy, protecting the private rented sector from rapid cyclical changes, and contributing to the effective functioning of the housing market as a whole.

EXECUTIVE SUMMARY

Why?

- The current rent regulation measures provided for under the Residential Tenancies Act 2004 do not protect landlords or tenants from rapid increases or decreases in market rent levels, thereby exposing tenants to the risk of homelessness, and exposing landlords to uncertainty as to their rental income.

Constitutional and human rights

- There is no obstacle either under the Constitution or the European Convention on Human Rights to the introduction of rent certainty measures, provided any such measures amount to a proportionate interference with the exercise by landlords of their property rights [para.1 – 25].

How?

- Rent certainty measures may be introduced by amending the Residential Tenancies Act 2004 to provide for:
 - the insertion of definitions of ‘rent’, ‘lawful rent’, ‘reference rent’, and ‘deposit’ [para.27 – 41];
 - the creation and publication of an index of reference rents by the Private Residential Tenancies Board, drawn from the existing register of tenancies, whereby landlords and tenants may determine the average market rent for comparable properties in similar locations over the preceding four year period [para.42 – 47];
 - the setting of initial rents at the market level for comparable properties in similar locations [para.48 – 49];
 - the making of regulations by the Minister for Environment, Community and Local Government, whereby initial rents in areas with high levels of demand and low levels of supply may be determined by means of the index of reference rents [para.50 – 57];
 - the determination of the rate of increase in rent during the lifetime of a tenancy with reference to the annual percentage change in the consumer price index, subject to an overall percentage limit over a four year period [para.59 – 61];
 - increases in rent where improvements are carried out by a landlord [para.62 – 66];
 - facilitating agreements in respect of rent which are more favourable to tenants than those which apply under the rent certainty measures [para.67 – 68];
 - the voiding of any provision which excludes or limits the application of the rent certainty measures [para.69 – 72];
 - the expansion of the remit of the Private Residential Tenancies Board to hear and determine disputes arising from the application of rent certainty measures referred by landlords and/or tenants [para.73 – 77];
 - the review of the operation of rent certainty measures within four years of their introduction [para. 81 – 82].

CONSTITUTIONAL/CONVENTION CONTEXT

1. The introduction of rent certainty measures is capable of being regarded as a legislative interference with the exercise by landlords of their private property rights, as guaranteed by Articles 40.3.2° and 43 of the Constitution, and Article 1 of Protocol No.1 to the European Convention on Human Rights ('ECHR').¹
2. Equally it must be recognised that the Constitution, the ECHR and the CFR expressly permit the regulation by law of the exercise of property rights in the interests of the common good.² Further, it is to be acknowledged that rent regulation measures in other EU member States do not exist in a constitutional vacuum, but rather operate in the context of robust constitutional protections for private property rights.³ As such the existence of constitutional protection for such rights cannot in and of itself be reasonably regarded as an insuperable obstacle to the introduction of rent certainty measures.
3. It is necessary however, in light of the protection afforded to property rights, to ensure that the introduction of rent certainty measures does not amount to an unjust attack on the exercise of such rights by landlords, and to ensure that rent certainty measures may properly be regarded as a proportionate interference with such rights.

Constitution

4. The Constitution affords dual protection to the right to private property, both as a personal right, and as an institution.⁴
5. Article 40.3.2° of the Constitution requires the State to protect property rights from unjust attack:

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the [...] property rights of every citizen.

6. Article 43 guarantees that the institution of private property will not be abolished, while recognising that the exercise of this right should be regulated by the principles of social justice, such that the State may regulate such rights by law according to the requirements of the common good:

1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

¹ It may also be noted that and Article 17 of the EU Charter of Fundamental Rights ('CFR') protects the right to property. The Charter is however limited in its application to the Member States only when they are implementing EU law (Article 51), such that it has no immediate implications for the introduction of rent certainty measures.

² Article 43.2 of the Constitution; Paragraph 2, Article 1, Protocol No. 1 ECHR; Paragraph 1, Article 17, CFR.

³ By way of example, German rent regulation legislation operates in the context of constitutional guarantees in respect of private property provided for by Article 14 of the German Basic Law or *Grundgesetz*.

⁴ On the complementary relationship between the personal right to property guaranteed by Article 40.3.2° and the general right to private ownership of external goods guaranteed by Article 43, see in particular *Dreher v Irish Land Commission* [1984] ILRM 94 at 96 per Walsh J, *Re Article 26 and Part V of the Planning and Development Bill 1999*, [2000] 2 IR 321 at 348, [2001] 1 ILRM 81 at 108 per Keane CJ.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good

7. The compatibility of rent control measures with the constitutionally protected property rights of landlords was considered in two associated cases relating to the Rent Restrictions Act 1960. In *Blake v Attorney General* [1982] 1 IR 117 the plaintiff landlords successfully argued that the relevant provisions of the Rent Restrictions Act 1960 amounted to an unjust attack on their property rights, contrary to Article 40.3.2°, in circumstances where the relevant legislative provisions rendered the exercise of such rights wholly ineffective. In particular, the Supreme Court held that the impugned legislation imposed a permanent freeze on rent levels which had originally been set with reference to prevailing market rents in 1914, that the basis on which some dwellings rather than others would be subject to rent control was arbitrary and unfair, in that the selection of properties subject to rent control was not related to the needs of tenants, the resources of landlords, or any established social or economic necessity. Crucially, the Supreme Court had regard to the fact that there was no effective mechanism in the rent control legislation for the review of rents, or the recovery of possession.
8. In striking down Parts II and IV of the Rent Restrictions Act 1960, the Supreme Court expressly recognised that this would create a legislative lacuna, and anticipated that the Oireachtas would seek to reintroduce legislation providing for security of tenure, the setting of fair rents, and for other relevant social and economic matters. A subsequent attempt to introduce rent control measures by way of the Housing (Private Rented Dwellings) Bill 1981 was equally found to amount to an unjust attack on the property rights of landlords, on the grounds that the provision made whereby landlords would receive a level of rent which was substantially less than the market rent for an initial five year phasing-in period was without any constitutionally permitted justification.⁵
9. It is submitted that the decisions of the Supreme Court in *Blake* and *In the matter of Article 26 of the Constitution and in the Matter of the Housing (Private Rented Dwellings) Bill, 1981* must be understood within the context of the subsequent development of the doctrine of proportionality in the context of judicial review of legislation, particularly where constitutionally protected property rights are at issue.
10. Increasingly, the doctrine of proportionality has formed an element in the court's assessment of whether a particular legislative measure amounts to an unjust attack on private property rights, having regard to the principles of social justice and the exigencies of the common good. In order for a particular legislative provision to be regarded as proportionate, its objective must be one of sufficient importance to warrant over-riding a

⁵ *In the matter of Article 26 of the Constitution and in the Matter of the Housing (Private Rented Dwellings) Bill, 1981* [1983] 1 IR 181 at 191, Per O'Higgins CJ.

constitutionally protected right. Further, the means chosen must (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational consideration, (b) impair the right as little as possible, and (c) be such that its effects on the constitutionally protected right are proportionate to that objective.⁶ While this principle has been applied in a number of cases where property rights were engaged,⁷ its application is perhaps most clearly illustrated by the decision of the Supreme Court in *Re Article 26 and Part V of the Planning and Development Bill 1999*.⁸ Here, Keane CJ held that the objective pursued by Part V of the Bill, namely the provision of affordable housing, was sufficient to justify the imposition of a requirement by a local authority that a certain percentage of land zoned for residential use be made available for affordable housing as a condition of the grant of planning permission:⁹

In the present case, as a condition of obtaining a planning permission for the development of lands for residential purposes, the owner may be required to cede some part of the enhanced value of the land deriving both from its zoning for residential purposes and the grant of permission in order to meet what is considered by the Oireachtas to be a desirable social objective, namely the provision of affordable housing and housing for persons in the special categories and of integrated housing. Applying the tests proposed by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 and subsequently endorsed by this court, the court in the case of the present Bill is satisfied that the scheme passes those tests. They are rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial. At the same time, the court is satisfied that they impair those rights as little as possible and their effects on those rights are proportionate to the objectives sought to be attained.

11. In light of the development of the proportionality doctrine, and notwithstanding the decision in *Blake*, the prevailing view is that there is no constitutional or legal impediment to the regulation of rents provided any such measures are proportionate. Thus the Constitution Review Group emphasised that, where legislation regulating the exercise of private property rights had been found to be unconstitutional, this was invariably in circumstances where the legislation at issue was disproportionate, unfair, or arbitrary.¹⁰ In similar terms, the Commission on the Private Rented Residential Sector reached the conclusion that the reintroduction of a system of rent regulation was not unconstitutional provided it was not unfair or oppressive, and corresponded to the interests of the common good.¹¹

4.3.5. While the result of this constitutional decision [*i.e. Blake*] has been to severely restrict the legislature's ability to provide for statutory rent control, it would be

⁶ For present purposes there is no material difference between the proportionality test as formulated by the Supreme Court of Canada in *Chaulk v R* [1990] 3 SCR 1303 at 1335 – 1336, adopted by the High Court and subsequently approved by the Supreme Court in *Heaney v Ireland* [1994] 3 IR 595 at 607, and the approach adopted by the European Court of Human Rights.

⁷ *Daly v Revenue Commissioners* [1995] 3 IR 1, [1996] 1 ILRM 122, *Crosbie v Custom House Dock Development Authority* [1996] 2 IR 531, *An Blascaod Mór Teo v Commissioners of Public Works (No 3)* [2000] 1 IR 6, [2000] 1 ILRM 401.

⁸ [2000] 2 IR 321, [2001] 1 ILRM 81

⁹ *Ibid.* at 354

¹⁰ *Report of the Constitution Review Group* (1996) at p.338

¹¹ *Report of the Commission on the Private Rented Residential Sector* (July 2002)

wrong to suggest that the constitutional provisions and case law as a matter of principle prevent the operation of rent control in Irish law where a reasonable balance between competing interests has been struck. [...]

4.3.6. In a number of subsequent cases, including *Dreher v Land Commission*, the Supreme Court has begun to stress that article 43.2.1. also requires that private rights ought to be regulated by the principles of social justice and that the exercise of rights may be delimited by the State to reconcile it with the exigencies of the common good. In any future decision, particularly in the context of development in the housing market over the last few years resulting in a greater reliance on the private rented sector to meet medium and long-term housing needs, the Courts may well place a greater emphasis on the exigencies of the common good and thus facilitate a greater level of regulation of the landlord and tenant relationship. [...]

5.3.6.2 Having regard to all of this the Commission is of the view that there is no existing constitutional or legal impediment to recommending the introduction of a system of rent control, provided that such a system was framed within the context of the common good and was fair and not oppressive, paying due regard to the rights and interests of both parties.

12. Most recently, the All-Party Oireachtas Committee on the Constitution has stressed that the decision of the *Blake* may be confined to its facts, and that it does not amount to an authority for the proposition that all forms of rent regulation are unconstitutional, particularly in the context of the emergence of the doctrine of proportionality in the years subsequent to *Blake*:¹²

[Blake] did *not* decide that all forms of price control were unconstitutional: all it decided was that the form of rent control sanctioned by the Rent Restrictions Acts 1946-1967 was unconstitutional. It must be recalled, however, that key elements of the legislation which led to that finding included the arbitrary selection of the properties which were to be subject to rent control; the freezing of rents at wholly uneconomic levels without reference to the means of either landlord or tenant and the fact that the landlord was effectively precluded from ever recovering the land in question.

¹² All-Party Oireachtas Committee on the Constitution, *Ninth Progress Report – Private Property* (2004), at p.40

13. The ECHR articulates the right to the protection of property in terms which are broadly similar to the guarantee provided for by Article 43 of the Constitution, and which similarly permit the State to regulate by law the exercise of property rights in the public interest.

14. Article 1 of Protocol No.1 to the ECHR provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

15. The European Court of Human Rights ('ECtHR') has reviewed the compatibility of various forms of rent regulation measures with the protections afforded by this Article on a number of occasions.¹³ The general principles arising from the case law of the ECtHR may be briefly be summarised as follows.

16. Where an applicant alleges that domestic legislation providing for the regulation of rents amounts to a 'deprivation of possessions' for the purpose of Article 1 of Protocol No. 1, the ECtHR has examined such complaints under the second paragraph Article 1, having regard to (a) the lawfulness of the impugned measures, (b) the pursuit of a legitimate aim in the general interest, and (c) the achievement of a 'fair balance'.

17. The ECtHR has acknowledged that the issues arising in relation to housing may often require some form of State regulation, and has afforded Member States a significant margin of appreciation in its choice of appropriate measures with a view to securing the housing needs of the community. The ECtHR has consistently held that there must be a reasonable relation of proportionality between the means employed by the State and the legitimate aim that is sought to be realised in the context of measures which control the use of private property. This requirement is often expressed as a need to strike a 'fair balance' between the requirements of the general interest of the community, and the requirement to protect the individual's fundamental rights.

18. In this context, the ECtHR will conduct an overall examination of the various competing interests, and ascertain whether the operation of rent regulation measures imposes a disproportionate and excessive burden on the individual concerned. This assessment will generally involve a consideration of a range of factors which will include the extent of the State's interference with freedom of contract in the private rented sector, as well as the existence of procedural safeguards which ensure that the operation of the particular system of rent regulation under scrutiny and its impact on the private property rights of landlords is neither arbitrary nor unforeseeable.

¹³ See for example *Hutten-Czapska v Poland* (Application no. 35014/97), *Edwards v Malta* (Application no. 17647/04), *Ghigo v Malta* (Application no. 31122/05), *Bittó v Slovakia* (Application no. 30255/09).

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19. Applying these principles in *Hutten-Czapska v Poland* (Application no. 35014/97) the ECtHR found that there had been a violation of the landlord's property rights arising from the combined effect of defective provisions relating to the determination of rent, together with various restrictions in respect of landlords' rights in relation to the termination of leases, the financial burdens placed on them by statute, and the absence of any mechanism whereby landlords could offset expenses incurred in maintaining or repairing the rented property. In *Edwards v Malta* (Application no. 17647/04) and *Ghigo v Malta* (Application no. 31122/05) the ECtHR found that a disproportionate and excessive burden had been imposed on the applicant landlords in circumstances where their properties had been requisitioned for a number of decades subject to an extremely low level of rent, which meant that they had to bear most of the social and financial costs associated with providing housing to the individuals concerned.
20. More recently, in *Bittó v Slovakia* (Application no. 30255/09), the applicant landlords argued that the rent regulation scheme under scrutiny amounted to an interference with their private property rights in that it prevented them from freely negotiating the level of rent in respect of the properties, and made the termination of the tenancies of these dwellings contingent upon their providing the tenants concerned with adequate alternative accommodation. The ECtHR was satisfied that the interference was 'lawful' within the meaning of Article 1 of Protocol No. 1, and that the measures concerned pursued a legitimate aim of social policy such that the regulation of the applicant's private property rights had been 'in accordance with the general interest' as required by the second paragraph of that Article. The ECtHR held however that the impugned rent regulation measures did not represent a proportionate interference with the private property rights of the applicant landlords, in that they did not strike the requisite fair balance between the general interests of the community, and the protection of the applicant's right to private property, including the right to derive profit from their property.

Implications arising from Constitutional/Convention jurisprudence for formulation of rent certainty measures

21. In light of the foregoing, it must be recognised that while neither the Constitution nor the Convention preclude the introduction of rent certainty measures, any legislation which regulates rents must be framed in such a manner that achieves a fair balance between the rights and interests of landlords and those of the community at large.
22. It is submitted that the interests of landlords and tenants in being afforded a greater degree of certainty as to the rent payable during the lifetime of a tenancy is capable of being regarded as an objective which is of sufficient importance to warrant interference with constitutionally protected property rights, particularly having regard to the real risk of homelessness posed by rapidly escalating market rents, a consideration which must be regarded as pressing and substantial in a democratic society.
23. However, legislative measures which seek to achieve this objective must impair constitutionally protected property rights as little as possible, and their effect on such rights must be proportionate to the objective sought to be obtained.
24. In order to ensure that rent certainty measures do not replicate the unconstitutional elements of the Rent Restrictions Act 1960, they must not be confined to a segment of the private rented sector which is selected on an unfair or arbitrary basis, but rather must apply

to the sector as a whole, i.e. to all dwellings that are the subject to a residential tenancy within the meaning of s.3 of the Residential Tenancies Act 2004. Where landlords invest in improvements to the rented dwelling over and above those required to maintain the property in good repair, this must be reflected in the rent payable by the tenant. Finally, regulated rent levels must reflect market realities, while the rights of landlords to review rents and to terminate tenancies cannot be subject to unfair or oppressive restrictions.

25. It is with these considerations in mind that the following proposals for the introduction of rent certainty measures by way of amendment to the Residential Tenancies Act 2004 are made.

LEGISLATIVE PROPOSALS

Commencement

26. While amending legislation will not normally require a commencement provision,¹⁴ it is desirable that rent certainty measures be commenced by way of Ministerial order in circumstances where the commencement date will be relevant to determining the lawful rent payable in respect of existing tenancies.¹⁵ For this purpose a standard commencement provision may be inserting in the amending legislation:

This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes and different provisions.

Interpretation

27. The introduction of rent certainty measures will necessitate the insertion of a number of new terms into the 2004 Act which will require definition, namely 'rent', 'lawful rent', and 'reference rent'.

Definition of 'rent'

28. The amendment of the 2004 Act represents a welcome opportunity to address the failure to define 'rent' in the original legislation. The failure to define this term within the original scheme of the 2004 Act has created a legislative lacuna which frequently gives rise to disputes between landlords and tenants as to the sums properly payable in respect of the tenancy of a dwelling.
29. The necessity of defining this term with sufficient clarity is all the more pressing in the context of the regulation of the setting and review of rents.¹⁶ It is vital that any such definition distinguishes between rent paid in consideration for occupation of the dwelling concerned, and any charges, taxes and fees which may (or may not) be properly payable by the tenant under the lease/tenancy agreement.
30. The following definition of 'rent' for the purposes of the 2004 Act as a whole (i.e. rather than Part III in isolation) is suggested:

'rent' means the amount of any consideration paid or given or required to be paid or given by or on behalf of a tenant to a landlord and/or his or her authorised agent in respect of the right to occupy a dwelling.

¹⁴ *Lough Swilly Shellfish Growers Co-Operative Society Limited v Bradley* [2013] IESC 16

¹⁵ It is proposed that the lawful rent payable in respect of existing tenancies will be the rent that is properly payable on the date immediately preceding commencement (see below).

¹⁶ It is instructive in this regard to consider the position in England and Wales, where the absence of a definition of rent in the equivalent legislation, namely the Rent Act 1977, has led to a series of cases which have sought to distinguish rent from other payments under the tenancy, see generally Woodfall, *Landlord and Tenant* (London: Sweet & Maxwell; 2014) at para. 23.150.

Definition of 'lawful rent'

31. In order for rent certainty measures to be effective it will be necessary to prohibit landlords from setting rent levels otherwise than in accordance with those measures, and to impose proportionate sanctions for the setting or reviewing of rent in a contravention of the proposed measures.¹⁷
32. It is proposed to introduce the concept of 'lawful rent', being the rent properly payable in accordance with the applicable rent certainty measures.¹⁸
33. The phrase 'lawful rent' for the purposes of Part III of the 2004 Act may be defined as follows:

In this Part 'lawful rent' in relation to the tenancy of a dwelling means rent calculated in accordance with this Part or any regulations made thereunder.

34. A prohibition on the setting of rent levels (whether at the commencement of the tenancy or in the context of a review of rent) may be provided for by substituting the following provision in place of the current prohibition on setting rent levels above market rent:¹⁹

(1) In setting, at any particular time, the rent under the tenancy of a dwelling, an amount of rent shall not be provided for that is greater than the amount of the lawful rent for that tenancy at that time.

(2) The reference in this section to the setting of the rent under a tenancy is a reference to –

(a) the initial setting of the rent under the tenancy, and

(b) any subsequent setting of the rent under the tenancy by way of a review of that rent.

(3) A person who contravenes subsection (1) is guilty of an offence.

35. Section 9 of the 2004 Act already provides that a person who is guilty of an offence shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both. Section 9 further provides that proceedings in relation to such an offence may be brought and prosecuted by the PRTB. No amendment to this provision is proposed.

Definition of 'reference rent'

36. The successful implementation of rent certainty measures is contingent upon a mechanism whereby landlords and tenants may determine the rent properly payable in respect of a

¹⁷ Cf. the offences provided for under German law by §5 of the *Wirtschaftsstrafgesetz* (Economic Offences Act), §291 of the *Strafgesetzbuch* (Penal Code). See also s.282 of the Danish Criminal Code (*Straffeloven*), and the Dutch Economic Offences Act (*Wet op de Economische Delicten*).

¹⁸ Cf. s.111 of Ontario's Residential Tenancies Act 2006.

¹⁹ As provided for by s.19 of the 2004 Act.

tenancy. It is proposed that the initial rent payable in respect of a tenancy will be determined by means of an index of 'reference rents' published by the PRTB.²⁰

37. In providing clarity as to the rent that may be sought under a tenancy, the operation of a reference rent mechanism provides certainty to current or prospective landlords as to the dividends they may expect to realise from their investment, and to tenants as to what they can reasonably afford.
38. The introduction of reference rents will lead to greater transparency in the private rented sector and is likely to contribute to greater competition and efficiency within the market by ensuring that landlords and tenants are provided with comprehensive and objective information in respect of rental values. The index of reference rents will enable landlords to calculate the return on their investment, and will enable tenants to estimate their housing costs over lifetime of their tenancy.²¹
39. The index of reference rents will reflect the market dynamics in the private rented sector while mitigating the impact of rapid cyclical changes and providing certainty for landlords and tenants. The provision of clear market price information to current and prospective landlords and tenants will contribute to increased competition and efficiency in the market, while preventing market failures caused by imbalances between supply and demand.²²
40. The phrase 'reference rent' may therefore be defined in the following terms:

'reference rent' means average letting values for comparable properties calculated in accordance with the index of reference rents published by the Board.

Definition of 'deposit'

41. The introduction of a statutory definitions of 'rent', 'lawful rent', and 'reference rent' should be complemented by a definition of 'deposit', in order to distinguish sums of money paid by the tenant in consideration for the right to occupy the dwelling from sums of money paid as security for performance by the tenant of his/her obligations. In defining the term 'deposit', it will be necessary to clarify that the term applies not just to those sums held by the landlord, but also to sums held on the landlord's behalf, for example by an agent. Further, it will be necessary to clarify that a deposit can only lawfully take the form of a sum of money, as opposed to some other form of consideration. In light of the foregoing, the following definition may be adopted:

'deposit' means a sum of money held (whether by the landlord or otherwise) as security for the performance of the tenant's obligations arising under or in connection with a lease or tenancy agreement.

²⁰ Cf. §558c - 558d and 558e of the German Civil Code, which provides for the creating of lists of representative rents by municipalities, on the basis of information contained in a rent database; see also §1 of the Austrian *Richtwertgesetz*.

²¹ Fitzsimons, "The German Private Rented Sector: A Holistic Approach", *The Knowledge Centre for Housing Economics*, (2014)

²² Haffner and Boelhouwer, "Housing allowances and economic efficiency", *International Journal of Urban and Regional Research*, (2006) 30(4): 944 - 959

Index of reference rents: creation and publication

42. It is proposed that the PRTB be placed under a duty to publish an index of reference rents, whereby landlords and tenants will determine the rent properly payable in respect of a particular tenancy.
43. It is likely that the publication of an index of reference rents will result in a decrease in the number of disputes referred to the PRTB in relation to the level of rent that is properly payable under a tenancy, by providing landlords and tenants with independent, objective and verifiable information in relation to rents in respect of comparable properties.
44. The placing of an obligation on the PRTB to create and publish an index of reference rents may be achieved by amending the existing provision for the publication by the PRTB of aggregated details derived from the register of private residential tenancies.²³
45. The information required for the creation of an index of reference rents is already gathered by the PRTB as part of the registration process for tenancies.²⁴ The creation of an index of reference rents based solely on those categories of tenancies which are subject to the 2004 Act will mean that various categories of tenancies which are not subject to normal market forces will be excluded in calculating reference rents.²⁵
46. It is proposed that the index be published in electronic format, and in such a way that preserves the privacy of the parties concerned. Having regard to the manner in which initial rents are to be calculated, the index of reference rents should be such as to enable landlords and tenants to calculate the average rent for a comparable property over the four year period immediately preceding the date of commencement of the tenancy concerned.
47. This following provision for the publication of an index of rent references by the PRTB is proposed:

(1) Without prejudice to section 128, the Board shall publish a document (in this Act referred to as the 'index of reference rents').

(2) Subject to subsection 3, the index of reference rents shall consist of an extract of the information contained in the register, and shall contain a list of the average letting values of comparable dwellings over the four year period immediately preceding the date on which the index is first published, having regard to the following criteria –

(a) the area in which the dwelling is situated;

(b) the estimated floor area;

(c) the number of bedrooms;

(d) the amount of rent payable under the tenancy;

(e) the category to which the dwelling belongs, namely –

²³ As provided for at Chapter 1, Part VII of the 2004 Act, and in particular s.131 thereof.

²⁴ Section 136 of the 2004 Act.

²⁵ Section 3 of the 2004 Act excludes a range of tenancies from its application, including formerly rent controlled tenancies, long occupation lease tenancies, holiday or business lettings, owner occupied dwellings and social housing.

(i) a house,

(ii) a maisonette,

(iii) an apartment,

(iv) a studio,²⁶

and, in case of the dwelling falling within the category of a house or a maisonette, whether the house or maisonette is detached, semi-detached, or terraced.

(3) The index of reference rents shall not contain any information, as regards a particular dwelling, that discloses or could reasonably lead to the disclosure of –

(a) the identity of the landlord or the tenant or tenants of the particular dwelling,

(b) the amount of rent payable under a tenancy of the particular dwelling.

(4) The index of reference rents shall be published in electronic form and made available for inspection on a website maintained and controlled by the Board.

(5) The Board shall review and update the particulars specified in subsection 2 and contained in the index of reference rents every 12 months, the first such review occurring on the first anniversary of the commencement of this section.

Setting of initial rent

48. It is proposed that, in general, where a property is made available for letting, the parties should be free to agree on a level of rent which is equivalent to the market rent for comparable properties.

49. As such, the current prohibition on setting an initial rent at an amount greater than the market rent,²⁷ as well as the definition of market rent for the purposes of Part III of the 2004 Act, is preserved under these proposals.²⁸

50. Threshold recognises however that the prohibition on setting the initial rent above the level of market rent would not in and of itself provide an effective mechanism for regulating rent in areas (particularly urban centres) characterised by sharp increases in rent due to imbalances between supply and demand.

²⁶ While the term ‘bedsitter’ continues to be used at s.136(i)(iii) of the 2004 Act (which sets out the particulars to be specified in an application for the registration of a tenancy), the commencement of Article 6 of the Housing (Standards for Rented Houses) Regulations 2008 (SI No 534 of 2008) on 1 February 2013 has effectively abolished the traditional bedsit, hence the use of the term ‘studio’ here, which denotes a self-contained residential unit with its own sanitary facilities.

²⁷ Section 19 of the 2004 Act.

²⁸ Section 24(1) of the 2004 Act provides that the ‘market rent’ in relation to the tenancy of a dwelling means the rent which a willing tenant not already in occupation would give and a willing landlord would take for the dwelling on the basis of vacant possession, having regard to the other terms of the tenancy and the letting values of dwellings of a similar size, type and character to the dwelling and situated in a comparable area to that in which it is situated.

51. It is proposed therefore that the Minister will be empowered to prescribe by way of Regulations those areas in which the initial rent will be calculated having regard to the reference rent for comparable properties averaged over a four year period immediately preceding the date of commencement of the tenancy.
52. Under these proposals, where a property is made available for letting in an area designated by the Minister, the lawful rent will be determined by the reference rent for comparable properties.²⁹ Landlords will be permitted to charge a level of rent in designated areas which is above the level of the applicable reference rent, subject to a percentage limit determined by the Minister. It will be necessary to insert principles and policies into the amending legislation in order to ensure that any such Regulations do not amount to an unconstitutional delegation of legislative authority.³⁰
53. The calculation of reference rents as an average of market rental values over a four year period will stabilise rental levels and insulate the private residential sector from the worst excesses of the inflationary and deflationary cycles seen in the housing market as a whole. It will also ensure that landlords are guaranteed a foreseeable return on their investment, rather than being exposed to the risks associated with a speculative bubbles in the housing market. The rationale for calculating the applicable rent over a four year period is derived from the four year cycles of tenure security provided for under Part IV of the 2004 Act.³¹
54. An increase in initial letting values, where applicable, will ultimately be factored into the PRTB's annual index of reference rents, such that the index will continue to reflect changes in rent levels in the private residential sector and keep pace with shifts in the housing market more generally. It is likely that areas with a higher turnover of tenancies will see more rapid changes in the applicable reference rent.³² The averaging of reference rents over the preceding four year period will however mitigate against sharp increases or decreases in letting values.
55. The placing of a percentage limit on the increase in rent where a property is made available for re-letting will prevent landlords from front-loading initial rents in order to compensate for a lower rate of increase in rents within tenancies.³³ However, by affording landlords the freedom to charge a level of rent which is above the reference rent, this provision will ensure that initial rents set at the commencement of a tenancy will continue to be reflective of market rent levels, such that the reference rent will not result in the imposition of an artificial freeze on rental values.

²⁹ It may be noted that the German Federal Ministry of Justice has introduced a Bill to amend existing tenancy legislation by preventing landlords from increasing rent by more than 10% above the comparable local rent in areas where there is a competitive housing market (Bill on the Rent Increase Cap in Residential Tenancy Law and the Purchaser Principle in Housing Agencies, *Gesetz zur Dämpfung des Mietanstiegs auf angespannten Wohnungsmärkten und zur Stärkung des Bestellerprinzips bei der Wohnungsvermittlung*).

³⁰ See *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413, *Cityview Press v. An Chomhairle Oiliúna* [1980] IR 381, *John Grace Fried Chicken Ltd v Catering Joint Labour Committee* [2011] IEHC 277, *McGowan v Labour Court* [2013] IESC 21

³¹ Cf. §558(2) of the German Civil Code, which provides that the reference for a given locality is calculated with reference to rents charged in the last four years for comparable properties in the same or a comparable municipality.

³² Generally rent certainty will result in a reduction in turnover thereby ensuring consistent returns to landlords and greater stability to tenants, Turner and Malpezzi, "A review of empirical evidence on the costs and benefits of rent control", *Swedish Economic Policy Review*, 10:11 – 56

³³ Andrews et al., "Housing Markets and Structural Policies in the OCED", *OECD Economics Department Working Papers*, (2011) No. 836

56. In light of the foregoing, it is proposed that the current prohibition on setting rent above the level of market rent in modified form as follows:

19.(1) Subject to subsection (2), in setting the initial rent under the tenancy of a dwelling, an amount of rent shall not be provided for that is greater than the amount of the market rent for that tenancy.

(2) In setting the initial rent under the tenancy of a dwelling to which subsection (3) applies, an amount of rent shall not be provided for that is greater than a prescribed percentage above the amount of the reference rent for that tenancy.

(3) The Minister may make regulations prescribing those areas to which subsection (2) shall apply.

(4) In making regulations under this section, the Minister shall have regard to –

(a) the rate of increase (if any) in the letting value of dwellings in a given area;

(b) the supply of dwellings in a given area;

(c) the demand for dwellings in a given area;

(iv) the desirability of ensuring that the right of tenants to security of tenure is not unduly undermined;

(v) the desirability of ensuring that the property rights of landlords are not unduly restricted;

(vi) the prevention of homelessness;

(vii) the exigencies of the common good.

(5) In this section, “prescribed percentage” means a percentage prescribed by regulations made under subsection (2).

57. The following example is illustrative of how initial rents will be calculated having regard to the index of reference rents. The example is based on a scenario in which the Minister published Regulations designating Dublin Central as an area to which the reference rent will apply, and has prescribed a 10% limit on increases of rent above the level of the reference rent.

A landlord decides to make his or her property available for letting. The landlord consults the PRTB index of reference rents for comparable properties, e.g. two bed terraced houses in Dublin 7 with a floor space of approximately 65 square metres. The index of reference rents will indicate the average rent for such a property over the four year period immediately preceding the date of publication of the index. Assuming for the purposes of this example that the average reference rent is €1,200,

the maximum rent which can be charged will be 10% more than this figure, i.e. €1,320.³⁴

Rent reviews

58. The current provisions in respect of (a) the frequency with which rent reviews may occur, (b) the implied right to conduct a rent review, and (c) the procedure to be followed in notifying a tenant of a new rent, may be preserved in their current form.³⁵

Increase in rent

59. It is proposed that the rate of increase in rent (if any) during the lifetime of a tenancy be determined by the annual percentage change in the consumer price index ('CPI').³⁶ The CPI represents an objective and transparent measure by reference to which landlords and tenants may determine the level of increase (if any) in rent which may apply at any given time during the currency of a tenancy. Given that a lease/tenancy agreement is a consumer contract between a service provider (i.e. a landlord) and a consumer (i.e. a tenant),³⁷ it is appropriate that increases in the amount charged for the provision of accommodation services should be linked to changes in the prices charged for other services used by households. Reliance on the CPI ensures that increases in rent are insulated from the dynamics of supply and demand in the housing market, while ensuring that rents remain reflective of changes in the market for goods and services more generally. Investors are given a degree of certainty as to the stability of rental income over the medium term, while tenants are protected from the threat of eviction due to exponential increases in rent which are wholly unrelated to the prices of other services availed of by households.
60. In order to ensure that landlords do not feel compelled to review the rent on an annual basis in order to keep pace with any percentage change in the CPI, the landlord will be entitled to increase the rent by an amount equivalent to the cumulative percentage change in the CPI since (a) the commencement of the tenancy concerned (where no review of rent has occurred), or (b) since the most recent review of rent, whichever is relevant. Where rent is increased, this will be subject to an overall limit of 20% over the course of a four-year Part IV tenancy.³⁸
61. Provision for the rate of increase in rents may be made by inserting the following section in Part III of the 2004 Act:

(1) Subject to subsection (2), no landlord may increase the annual rent payable under the tenancy of a dwelling by more than the percentage change from year to year in

³⁴ In the unlikely event that no reference rent is available for a comparable dwelling in the same area, it is suggested that the landlord may have regard to the reference rent in respect of a comparable dwelling in a similar area.

³⁵ Sections 20 – 22 of the 2004 Act.

³⁶ For examples of index-linked rent regulation mechanisms, see §557b of the German Civil Code, s.120 of the Ontario Residential Tenancies Act 2006, Article 6 of the Belgian Civil Code, Article 7:248 of the Dutch Civil Code (*Burgerlijk Wetboek*), Article 18.1 of the Spanish Urban Tenancy Act (*Ley de Arrendamientos Urbanos*).

³⁷ Such that Directive 93/13/EEC on unfair terms in consumer contracts, as implemented by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI No 27/1995) apply; see the decisions of the Court of Justice of the EU in Case C-488/11 *Brusse v Jahani BV* and Case C-226/12 *Constructora Principado SA v Alvarez*.

³⁸ Cf. §558(3) of the German Civil Code, which places a 20% cap on the increase of rents over a three year period.

the consumer price index (if any), averaged over a 12 month period ending on the 31st December of the calendar year immediately preceding the proposed date of increase in rent, rounded to the first decimal point.

(2) Where a landlord has not increased the annual rent payable under the tenancy of a dwelling in the calendar month immediately preceding the proposed date of increase in rent, the landlord may increase the annual rent by an amount equivalent to the cumulative percentage change in the consumer price index (if any) since the date of:

(a) the commencement of the tenancy concerned, or

(b) the most recent review of rent,

whichever is the latest.

(3) In the case of an increase under subsection (1) or subsection (2), the rent payable under the tenancy of a dwelling may not be increased by more than 20% in the period of 4 years from the commencement of the tenancy.

(3) In this section, 'consumer price index' means the consumer price index of goods and services compiled by the Central Statistics Office.

Improvements

62. It is vital that rent certainty measures incentivise the improvement and modernisation of the existing housing stock by permitting landlords to increase the rent to reflect the cost of any such works carried out.
63. Improvement in this context must be differentiated from works carried out by a landlord to the structure or interior of the dwelling so as to ensure compliance with the obligations set out at s.12(1)(b) of the 2004 Act and the Housing (Standards for Rented Houses) Regulations 2008 (SI No 534 of 2004)(as amended). It perhaps goes without saying that an increase in rent should not be attributable to repairs to the structure or interior of the dwelling carried out by the tenant pursuant to s.12(1)(g) of the 2004 Act.
64. Currently, a landlord is permitted to review the rent more than once in any given 12 month period where there has been a substantial change in the nature of the accommodation such that the rent payable in light of that change would be different to the market rent at the commencement of the tenancy, or at the last review.³⁹ As such, the rent payable after the carrying out of improvement works is not related to the cost of those works, but rather to the increased market value of the property.
65. It is proposed that any increase in rent which is attributable to improvement works carried out by the landlord will be related to the cost of those works, and will be subject to a percentage limit in order to ensure that a landlord achieves a reasonable return on his or her investment without subjecting the tenant to an unsustainable increase in rent.⁴⁰ Where there is a dispute relating to an increase in rent due to improvement works, it is proposed

³⁹ Section 20(3) of the 2004 Act.

⁴⁰ Cf. §559 of the German Civil Code which provides for an increase in the annual where the lessor has carried out modernisation works, capped at 11% of the costs of the improvement works. See also s.58 of the Danish Private Housing Act (*Bekendtgørelse af lov om leje*).

that the onus will be on the landlord to establish (a) the increase in the letting value of the dwelling attributable to the improvement works, and (b) the costs of the improvement works in question. It is suggested that an independent valuation and/or vouched expenses relating to the works would be sufficient to discharge the onus of proof placed on the landlord.

66. Provision may be made for increases in rent due to improvement works by providing that the provisions which limit the rate of increase in rents to the annual percentage in the CPI are subject to the following:

(1) Section [reference to sections imposing limits on rate of increase in rents and overall percentage limit over four year period] shall not apply where the landlord has carried out improvement works to the structure and/or the interior of the dwelling.

(2) In this section, 'improvement works', mean works resulting in an increase in the letting value of the dwelling, but shall not include works carried out under –

(a) section 12(1)(b)(i),

(b) section 12(1)(b)(ii),

(c) section 12(1)(g), or

(d) otherwise to ensure compliance with any standards for houses for the time being prescribed under section 18 of the Housing (Miscellaneous Provisions) Act 1992.

(3) In the case of an increase under subsection (1), the annual rent payable under the tenancy of a dwelling may not be increased by more than 10% of the total cost of the improvement works.

(4) In any dispute as to the amount of increase in the rent payable under the tenancy of a dwelling under subsection (1), the onus shall be on the landlord to establish –

(a) the increase in the letting value of the dwelling attributable to the improvement works, and

(b) the costs of the improvement works.

Agreements in respect of rent and voiding of certain provisions

67. While the proposals outlined seek to provide a legislative framework in which landlords and tenants may set the rent under a lease/tenancy agreement, it is desirable to preserve the contractual autonomy of the parties to agree the initial rent.

68. It is to be considered therefore whether the contractual freedom of the parties to enter into agreements in respect of rent which are more beneficial to the tenant (e.g. in providing for a lower rent than would be applicable under the rent certainty measures) may be preserved.⁴¹

⁴¹ Another option which might be considered is that of expanding the prohibition of the penalisation of tenants by landlords (as provided for by s.14 of the 2004 Act) to apply to the refusal by a landlord to enter into a lease/tenancy agreement which is subject to rent certainty measures. It is to be remembered however that

69. It is vital however to ensure, in a market that is characterised by inequalities in bargaining power as and between landlords and tenants,⁴² that landlords do not rely on such a provision to deprive tenants of the protections afforded by rent certainty measures.

70. As such it will be necessary to ensure that any provision in a lease/tenancy agreement which purports to exclude or limit the operation of the rent certainty measures will be of no legal effect as and between the parties.⁴³

71. It may be recalled in this context that the 2004 Act already renders void any provision in a lease/tenancy agreement where it may reasonably be inferred that the sole or main purpose of the provision is facilitate the termination of the tenancy.⁴⁴ Further, while the parties to a lease/tenancy agreement are precluded from contracting out of the obligations placed on landlords and tenants by virtue of the 2004 Act, this does not prevent the parties from agreeing more favourable terms for the tenant.⁴⁵ Similarly, while the 2004 Act prohibits the termination of a tenancy otherwise than in the manner provided for by Part IV, the parties remain free to enter into fixed-term agreements which only provide for termination in the event of a breach of by the landlord or tenant of their obligations under the tenancy.⁴⁶ As Laffoy J. commented in *Canty v Private Residential Tenancies Board* [2007] IEHC 243:

‘[t]he obvious purpose of s.58(3) is to ensure that contractual rights of a tenant which are more beneficial than the statutory rights conferred by the Act of 2004 are not interfered with, an objective which is also given effect to in s.26, which provides that nothing in Part 4 shall derogate from rights enjoyed by the tenant which are more beneficial for the tenant than Part 4 rights.

72. In light of the foregoing it is submitted that it would be consistent with the scheme and purpose of the 2004 Act as a whole to insert a new section into Part III which permits the parties to enter into agreements in respect of rent which are not less favourable than those which would apply having regard to the rent certainty measures, in the following terms:

(1) Subject to subsection (2), any provision in an agreement (whether a lease or tenancy agreement in respect of a dwelling, and whether entered into before, on, or after the commencement of this section) purporting to vary, modify, restrict or exclude the operation of this Part shall be null and void.

penalisation for the purposes of the relevant section is defined as an action that adversely affects the tenant’s peaceful occupation of the dwelling concerned, and would as such not extend to acts that were adverse to a prospective tenant. Further, the 2004 Act as a whole is limited in its application to every dwelling that is the subject of a tenancy (Section 3(1)), while only the parties to an existing or terminated tenancy may refer a dispute to the PRTB for resolution (s.76(1)), such that it may be impossible within the current statutory framework to prevent a landlord from taking steps which are adverse to a prospective tenant prior to the entry into a lease/tenancy agreement.

⁴² Many commentators argue that rent regulation measures are justified by the need to correct distortions in the private rented market arising from landlord’s market power and monopolistic features of the housing market more generally. See Arnott, “Time for revisionism on rent control?” *Journal of Economic Perspectives*, (1995) 9(1): 99 – 120, Basu and Emerson, “The economics of tenancy rent control”, *The Economic Journal* (2000) 110, 939 – 962, Arnott and Igarashi, Rent control, mismatch costs and search efficiency”, *Regional Science and Urban Economics*, (2000) 30, 249 – 288.

⁴³ Cf. §557 et seq. of the German Civil Code, whereby agreements which deviate from the rent regulation measures to the disadvantage of the lessee are ineffective.

⁴⁴ Section 184 of the 2004 Act. Additionally, sections 32 and 38 of the 2004 Act render void the creation and assignment of sub-tenancies in respect of Part IV tenancies in certain circumstances.

⁴⁵ Section 18(2) of the 2004 Act.

⁴⁶ Section 58(3) of the 2004 Act.

(2) Subsection (1) does not prevent the parties from entering into an agreement in respect of the rent payable under a lease or tenancy agreement which is more favourable to the tenant as to its terms than those which would otherwise apply by virtue of the operation of this Part.

Disputes and redress

73. The introduction of rent certainty measures will require the making of certain additions to the non-exhaustive list of matters which may be referred to the PRTB for dispute resolution under Part VI of the 2004 Act.

74. Section 78(1) of the 2004 Act already makes provision for the following disputes relating to the rent payable under a tenancy:

- the amount that ought to be initially set (in compliance with section 19) as the amount of rent under a tenancy (78(1)(b));
- (c) the time at which a review of rent referred to in Part 3 should be determined on foot of that review (78(1)(c));
- (d) an alleged failure by the tenant to comply with any of the obligations applicable to the tenant [necessarily including a failure to rent in accordance with the terms of the lease or tenancy agreement] (78(1)(d));
- (q) a claim by a landlord for arrears of rent or other charges (78(1)(q)).

75. It is proposed that s.78 of the 2004 Act be amended by deleting subsection (1)(c) (which relates to the prohibition on setting the initial rent above the market rent level), and inserting the following additional grounds of dispute:

(1) Without prejudice to the generality of sections 76 and 77, the matters in respect of which disputes and, where appropriate, complaints may be referred to the Board for resolution include –

[...]

(r) the determination of the lawful rent in respect of the tenancy of a dwelling;

(s) the determination of the applicable reference rent in respect of the tenancy of a dwelling;

(t) a complaint that the rent under the tenancy of a dwelling is greater than the amount of the lawful rent in respect of the tenancy at the material time;

(u) a complaint that the landlord has increased the rent under the tenancy of a dwelling by more than –

(i) the percentage change from year to year in the consumer price index, or

(ii) 20% in the period of 4 years from the commencement of a tenancy

as provided for by section [insert reference to relevant section];

(v) a claim that a landlord is entitled to an increase in the amount of rent payable under the tenancy of a dwelling due to improvement works carried out pursuant to [insert reference to relevant section];

(w) a complaint that an increase in the amount of annual rent under the tenancy of a dwelling attributable to improvement works carried out pursuant to [insert reference to relevant section] is greater than 10% of the total of cost of the improvement works.

76. The insertion of additional grounds of dispute will require consequential amendments to the various forms of redress which may be awarded by an adjudicator or the Tribunal on foot of a dispute referred to the PRTB for dispute resolution. In particular, it is proposed that an adjudicator or the Tribunal be entitled to make a declaration as to whether or not the rent charged to a tenant is the 'lawful rent' (as defined above), and to direct the repayment of rent to a tenant where he or she has been charged rent over and above that which is permissible under the rent certainty measures.

77. It is proposed that section 115 of the 2004 Act be amended by deleting subsection (2)(b) (which provides for the making of a declaration as to whether or not the amount of rent set under a tenancy is the market rent at the material time), and the insertion of the following forms of redress:

(2) Without prejudice to the generality of subsection (1) and the subsequent provisions of this Chapter, one or more of the following declarations or directions, as appropriate, may be made or given in respect of a dispute –

[...]

(j) a declaration that a term of an agreement (whether a lease or tenancy agreement or otherwise) is void by reason of [insert reference to section relating to avoidance of provisions contrary to rent certainty measures];

(k) a declaration as to whether or not an amount of rent set under the tenancy of a dwelling is the lawful rent;

(l) a direction as to the return or repayment of a specified amount of rent.

Regulations

78. It is desirable that the Minister for Environment, Community and Local Government be empowered to make regulations in respect of any technical or administrative matters arising from the introduction of rent certainty measures (such as the manner in which the reference rent, or any increase in rent linked to a change in the CPI, is calculated). Any such regulations would merely give effect to the legislative principles and policies as outlined above, and would therefore amount to a permissible delegation of legislative authority within the meaning of Article 15.2.1 of the Constitution.

79. The Minister already enjoys a power pursuant under the 2004 Act to make regulations 'prescribing any matter or thing which is referred to in this Act as prescribed or to be

prescribed’.⁴⁷ The relevant section further provides for a mechanism whereby any such regulations are to be laid before the Houses of the Oireachtas, and may be annulled by resolution within 21 days.

80. In light of the Minister’s existing powers, the following provision may be made in Part III of the 2004 Act for the making of regulations:

(1) The Minister may make regulations prescribing any matter or thing which is provided for by this Part.

Review of operation

81. It is perhaps to be anticipated that the Minister may wish to keep under review the implementation of rent certainty measures within the context of changing dynamics within the housing market as a whole.

82. Provision may be made for such a review by way of insertion of the following section into Part III of the 2004 Act:

(1) The Minister shall review the operation of this Part, within 4 years of the date of the commencement of this section.

Tenure security

83. Threshold recognises that rent certainty and tenure security are mutually indispensable components of a well regulated private rented sector.⁴⁸ In Threshold’s experience, some landlords when faced with a difference between the rent payable under an existing tenancy, and the initial rent which they could receive on the open market, will seek to abuse the lawful grounds for terminating Part IV tenancies under the 2004 Act, and re-let the property subject to an increased rent.⁴⁹ It is to be anticipated that where the rent payable under an existing tenancy is significantly less than the applicable reference rent, this will give rise to a risk of evictions, thereby undermining security of tenure for tenants. Threshold therefore proposes that the tenure security provisions of the 2004 Act should be revisited in the context of the introduction of rent certainty measures.

⁴⁷ Section 8 of the 2004 Act. The term ‘prescribed’ is defined as meaning ‘prescribed by regulations made by the Minister’, pursuant to s.4 the 2004 Act.

⁴⁸ Hubert, “Rent control: academic analysis and public sentiment”, *Swedish Economic Policy Review*, (2003) 10: 69, National Economic and Social Council, “Social housing at the crossroads: possibilities for investment, provision and cost rental”, (2014) at p.30

⁴⁹ The grounds for terminating Part IV tenancies are provided for at s.34 of the 2004 Act.

APPENDIX 1 | summary of proposals

Head 1 Commencement

This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes and different provisions.

Head 2 Interpretation

Amend s.4 of the Residential Tenancies Act 2004 ('the Principal Act') –

'deposit' means a sum of money held (whether by the landlord or otherwise) as security for the performance of the tenant's obligations arising under or in connection with a lease or tenancy agreement.

'rent' means the amount of any consideration paid or given or required to be paid or given by or on behalf of a tenant to a landlord and/or his or her authorised agent in respect of the right to occupy a dwelling.

'reference rent' means average letting values for comparable properties calculated in accordance with the index of reference rents published by the Board.

Head 3 Interpretation for purpose of Part III of the Principal Act

Amend s.24 of the Principal Act –

In this Part 'lawful rent' in relation to the tenancy of a dwelling means rent calculated in accordance with this Part or any regulations made thereunder.

Head 4 Prohibition on setting rent at leave greater than 'lawful rent'

Amend s.19 of the Principal Act –

(1) In setting, at any particular time, the rent under the tenancy of a dwelling, an amount of rent shall not be provided for that is greater than the amount of the lawful rent for that tenancy at that time.

(2) The reference in this section to the setting of the rent under a tenancy is a reference to –

(a) the initial setting of the rent under the tenancy, and

(b) any subsequent setting of the rent under the tenancy by way of a review of that rent.

(3) A person who contravenes subsection (1) is guilty of an offence.

Head 5 Regulations for purposes of Part III of the Principal Act

Insert at Part III of the Principal Act –

(1) The Minister may make regulations prescribing any matter or thing which is provided for by this Part.

Head 6

Setting of initial rent

Insert at Part III of the Principal Act –

19.(1) Subject to subsection (2), in setting the initial rent under the tenancy of a dwelling, an amount of rent shall not be provided for that is greater than the amount of the market rent for that tenancy.

(2) In setting the initial rent under the tenancy of a dwelling to which subsection (3) applies, an amount of rent shall not be provided for that is greater than a prescribed percentage above the amount of the reference rent for that tenancy.

(3) The Minister may make regulations prescribing those areas to which subsection (2) shall apply.

(4) In making regulations under this section, the Minister shall have regard to –

(a) the rate of increase (if any) in the letting value of dwellings in a given area;

(b) the supply of dwellings in a given area;

(c) the demand for dwellings in a given area;

(iv) the desirability of ensuring that the right of tenants to security of tenure is not unduly undermined;

(v) the desirability of ensuring that the property rights of landlords are not unduly restricted;

(vi) the prevention of homelessness;

(vii) the exigencies of the common good.

(5) In this section, “prescribed percentage” means a percentage prescribed by regulations made under subsection (2).

Head 7

Rate of increase in rent

Insert at Part III of the Principal Act –

(1) Subject to subsection (2), no landlord may increase the annual rent payable under the tenancy of a dwelling by more than the percentage change from year to year in the consumer price index (if any), averaged over a 12 month period ending on the 31st December of the calendar year immediately preceding the proposed date of increase in rent, rounded to the first decimal point.

(2) Where a landlord has not increased the annual rent payable under the tenancy of a dwelling in the calendar month immediately preceding the proposed date of increase in rent, the landlord may increase the annual rent by an amount equivalent

to the cumulative percentage change in the consumer price index (if any) since the date of:

- (a) the commencement of the tenancy concerned, or*
- (b) the most recent review of rent,*

whichever is the latest.

(3) In the case of an increase under subsection (1) or subsection (2), the rent payable under the tenancy of a dwelling may not be increased by more than 20% in the period of 4 years from the commencement of the tenancy.

(3) In this section, 'consumer price index' means the consumer price index of goods and services compiled by the Central Statistics Office.

Head 8 Increase in rent where improvements carried out by landlord

Insert at Part III of the Principal Act –

(1) Section [reference to provisions under Head 7] shall not apply where the landlord has carried out improvement works to the structure and/or the interior of the dwelling.

(2) In this section, 'improvement works', mean works resulting in an increase in the letting value of the dwelling, but shall not include works carried out under –

- (a) section 12(1)(b)(i),*
- (b) section 12(1)(b)(ii),*
- (c) section 12(1)(g), or*
- (d) otherwise to ensure compliance with any standards for houses for the time being prescribed under section 18 of the Housing (Miscellaneous Provisions) Act 1992.*

(3) In the case of an increase under subsection (1), the annual rent payable under the tenancy of a dwelling may not be increased by more than 10% of the total cost of the improvement works.

(4) In any dispute as to the amount of increase in the rent payable under the tenancy of a dwelling under subsection (1), the onus shall be on the landlord to establish –

- (a) the increase in the letting value of the dwelling attributable to the improvement works, and*
- (b) the costs of the improvement works.*

Head 9 Agreements in respect of rent, voiding of certain provisions

Insert at Part III of the Principal Act –

1) Subject to subsection (2), any provision in an agreement (whether a lease or tenancy agreement in respect of a dwelling, and whether entered into before, on, or

after the commencement of this section) purporting to vary, modify, restrict or exclude the operation of this Part shall be null and void.

(2) Subsection (1) does not prevent the parties from entering into an agreement in respect of the rent payable under a lease or tenancy agreement which is more favourable to the tenant as to its terms than those which would otherwise apply by virtue of the operation of this Part.

Head 10 Review of operation

Insert at Part III of the Principal Act –

(1) The Minister shall review the operation of this Part, within 4 years of the date of the commencement of this section.

Head 11 Disputes which may be referred to the Private Residential Tenancies Board

Amend s.78 of the Principal Act –

(1) Without prejudice to the generality of sections 76 and 77, the matters in respect of which disputes and, where appropriate, complaints may be referred to the Board for resolution include –

[...]

(r) the determination of the lawful rent in respect of the tenancy of a dwelling;

(s) the determination of the applicable reference rent in respect of the tenancy of a dwelling;

(t) a complaint that the rent under the tenancy of a dwelling is greater than the amount of the lawful rent in respect of the tenancy at the material time;

(u) a complaint that the landlord has increased the rent under the tenancy of a dwelling by more than –

(i) the percentage change from year to year in the consumer price index, or

(ii) 20% in the period of 4 years from the commencement of a tenancy

as provided for by section [insert reference to provisions under Head 7];

(v) a claim that a landlord is entitled to an increase in the amount of rent payable under the tenancy of a dwelling due to improvement works carried out pursuant to [insert reference to provisions under Head 8];

(w) a complaint that an increase in the amount of annual rent under the tenancy of a dwelling attributable to improvement works carried out pursuant to [insert reference to provisions under Head 7] is greater than 10% of the total of cost of the improvement works.

Head 12 Redress which may be ordered

Amend s.115 of the Principal Act –

(2) Without prejudice to the generality of subsection (1) and the subsequent provisions of this Chapter, one or more of the following declarations or directions, as appropriate, may be made or given in respect of a dispute –

[...]

(j) a declaration that a term of an agreement (whether a lease or tenancy agreement or otherwise) is void by reason of [insert reference to provisions under Head 9];

(k) a declaration as to whether or not an amount of rent set under the tenancy of a dwelling is the lawful rent;

(l) a direction as to the return or repayment of a specified amount of rent.

Head 13 Publication of an index of reference rents by the Private Residential Tenancies Board

Insertion at Chapter 1 of Part 7 of the Principal Act –

(1) Without prejudice to section 128, the Board shall publish a document (in this Act referred to as the ‘index of reference rents’).

(2) Subject to subsection 3, the index of reference rents shall consist of an extract of the information contained in the register, and shall contain a list of the average letting values of comparable dwellings over the four year period immediately preceding the date on which the index is first published, having regard to the following criteria –

(a) the area in which the dwelling is situated;

(b) the estimated floor area;

(c) the number of bedrooms;

(d) the amount of rent payable under the tenancy;

(e) the category to which the dwelling belongs, namely –

(i) a house,

(ii) a maisonette,

(iii) an apartment,

(iv) a studio,

and, in case of the dwelling falling within the category of a house or a maisonette, whether the house or maisonette is detached, semi-detached, or terraced.

(3) The index of reference rents shall not contain any information, as regards a particular dwelling, that discloses or could reasonably lead to the disclosure of –

(a) the identity of the landlord or the tenant or tenants of the particular dwelling,

(b) the amount of rent payable under a tenancy of the particular dwelling.

(4) The index of reference rents shall be published in electronic form and made available for inspection on a website maintained and controlled by the Board.

(5) The Board shall review and update the particulars specified in subsection 2 and contained in the index of reference rents every 12 months, the first such review occurring on the first anniversary of the commencement of this section.

APPENDIX 2 | table of cases and legislation

CASES

An Blascaod Mór Teo v Commissioners of Public Works (No 3) [2000] 1 IR 6, [2000] 1 ILRM 401

Blake v Attorney General [1982] 1 IR 117

Bittó v Slovakia (Application no. 30255/09)

Brusse v Jahani BV, Case C-488/11

Canty v Private Residential Tenancies Board [2007] IEHC 243

Cityview Press v. An Chomhairle Oiliúna [1980] IR 381

Constructora Principado SA v Alvarez, Case C-226/12

Crosbie v Custom House Dock Development Authority [1996] 2 IR 531

Daly v Revenue Commissioners [1995] 3 IR 1, [1996] 1 ILRM 122

Dreher v Irish Land Commission [1984] ILRM 94

Edwards v Malta (Application no. 17647/04)

Ghigo v Malta (Application no. 31122/05)

Heaney v Ireland [1994] 3 IR 595

Hutten-Czapska v Poland (Application no. 35014/97), (2007) 45 EHRR 4

In the matter of Article 26 of the Constitution and in the Matter of the Housing (Private Rented Dwellings) Bill, 1981 [1983] 1 IR 181

John Grace Fried Chicken Ltd v Catering Joint Labour Committee [2011] IEHC 277, [2011] 3 IR 211, [2012] 1 ILRM 392

Lough Swilly Shellfish Growers Co-Operative Society Limited v Bradley [2013] IESC 16, [2013] 1 IR 227, [2014] 2 ICLMD 70

McGowan v Labour Court [2013] IESC 21, [2013] 24 ELR 293, [2013] 11 ICLMD 22

Pigs Marketing Board v Donnelly (Dublin) Ltd [1939] IR 413

Re Article 26 and Part V of the Planning and Development Bill 1999, [2000] 2 IR 321, [2001] 1 ILRM 81

LEGISLATION

Ireland

Primary legislation

Residential Tenancies Act 2004

s.3(1)

s.8

s.9

s.12(1)(b)

s.12(1)(g)

s.18(2)

s.19

s.20(3)

s.24(1)

s.32

s.34

s.38

s.58(3)

s.76(1)

s.78(1)

s.115

s.136(i)(iii)

s.184

Statutory instruments

European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI No 27/1995)

Housing (Standards for Rented Houses) Regulations 2008 (SI No 534 of 2008)
Article 6

Other jurisdictions

Austria

Richtwertgesetz
§1

Belgium

Code Civil
Art. 6

Canada

Ontario Residential Tenancies Act 2006
s.111
s.120

Denmark

Bekendtgørelse af lov om leje (Private Housing Act)

s.58

Straffeloven (Criminal Code)

s.282

Germany

Bundesgesetzbuch (Civil Code)

§557b

§558c

§558d

§558e

§558(2)

§558(3)

§559

Wirtschaftsstrafgesetz (Economic Offences Act)

§5

Strafgesetzbuch (Penal Code)

§291

Netherlands

Burgerlijk Wetboek (Civil Code)

Art. 7:248

Wet op de Economische Delicten (Economic Offences Act)

Spain

Ley de Arrendamientos Urbanos (Urban Tenancy Act)

Article 18.1

