

Renting Homes (Fees etc.) (Wales) Bill

Bill Summary

November 2018



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November 2018

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Paper Overview:

The Renting Homes (Fees etc.) (Wales) Bill will stop anyone being charged fees (other than permitted payments outlined in the Bill) as a condition of the grant, renewal or continuance of a standard occupation contract. Standard occupation contracts will be introduced by the Renting Homes (Wales) Act 2016 and will replace assured shorthold tenancies. The only fees that will be permitted will be rent, security deposits, holding deposits and payments in default. It will also not be possible to require a person to make a loan or, in most cases, enter into contract for services as a condition of the grant, renewal or continuance of a standard occupation contract. However, the Bill does not prevent agents charging landlords for their services.

The Bill makes provision for enforcement of the new regime and for prohibited payments to be recovered. It allows Welsh Ministers to amend the Consumer Rights Act 2015 so that an agent's fees (including those charged to landlords) must be publicised by any online advertiser. It also allows Welsh Ministers to amend the 2015 Act so that multiple penalties can be imposed in relation to the same breach of a duty in Chapter 3 of Part 3 of the 2015 Act.

Should the Renting Homes (Wales) Act 2016 not be commenced when the Bill comes into force, Section 19 allows Welsh Ministers to make regulations that will apply the provisions of the Bill to assured and assured shorthold tenancies.



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Introduction

The Renting Homes (Fees etc.) (Wales) Bill was laid before the Assembly on 11 June 2018. In her statement to the Assembly the following day, Rebecca Evans AM, the Minister for Housing and Regeneration, outlined the purpose of the Bill:

...the Bill will make the costs tenants face in future significantly lower and simpler to understand. The Bill is drafted in the light of the Renting Homes (Wales) Act 2016, and therefore applies to contract holders. No longer will they be charged for an accompanied viewing, receiving an inventory, or signing a contract. No longer will they be charged for renewing a tenancy. And no longer will they see a range of services added to their contract as check-out fees when they move out. Payments will be much more predictable, limited to rent, security deposits, holding deposits and payments in default. I expect most contract holders will only ever need to think about paying their rent and finding a security deposit.

The Bill also guarantees that holding deposits are capped to a week’s rent. This is the level that most tenants currently pay, but I want to ensure that the costs they face at the beginning of their rental contract are kept to a minimum. Similarly, most tenants currently pay the equivalent of around a month’s rent as a security deposit, which I think is reasonable. However, the Bill provides for a regulation-making power regarding the amount of a security deposit. This safeguard has been provided to ensure we can avoid costs rising to an unreasonable level.

The introduction of this Bill to the Assembly follows the introduction of the **Tenant Fees Bill** (which will apply to England only) to Parliament in May 2018. In Scotland, most fees payable by tenants have been prohibited since the law was clarified in 2012.

In addition to the Bill, and the Explanatory Memorandum, a number of impact assessments have also been undertaken and published by the Welsh Government.

This briefing is intended to be read in conjunction with the Stage 1 reports from both the Equality, Local Government and Communities Committee and the Constitutional and Legislative Affairs Committee.

Policy background

Fees charged by landlords and letting agents to tenants are currently not capped. However, charging prospective tenants to simply register their name or accommodation requirements, or for supplying addresses of properties available to let, are both prohibited.

There are also requirements relating to the transparency of fees that apply to letting agents.

What fees are charged to tenants?

The fees (if any) charged to tenants will vary considerably. Based on responses to the Welsh Government's recent consultation, 99% of letting agents and 19% of landlords charge fees to tenants.

Most properties in the private rented sector are self-managed by landlords. The Explanatory Memorandum uses data from Rent Smart Wales to estimate that 59% of all properties are self-managed, 37% managed by an agent and 4% are "let only" where an agent finds the tenant, but the landlord manages the property.

The Welsh Government's recent consultation listed a range of activities for which fees may be charged to tenants:

- Accompanied viewings;
- Pre-tenancy negotiation;
- Producing the tenancy agreement;
- Producing guarantor forms if applicable;
- Completing reference reports;
- Obtaining / verifying all safety certificates;
- Protecting the deposit and issuing documentation;
- Processing move in monies and signing documentation;
- Issuing the inventory and schedule of property;
- Amending tenancy agreements;

- Renewing tenancy agreements;
- Early termination;
- Moving out

The Explanatory Memorandum, citing research commissioned by the Welsh Government from the Cambridge Centre for Housing and Planning Research, highlights:

...a wide variation in fees charged by letting agents for a particular service with no real justification for the variation; a lack of clarity on what the fee covers; and a real lack of choice for potential tenants.

While most fees are likely to be charged by letting agents, landlords may also charge fees and tenants (or someone acting for them like a parent or guarantor) may be asked to pay third parties directly. This could include, for example, credit reference agencies.

Landlords that use an agent will also be charged fees depending on the service provided. Typically, there are three levels of service offered to landlords: let only (where the letting agent finds the tenants, sets up the tenancy and then hands over management to the landlord); rent collection; and full management.

Debate in the Assembly

The issue of fees charged to tenants, particularly by letting agents, has been discussed frequently in the Senedd.

A Plaid Cymru amendment to the Renting Homes (Wales) Bill tabled at **stage 3 debate** in November 2015 would have allowed Welsh Ministers to make regulations restricting the fees which may be charged by an agent for preparing a notice or document under what is now the *Renting Homes (Wales) Act 2016*. However, that amendment was defeated. The Minister for Communities and Poverty, Lesley Griffiths AM, noted that the Bill already prevented landlords and agents from charging for the statutory obligation to issue a written statement of the contract and highlighted that the proposed amendment contained no enforcement provisions.

On 29 November 2016 during First Minister's Questions, the First Minister confirmed that a ban on letting agents' fees was "actively under consideration", in response to a question from Leanne Wood AM. However, the First Minister did emphasise the importance of analysing evidence from Scotland of the impact banning fees had there, particularly in terms of whether additional costs were being passed on to

tenants through higher rents. This point was also made in plenary by the Cabinet Secretary for Communities and Children on 7 December 2016 during a UKIP Cymru debate on letting agent fees. During that debate, the Assembly supported a motion that included calls for the Welsh Government to:

- (a) consider how legislation on this subject might work in light of the evidence on the impact of abolition in Scotland and the responses to the consultation in England.
- (b) consult with other parties in the Assembly and stakeholders on the best way forward for Wales.

In the **Member Bill Ballot**, held on 25 January 2017, five Assembly Members proposed Bills that would have taken action in this policy area. None of those Bills were successful in the ballot.

In February 2017, the Assembly's Petitions Committee considered a **petition** from Shelter Cymru to ban letting agency fees. A year earlier, in March 2016, Shelter Cymru had published ***Letting go: why it's time for Wales to ban letting agents' fees.***

Shelter Cymru had undertaken a mystery shopper exercise and found that compliance with the *Consumer Rights Act 2015 amongst letting agents was variable, with more than half not displaying a clear list of fees on their website. They also found vague terms, like 'administration fee', being used without an explanation of what it actually covered. Different agents set out fees in different ways, with some general fees including a variety of expenses, while other agents would charge fees for specific purposes separately. Shelter Cymru concluded that its mystery shop:*

...demonstrated massive problems of fairness and transparency in letting agents' fees to tenants. Renters face a bewildering variety of charges which makes an informed comparison almost impossible.

In response to the petition from Shelter Cymru, in a **letter dated 4 January 2017** (PDF, 167KB), the then Cabinet Secretary for Communities and Children wrote to the Petitions Committee and confirmed his earlier stance, commenting:

I am reluctant to go rushing into legislation without carefully studying all the evidence and thinking through the potential consequences first.

However, subsequent correspondence with the Petitions Committee Chair indicated that the government was intending to take action to restrict fees. On 27 June 2017, the First Minister confirmed to the Assembly during his **statement on the Legislative Programme** that a Bill would be introduced to ban fees charged to tenants. He said:

Llywydd, this Government will take legislative action to tackle the fees charged to tenants in the private rented sector. A good-quality, affordable home is key to well-being. There is increasing evidence that suggests the current fees, mainly charged by agents, are a barrier to people accessing private rented housing, and, once accessed, that fees can discourage people from moving home. Tenants can face significant upfront costs, which include a month's rent, a substantial security deposit and agency fees for securing a tenancy. The fee can be made up of multiple charges but is often a fixed charge or based on a percentage of the property's rental costs. Too often, tenants do not know what these costs cover. So, we will introduce a Bill to prevent unfair fees from being charged to tenants and their prospective tenants. This will provide those in the private rented sector with clarity about the costs involved and ensure the system is fair, equitable and sustainable.

Consultation on proposals for a Bill

The Welsh Government undertook a **consultation** on fees charged to tenants in the private rented sector between July and September 2017. The **outcome** (PDF, 416KB) was published in February 2018.

Six hundred and eighty three responses were received; 45% from landlords, 33% from tenants and 14% from letting and management agents. Local authorities, representative bodies and others made up the remainder of the responses. Overall, 56% of all respondents agreed with an outright ban on fees.

While a minority of landlords who responded to the consultation charged up-front fees to tenants (19%), almost all letting agents (99%) who responded charged fees.

Ninety-one per cent of tenants who responded said they were charged fees to rent properties, but only two-thirds of them were made aware of fees before they entered into any agreement.

Sixty-one per cent of landlords who used an agent, who responded to the consultation, did not know what fees their agent charged to tenants.

Will the Bill lead to higher rents for tenants?

The consultation asked a specific question about the potential for rents to increase if fees were to be prohibited. The majority of respondents to the consultation, 55%, understood that a ban on fees could lead to an increase in rents. However, the response to the consultation notes “many respondents thought that the rise would be negligible and preferable to finding up-front fees.”

Some respondents felt that while rents may increase, they would not increase by much.

What fees should be allowed?

Of those who responded to the relevant questions: Twenty eight per cent said no fees should be allowed at all; twenty eight per cent believed fees for referencing and credit checks should be allowed; Sixty four per cent of respondents believed that a refundable holding deposit should be allowed; Ninety per cent of respondents believed that fees for actions or services provided at the request of the tenant, or as a result of the actions of a tenant, should be allowed - the example given was replacing lost keys.

Evidence of a problem

In August 2017, the Welsh Government published ***Research into letting agent fees to tenants*** which it commissioned from the Cambridge Centre for Housing and Planning Research. The research found a wide variation in the fees charged by letting agents for their services in setting up, renewing or ending tenancies. The other key findings of that research included:

- There is evidence that upfront fees to tenants exacerbate difficulties in accessing the private rented sector (PRS). Many struggle with the costs, and the fees make moving into or between PRS homes expensive. Charges for renewing a tenancy are particularly difficult because the tenant is less likely to have been aware of these upfront, or may be in a different position financially by the time a tenancy is renewed;
- There is work involved for agents in setting up a new tenancy. Letting agencies do not generally make excessive profits on set-up fees in relation to costs incurred;

- There appears to be little justification for renewal fees in any circumstances, or for exit fees, except in a situation where a tenant leaves early;
- Capping fees would offer a way to limit the highest fees but could have little impact in practice. If the cap is set at a level deemed to cover costs, fees may change little, and most agents would be able to make a reasonable case for their current levels of fees, given their overheads and varying staff time required to set up a new let. Some of the highest fees (per let) found in this research were agents letting large HMOs to groups of students, where considerably more work was needed;
- There is, however, no compelling evidence as to why tenants should pay the fees rather than the landlord;
- The vast majority of the work undertaken by agents is work that the landlord would otherwise be doing themselves. Referencing tenants is a service to landlords, not tenants;
- While landlords can choose which agent they use, tenants can rarely choose an agent independently of the property;
- The wide range of fees charged to tenants, which did not correlate with agents' own estimations of the time or costs incurred in setting up a new tenancy, also suggests that market forces are operating ineffectively between tenants and agents;
- The Scottish experience suggests that most of the fears that agents had about a ban on fees to tenants were in the end unfounded, and this may also be the case in Wales. The Scottish letting agent sector appears to have coped with the ban, despite most agents having previously charged fees, with business models adjusting accordingly. Agents in Wales are currently fearful of the loss of income from a ban on tenants' fees and feel that they could not charge more to landlords without losing them, but a Wales-wide ban would mean all agents were in the same position, meaning landlords would be unlikely to find a better deal from another agent;
- If fees to tenants were banned, agents could recoup the costs of setting up new tenancies in the fees they charge to landlords. They are free to decide how to do this and could take a higher up-front fee or take a higher cut from the first month's rent, the first six month's rent or the entire tenancy, as they wish. However, this research suggests that landlords would be less likely to cease using agents if increased management charges were taken from the rent than if they were asked for a higher up-front fee. The ARLA suggestion that fees are charged to tenants over the first six months of the tenancy could just as easily be implemented via an additional management charge to landlords over the

first six months, with lower rates charged thereafter to reflect the lower costs associated with managing longer term tenants. Landlords could, if they wish, offer a higher up-front rent, with a reduction after six months to reward long term tenants. (In a rising market, the same result could be achieved by leaving the rent alone for long term tenants). Charging any costs to tenants as rent is preferable to charging fees as it improves transparency, facilitates comparability between options for tenants, and also helps tenants on low incomes to claim support via Local Housing Allowance in areas where LHA caps permit;

- There would be an increased incentive for landlords to self-manage if their fees increased. However, the research suggests that most landlords, if otherwise happy with the service their agent provides, would be unlikely to do so;
- An increase in charges to landlords will come at a time when many are already being hit by higher tax bills and further disincentives to increase their portfolios. This may cause some landlords to sell up and, overall, is likely to exert a small downward pressure on the speed of growth of the PRS in Wales;
- There is a strong case for allowing agents or landlords to charge a small holding deposit and also for allowing agents to charge tenants who cause damage or unnecessary maintenance work, or who want to leave part-way through a fixed term contract;

The same research also made a number of recommendations which were supportive of new legislation to ban most fees charged to tenants, including:

- Some fees should still be allowed: small holding deposits, fees relating to early termination of the contract and for work created by a tenant (such as losing keys or failing to keep appointments);
- Renewal fees and tenancy termination fees (excluding those for leaving early) should be included in any ban, as the *Renting Homes (Wales) Act 2016* may not be sufficient to prevent renewal or exit fees as it is currently worded;
- Legislation should address the likely consequences of tenants being asked to produce their own credit check;
- Any change in rents should be monitored over the two years following a ban, including the implications for tenants on LHA. The impact on the take up of Discretionary Housing Payments should be monitored to see whether higher rents lead to increased use of DHPs. There may be some savings to homelessness prevention budgets currently paying fees on behalf of tenants;

- If a ban is implemented, there will be a need for independent enforcement that does not rely on tenants complaining if they are asked to pay a fee; tenants often struggle to find somewhere to live and will prioritise gaining a tenancy over complaining about a fee, even if they are aware it is illegal. There is likely to be a key role here for Rent Smart Wales.

Regulatory Impact Assessment

A full Regulatory Impact Assessment (RIA) is included within the Explanatory Memorandum. The most significant costs of bringing forward this Bill are anticipated to fall on landlords and letting agents while tenants are expected to benefit the most.

The RIA notes that “the main ongoing costs of the Bill, in terms of a loss of revenue, will be felt by those letting agents who currently charge the most and largest fees.” The RIA also notes that costs could be transferred from letting agents to landlords if agents pass these costs on. In turn, landlords could pass these costs on to tenants by way of higher rent. Over the period 2019/20 to 2023/24 costs to landlords and letting agents (training providers would incur some of the transitional costs) is estimated to be within the range £18.5 million to £42.4 million for the Welsh Government’s preferred option. However, the cost benefits to tenants are expected to be between £16.7 million and £38.6 million over the same period.

The RIA notes some unquantified costs and disbenefits. These include landlords choosing to manage their own properties rather than use an agent or even divest of their properties and a risk of fewer jobs or agencies in the lettings industry.

Equality Impact Assessment

The Welsh Government has undertaken an Equality Impact Assessment (EIA) for the Bill, which explains the impact of the proposal on people with protected characteristics as defined in the *Equality Act 2010*. The EIA states that the *Private Rented Sector (PRS)* has a higher proportion of younger, BME and non-Christian residents than other tenures, and therefore the Bill will consequentially have a proportionately greater positive impact on these groups. The PRS represents over 16% of accommodation in Wales, and the prevalence of the PRS is growing, and therefore any change to accessibility of the sector will have an impact on tenants of all protected characteristics.

In terms of protected characteristics, the EIA notes that the Bill will have a positive impact on all those in the PRS, but a disproportionately high impact on young people, since there is a higher proportion of these in the PRS compared to other tenures. According to the EIA, the Bill aims to remove a financial barrier to moving into and within the PRS, which should assist tenants to locate and move to property which is more suited to their needs. This should assist disabled tenants to achieve a PRS tenancy in a property which suits their particular needs, whatever they may be. The EIA notes that the proposed Bill is neutral on the grounds of race, but it is likely to have a disproportionately positive impact on those from a BME background, since there is a higher proportion of BME householders in the PRS than among other tenures. The EIA also states that the Bill should have a positive impact on low income households as it intends to remove a significant financial barrier for those wishing to enter or move within the PRS. However, a potential negative impact would also be felt by this group if the ban on fees resulted in letting agents and landlords seeking to recoup lost income by increasing the rent charged to tenants.

Alternatives to legislation

The Welsh Government considered three options in the impact assessment that is included within the Explanatory Memorandum. Option one was to do nothing and maintain the status quo. Option two is to bring forward the Bill. Option three was to take a non-legislative approach that would promote the charging of “fewer fees to tenants”.

Option three would have involved more effective enforcement of the *Consumer Rights Act 2015*. The research commissioned by the Welsh Government and published in 2017 noted the “lack of effective enforcement of the 2015 legislation”. Option three could also have included the introduction of a voluntary fees code which may have set standardised charges and caps.

The suggestion that a voluntary code could have been implemented through changing Rent Smart Wales licence conditions was discounted as, because there is no need for legislative change, there would have been no “oversight and amendment” by the National Assembly even though the change would have imposed “a significant change to business practices for letting agents and landlords”.

The letting industry itself has proposed some alternatives to legislation, some of which were highlighted in the research commissioned by the Welsh Government noted above. This includes spreading the cost of fees over a number of rental payments and provisions to make it easier to transfer deposits from one landlord to another. More effective enforcement of existing requirements on the transparency of fees has also been advocated by the sector.

Regulation of letting agents in Wales

In March 2011, the Assembly’s Communities and Culture Committee published its report, ***Making the most of the private rented sector in Wales (PDF, 695kb)***, following an in-depth inquiry. The Committee’s report included a recommendation that “the Welsh Government takes appropriate legislative action to enable the introduction of statutory regulation of all letting agencies in Wales.” This was taken forward through Part 1 of the *Housing (Wales) Act 2014 (the 2014 Act)*.

The 2014 Act contains provisions that requires agents who engage in lettings or property management work to obtain a licence. Licences are issued by Rent Smart Wales, a service within Cardiff Council, which acts as the licensing authority for the whole of Wales. Rent Smart Wales works with individual local authorities when it comes to taking enforcement action. The relevant sections of the 2014 Act came into force on 23 November 2016.

When the legislation was initially introduced, it was proposed that for an agent to obtain a licence, they would have to join an approved professional body. As the Bill progressed through the Assembly, that requirement was removed. However, agents who are members of a relevant professional body receive a discount on their licence fee. Relevant professional bodies include the Association of Residential Letting Agents (ARLA), National Association of Estate Agents (NAEA), Royal Institution of Chartered Surveyors (RICS), National Approved Letting Scheme (NALS), the UK Association of Letting Agents and others determined by the Licensing Authority.

*Agents have to undertake approved training to obtain a licence. Licences are issued subject to a condition that the Code of Practice issued under the 2014 Act is adhered to. The Code of Practice sets standards relating to letting and managing rental properties. There are also a range of other conditions that are attached to agent licences. This includes conditions which address client money protection (if the agent handles money), professional indemnity insurance, and membership of a redress scheme. Licence holders must also be fit and proper persons. Rent Smart Wales must have regard to **guidance** issued by the Welsh*

Government when determining whether a person is fit and proper person to hold a licence.

Letting agents must also comply with consumer protection legislation. On 25 November 2014, the Assembly agreed a Legislative Consent Motion on the Consumer Rights Bill (as it then was) relating to letting agency fees. The *Consumer Rights Act 2015* now requires letting agents in Wales to display or publish a list of their relevant fees and charges, although it does not regulate fees. Local authorities enforce this legislation. They can impose a civil penalty of up to £5,000 on agents failing to comply with the requirements. Agents in Wales can appeal to the Residential Property Tribunal against a civil penalty. It is a requirement of the Rent Smart Wales Code of Practice that the requirements of the Consumer Rights Act 2015 are complied with. The Rent Smart Wales Code of Practice states:

An agent must disclose to a prospective tenant all fees so all the costs payable if entering a tenancy agreement are clear and understood. The same also applies to any fees which may be charged at a later date, such as any fees for the renewal of the tenancy agreement. All fees must be stated as being inclusive of Value Added Tax (“VAT”). This also includes any fees which may be charged as a result of late payment of rent. This requirement covers any property adverts an agent may produce.

When section 31 of the *Renting Homes (Wales) Act 2016* is in force it will prohibit landlords charging fees for the provision of written statements of occupation contracts, unless a further copy is requested.

Research by Shelter Cymru found widespread non-compliance with the requirement to display fees and the Explanatory Memorandum notes that “there is widespread commentary suggesting that the duty is not being enforced consistently”.

Relevant legislation

Accommodation Agencies Act 1953

The *Accommodation Agencies Act 1953* prohibits the taking of money from a prospective tenant simply for registering their name or ‘requirements’. It also prohibits charges being made simply for supplying addresses of properties to let.

Housing Act 2004

The *Housing Act 2004* introduced tenancy deposit protection in England and Wales. Any deposit paid in connection with an assured shorthold tenancy must be protected by an approved tenancy deposit scheme. The deposit needs to be protected within 30 days of the landlord or agent receiving it. Each of the deposit protection schemes has procedures in place for resolving disputes at the end of the tenancy. Holding deposits, to take the property off the market, do not need to be protected unless/until they become the deposit for the tenancy. Rent in advance would not normally be regarded as a deposit.

The provisions for tenancy deposit protection are replicated in the *Renting Homes (Wales) Act 2016*.

Housing (Wales) Act 2014

Most letting agents in Wales now need to be licensed by Rent Smart Wales. Agents not dealing with residential property, or residential property not let (or to be let) on domestic tenancies would not need to be licensed.

Part 1 of the *Housing (Wales) Act 2014* requires registration of private landlords and licensing of agents. Private landlords who undertake lettings or management activities in relation to their own properties also require a licence. These provisions only apply in relation to domestic tenancies, i.e. assured, assured shorthold and regulated tenancies. Registration and licensing is managed by Rent Smart Wales, a service within Cardiff Council, on behalf of all Welsh local authorities.

Licences are issued subject to a number of conditions. There are specific conditions attached to agent licences. Rent Smart Wales published ***Types of Licence and Conditions*** which outlines conditions that may be attached to agent licences (depending on the circumstances) in addition to standard conditions – such as complying with the Code of Practice.

Consumer Rights Act 2015

The *Consumer Rights Act 2015* requires letting agents in Wales and England to display or publish a list of their relevant fees and charges. Local authorities enforce this legislation and are able to impose a civil penalty of up to £5,000 on agents who fail to comply with the requirements. Agents in Wales can appeal to the Residential Property Tribunal against any civil penalty.

While the 2015 Act should provide greater transparency, it does not control or prohibit any fees.

Renting Homes (Wales) Act 2016

With a limited number of exceptions, the *Renting Homes (Wales) Act 2016* will replace current tenancies and licences with just two types of occupation contract: secure and standard. It is anticipated that the *Renting Homes (Wales) Act 2016* will commence in 2019. In the private rented sector, standard occupation contracts will replace assured shorthold tenancies as the default contract.

While the 2016 Act does not deal with the regulation of letting agents, it does prevent fees being charged in one specific circumstance. The landlord under an occupation contract must give the contract-holder a written statement of the contract before the end of the period of 14 days starting with the occupation date. Under Section 31(3) the landlord (or an agent working on their behalf) cannot charge for this.

Policy in England and Scotland

England

In the UK Government's 2016 Autumn Statement it was announced that letting agent fees were to be banned in England. A **public consultation** followed in April 2017.

The **Tenant Fees Bill** was introduced to the House of Commons and given its First Reading on 2 May 2018. It is expected that the proposals in the Bill will take effect in 2019.

Introduction of the Bill follows pre-legislative scrutiny of a **draft Tenant Fees Bill (PDF 716 KB)** which was published on 1 November 2017. The publication of the draft Bill followed a **public consultation** (PDF, 842KB) that took place between April and June 2017. The draft Bill is similar in many respects to the Bill that has been introduced in Wales.

Scrutiny of the draft Bill was undertaken by Parliament's Housing, Communities and Local Government Select Committee and its **report** (PDF, 560KB) was published in March 2018. The final Bill reflects many, though not all, of the Committee's recommendations.

Recommendations that were accepted included:

- Amending the Bill to ensure that only variations in the rent agreed subsequent to the tenancy being entered into will be permitted. The Committee had felt that as originally drafted there was little to prevent a tenancy agreement providing that the rent is very high initially, with a downward variation to take effect from, for example, a month later;
- An amendment that will provide a landlord with a defence to any financial penalty or offence should they have been incorrectly told that a tenant does not have the right to rent;
- On default fees, the Committee recommended that the Government issues guidance on what constitutes a reasonable default fee and guidance to tenants on how to challenge the inclusion of such fees in agreements. The Committee also recommended that Trading Standards be given the express power and resources to enforce the reasonableness of default fees without reliance on the Consumer Rights Act 2015. The Government accepted this recommendation in part, and the amount of any payment which exceeds the landlord's loss will be a prohibited payment;
- Preventing a landlord from recovering possession until prohibited fees have been repaid;
- Prohibited loans made by tenants should be repayable on demand;

The Government rejected a number of recommendations and accepted others in part. One of the recommendations rejected, was that the Bill should prevent retaliatory eviction to stop landlords evicting tenants simply for trying to enforce their rights. The Government rejected this recommendation because it was felt it would be difficult to prove why the eviction was taking place and it would be one person's word against another.

The Tenant Fees Bill received its first reading in the House of Commons on 2 May 2018. The Explanatory Notes that accompany the Bill set out the government's objectives:

...the Government aims to make renting fairer and more affordable for tenants by reducing the costs at the outset of a tenancy. This Bill also aims to improve transparency and competition in the private rental market. The Bill delivers the manifesto commitment to ban letting fees paid by tenants in England and other measures to improve fairness, competition and affordability in the lettings sector.

The *Tenant Fees Bill* will only allow certain payments to be made in connection with the grant, renewal, continuance, variation, assignment, novation or termination of an assured shorthold tenancy in the private sector. It also applies to certain lettings to students and licences. These permitted payments are:

- the rent;
- a refundable tenancy deposit (reserved for any damages or defaults on the part of the tenant) capped at no more than six weeks' rent (there is no cap in the *Renting Homes (Fees etc.) (Wales) Bill*, but there is a power to introduce a cap through regulations);
- a refundable holding deposit (to reserve a property) capped at no more than one week's rent;
- certain payments on assignment, novation or variation of a tenancy when requested by the tenant capped at £50, or reasonable costs incurred if higher;
- payments associated with early termination of the tenancy, when requested by the tenant;
- payments in respect of utilities, communication services and council tax; and
- payments in the event of a default by the tenant (such as replacing a lost key or late rent payment fine), capped at the level of the landlord's loss.

Landlords and letting agents will also be prevented from requiring anyone acting on behalf of the tenant (or guaranteeing their rent) to make a payment not listed above. The Bill also bans landlords and their agents from requiring tenants and other relevant persons to secure and pay for services from any third party (other than landlords in relation to utilities and communication services) or to make a loan.

Under the Tenant Fees Bill, the responsibility for enforcing the prohibitions applying to landlords and letting agents lies with each individual weights and measures authority (trading standards) in England. Where an enforcement authority is satisfied beyond reasonable doubt that a person has breached the prohibitions on landlords and letting agents, the authority may impose a financial penalty of such an amount as the authority determines, but no more than £5,000.

A landlord or letting agent will be guilty of a criminal offence if they commit a breach (as described above) within 5 years of the imposition of a financial penalty or conviction for a previous breach. A person found guilty of such an offence is liable on summary conviction to an unlimited fine.

If a criminal offence is committed, local authorities may impose a financial penalty of up to £30,000 as an alternative to prosecution. In such a case, local authorities will have discretion whether to prosecute or impose a financial penalty. Where a financial penalty is imposed, this will not amount to a criminal conviction.

The *Tenant Fees Bill* establishes a lead enforcement authority for the purposes of the legislation. The lead enforcement authority may be the Secretary of State or a local weights and measures authority with which the Secretary of State makes arrangements to be the lead enforcement authority.

The Bill also proposes making some changes to the *Consumer Rights Act 2015* which requires agents' fees to be displayed in their offices and on their website. The proposed amendments will amend the 2015 Act as it applies in relation to housing in England to require letting agents to display the name of the Client Money Protection scheme to which they belong. It also applies the letting agent transparency requirements (which requires an agent's fees to be displayed) to third-party online property portals like Zoopla and Rightmove. In contrast to the proposals in Wales, the amendments to the *Consumer Rights Act 2015* are on the face of the Tenant Fees Bill.

In addition to the [Explanatory Notes](#), an [Impact Assessment](#) (PDF, 1MB) was also published. The House of Commons Library has published [Tenant Fees Bill 2017-19: analysis for Second Reading](#) and [Tenant Fees Bill 2017-19: analysis for Report Stage](#).

Scotland

Letting agents in Scotland have not been able to charge tenants fees in addition to the rent and a refundable deposit when granting, renewing or allowing a 'protected' tenancy to continue since November 2012.

In 2012, the Scottish Government undertook a consultation on the charging of premiums in the private rented sector. This followed widespread concerns about the legality of pre-tenancy charges made by some letting agents. The *Rent (Scotland) Act 1984 (the 1984 Act)* had already made it an offence to require payment of any premium (in addition to the rent and a refundable deposit of no more than two months' rent) as a condition of the grant, renewal or continuance of a 'protected tenancy'.

The Scottish Government believed that there was confusion around what constituted a premium. Following the consultation, the 1984 Act was amended to clarify that 'premium' included any service or administration fees or charges.

The Welsh Government's Research into letting agents' fees to tenants explored the impact of the ban, and subsequent clarification, in Scotland. It summarised the available research and notes that the situation pre-2012 (when the law was clarified) was not the same as the situation that we currently have in Wales. A number of issues were highlighted:

- While a large majority of letting agents in Scotland were charging fees prior to 2012, these fees were relatively low. Research from Shelter in 2011 showed 15 out of 26 agents surveyed charged less than £120;
- Further research from Shelter in 2013 found that 23 out of 50 agents had made changes as a result of the 2012 clarification, and 17% of them had increased management fees to landlords as a result;
- From the same research 12% of agents believed landlords had increased their rent as a result of the changes. Other quantitative evidence found a small inflationary impact on rents – and the letting industry sector remained healthy;
- A range of other changes were being implemented in Scotland around the same time (including the requirement to provide Tenant Information Packs);

- There has been no evaluation by the Scottish Government of the impact of the 2012 clarification;
- A 2015 House of Commons Communities and Local Government select committee inquiry, ***Private Rented Sector: the evidence from banning letting agents' fees in Scotland***, found that the available evidence was not adequate to determine the impact of the 2012 clarification in Scotland or how a ban might work in England.

Holding deposits in Scotland

Despite the law being clarified in 2012, there is still some uncertainty as to whether holding deposits are an illegal premium in Scotland.

The 1984 Act, as amended, does not specifically permit holding deposits. However, it is clear from the websites of some letting agents operating in Scotland that holding deposits are still routinely charged.

The Welsh Government's research that was undertaken to inform the development of this Bill found that, in Scotland, "most stakeholders were unclear whether charging a refundable deposit for taking a property off the market whilst checks were undertaken was permissible under the 2012 legislation." However, the same research found that there was a consensus that refusing to return a holding deposit if the tenancy did not proceed was illegal.

Since there was an acceptance that holding deposits had to be returned should the tenancy not proceed, the research concluded that they offered limited security to agents and were "believed to be falling out of use, even amongst those who did still believe them to be permitted." Furthermore, the "growing practice of expecting tenants to come prepared with their references and credit check, meaning that signing the tenancy could happen very quickly."

The Bill as introduced

The following paragraphs provide a concise section-by-section summary of the Bill's provisions.

The Bill refers to contract-holders rather than to tenants. This is because the Bill reflects changes that will be implemented by the *Renting Homes (Wales) Act 2016* (the 2016 Act) once it is fully commenced. Under the 2016 Act, standard occupation contracts will replace assured shorthold tenancies as the default tenancy in the private rented sector.

Part 1

Section 1: Overview

Section 1 provides an overview of the Act.

Part 2: Prohibition of certain payments etc.

Section 2: Prohibitions applying to landlords

Section 2 creates a number of offences that apply to landlords.

It will be an offence for a landlord to require a 'prohibited payment' to be made by anyone (whether the contract-holder or a third party) for the grant, renewal or continuance of a standard occupation contract. A requirement for anyone to make a loan to the landlord (or anyone else) in these circumstances will also be an offence.

A landlord cannot require anyone to enter into a contract for services for the grant, renewal or continuance of a standard occupation contract. However, this does not apply where the contract for services provides for any services to be provided by any person with a right to occupy a dwelling. This would include people living in tied accommodation, such as a caretaker.

A person who commits an offence under this section is liable on summary conviction to an unlimited fine. The court may also order that any prohibited payment is repaid to the person who made it.

Section 3: Prohibitions applying to letting agents

Section 3 largely replicates Section 2, and creates equivalent offences relating to letting agents. However, a letting agent cannot require anyone to enter into a contract for services for the grant, renewal or continuance of a standard occupation contract. However, there is no exception where the contract for services provides for any services to be provided by any person with a right to occupy a dwelling, as is the case in Section 2.

A person who commits an offence under this section is liable on summary conviction to an unlimited fine. The court may also order that any prohibited payment is repaid to the person who made it.

Section 4: Prohibited and permitted payments

Section 4 defines prohibited payments. Any payment will be a prohibited payment unless it fits into one of two categories:

- It is a payment by a landlord to a letting agent in respect of 'letting agency work' or 'property management work'; or
- It is a permitted payment set out in Schedule 1 (Rent, security deposit, holding deposits and payments in the event of a default)

'Lettings work' (though not 'letting agency work' which is the term used in the Bill) and 'property management work' are both defined in Part 1 of the *Housing (Wales) Act 2014*.

Schedule 1: Permitted payments

Any payment not listed in Schedule 1 is prohibited if it is required as a condition of the grant, renewal or continuance of a standard occupation contract.

Rent is a permitted payment. However, a limit is placed on the amount of rent that will be a permitted payment. Where payment of rent for one period is greater than the amount of rent payable in any other period during the contract, the difference is a prohibited payment. This is intended to avoid prohibited payments being disguised as rent. For example, a landlord or agent may choose to charge a higher rent for the first month as it includes prohibited payments. This does not mean the rent cannot be increased as permitted variations of the rent are allowable. This would include an increase in rent agreed between the landlord and contract-holder, in accordance with the contract or under any enactment.

Security deposits are permitted payments. These must be dealt with in accordance with an authorised deposit scheme. Paragraph 2(4) of Schedule 1 allows Welsh Ministers to make regulations to specify a limit to any security deposit. The Explanatory Memorandum states (para 3.28) that:

Evidence for capping security deposits in Wales is unclear and did not feature in responses to the consultation. However there is a risk that such deposits could rise and therefore become unaffordable. Powers for the Welsh Ministers to set a lower cap have therefore been included within the Bill as a necessary safeguard.

Holding deposits are permitted payments. A holding deposit is commonly charged before a tenancy is agreed to reserve the property subject to satisfactory checks and other matters being agreed between landlord, agent and tenant.

The Bill will limit the amount of any holding deposit to the equivalent of one week's rent. Holding deposits are treated as having been made on the terms set out in Schedule 2.

Payments in default are also permitted payments. A payment in default is one required under an occupation contract as a result of the contract-holder's 'default'. 'Default' includes failure to make a payment by the due date to the landlord and a breach by the contract-holder of a term of the contract. This could include charges relating to the late payment of rent, charges to replace lost keys and charges relating to the failure of the tenant to rectify damage they caused to the premises. Any charges would have to be permitted by the occupation contract.

Section 5: Non-binding contract terms

Terms in occupation contracts that require prohibited payments, a contract for services to be entered into, or a loan to be made are not binding on the contract-holder, but the occupation contracts continue to have effect in every other respect.

Section 6: Application of sections 2 to 5 to pre-existing requirements and contracts

Sections 2 to 5 do not apply in respect of either:

- Requirements to make a payment (or to enter into a contract for services make a loan) imposed before Part 2 of the Bill comes into force; or

- Requirements to make a payment (or to enter into a contract for services make a loan) forming part of a standard occupation contract entered into before Part 2 of the Bill comes into force.
- The Explanatory Notes make it clear that tenancies or licences that convert to standard occupation contracts because of the implementation of the *Renting Homes (Wales) Act 2016* will not be affected by Sections 2 to 5 provided the original contract was entered into before Part 2 of the Bill comes into force.

Section 7: Power to amend definition of "permitted payment"

Welsh Ministers can add, modify or remove a permitted payment from Schedule 1, with the exception of rent. The Explanatory Notes state that this could be used to address any unforeseen practices to defeat the purposes of the Bill.

Section 8: Meaning of letting agent

Section 8 defines "letting agent" as someone who undertakes "lettings work" or "property management work" as defined in Part 1 of the *Housing (Wales) Act 2014*. *Those letting agents are subject to regulation by Rent Smart Wales.*

Part 3: Treatment of holding deposits

Section 9 – treatment of holding deposits

Section 9 requires that holding deposits are treated as having been made on the terms set out in Schedule 2.

Holding deposits must be repaid within a prescribed time frame unless an exception applies. Exceptions are:

- Where the deposit is applied towards the first payment of rent;
- Where it is applied towards the security deposit;
- In certain circumstances, where the landlord is prohibited from letting the premises because of the prospective contract-holder's immigration status (Right to Rent checks are not currently in force in Wales – this is a non-devolved area);
- In certain circumstances, where the prospective contract holder has provided false or misleading information to the landlord;
- Where the contract holder decides not to enter a contract, or fails to take reasonable steps to enter into a contract.

Part 4: Enforcement

Sections 10 to 16 deal with enforcement of the Bill's provisions.

Section 10 – Power to require documents or information

Local authorities will be able to authorise officers for the purposes of requiring documents or information in connection with the Bill. Authorised officers will be able to require documents and must be provided with information for the purposes of investigating whether any offence has been committed. The requirement is imposed by giving a notice to the relevant person. Documents and information can be demanded from contract-holders, landlords and letting agents.

There will be no requirement to provide any documents which have legal professional privilege.

Sections 11 and 12

These sections create a number of offences to ensure the provisions in the Bill can be effectively enforced.

Under Section 11 of the Bill, it is an offence for a person to fail to provide documents (as set out in a notice under Section 10) or information as required by a local housing authority, unless they had a reasonable excuse. A person who commits this offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500). A person who intentionally alters, suppresses or destroys any document they have been required to produce commits an offence which is subject to an unlimited fine.

Section 12 creates two offences which are subject to unlimited fines. Providing false or misleading information either knowingly or recklessly is an offence. An offence is also committed if any person provides false or misleading information (again, either knowingly or recklessly) to another person who they know is going to provide it in reply to a Section 10 notice.

Section 13

Under Section 13 of the Bill, where an authorised officer of a local housing authority believes that an individual has committed an offence under Section 2 or 3 (requiring a prohibited payment to be made to a landlord or letting agent) the officer may give that individual a fixed penalty notice, which allows that individual to discharge any liability to conviction for the offence on payment of a £500 penalty. The amount of the fixed penalty may be amended by regulations. The Explanatory Memorandum notes that should a landlord or letting agent choose not to pay the fixed penalty notice, court proceedings may be commenced. Also, as the licensing arrangements for letting agents and landlords under the *Housing (Wales) Act 2014* requires a landlord or letting agent to pass the 'fit and proper' person test, an offence resulting from a breach of the ban could put their licence in jeopardy.

Notices issued under Section 13 are treated as if they were given under Section 29 of the Housing (Wales) Act 2014. Amongst other matters, this means no proceedings can be issued if the penalty is paid within 21 days following the date of the notice. It also sets out what information the notice must include.

Receipts from these notices can only be used for the functions of the local authority in relation to this Bill.

Section 14

If a person has been convicted of an offence under the Bill, the licensing authority (Cardiff Council using the Rent Smart Wales brand) for Part 1 of the *Housing (Wales) Act 2014* must be informed. The licensing authority will then take the conviction into consideration when determining whether the person is a fit and proper person to hold a landlord or agent licence.

Section 15

The Welsh Ministers may issue guidance in relation to Part 4 of the Bill and local authorities must have regard to it.

Section 16

This section defines an authorised officer.

Part 5: Recovery of an amount by a contract holder

Section 17

Section 17 allows a person to apply to the county court so they can recover a prohibited payment or holding deposit. This does not apply where criminal proceedings have been brought in relation to a permitted payment. This is because where a person is convicted under Section 2 or 3 the court has the power to order payment of an amount equivalent to the prohibited payment to the person who paid it.

Part 6: Publicising letting agents' fees

Section 18

Section 18 allows Welsh Ministers to amend the *Consumer Rights Act 2015* so that *an agent's fees must be publicised by any online advertiser (such as Zoopla or Rightmove) it uses. It also allows Welsh Ministers to amend the 2015 Act so that multiple penalties can be imposed in relation to the same breach of a duty in Chapter 3 of Part 3 of the 2015 Act. The Explanatory Memorandum notes that this means more than one penalty can be imposed when a continuing breach has not been remedied.*

Part 7: Final provisions

Sections 19 to 24

This Bill is written on the assumption that the *Renting Homes (Wales) Bill 2016* will be fully commenced. This will not be before April 2019. Should the relevant sections of the 2016 Act not be in force when this Bill is commenced, Section 19 allows transitional provisions to be made that will apply to assured and assured shorthold tenancies, as defined in the *Housing Act 1988*.

Section 20 provides that senior officers of corporate bodies can also be held liable for offences under the Bill.

Sections 21 to 23 set out technical provisions about regulations, terms defined in the

Bill and how the Bill applies to the Crown. Section 24 sets out that only that section and Section 25 (which sets out the Bill's short title) come into effect on the day the Act receives Royal Assent. All remaining provisions will come into effect on a day to be appointed by Welsh Ministers.

Schedule 1

Schedule 1 outlines permitted payments. See commentary on Part 2 above.

Schedule 2

Schedule 2 outlines the treatment of holding deposits. See commentary on Part 3 above.

Reaction from stakeholders

The Stage 1 report from the Equality, Local Government and Communities Committee outlines the broad range of views from stakeholders. All the responses to that Committee's public consultation can be viewed on the Bill's [webpage](#).

Groups representing tenants and advice agencies were supportive of the legislation, even if it resulted in an increase in rents. For example, in its response to the Committee's consultation, Shelter Cymru cited its **Letting Go** campaign which "highlighted the cost of tenants' fees and the lack of transparency and consistency in agents' fee policies." Citizens Advice Cymru said in relation to the Bill that, "If the wording of the legislation is watertight and includes adequate enforcement mechanisms, it will fix a dysfunctional feature of the rental market. It will also make it easier for renters on lower incomes to meet the upfront costs of renting."

Letting agents and landlords, while broadly supportive of attempts to raise standards in the sector, are generally opposed to this Bill; they questioned whether it will achieve its objectives, including whether it will improve access to the sector. The Association of Residential Letting Agents (ARLA) PropertyMark highlighted a number of broad concerns in its response to the consultation, including:

- A ban will make buy-to-let investment even less attractive and result in the extra costs borne by landlords being passed on to tenants through rent rises.
- Banning fees will reduce competition in the market and agents will become more selective about the tenants they choose.

- In relation to rent rises, ARLA Propertymark cited research that it had commissioned from **Capital Economics** which suggested a ban on fees could lead to a rent increase of £103 per year.

The Residential Landlords Association suggested that an unintended consequence of this Bill could be reducing the overall housing supply available to rent in Wales, increasing demand in the private sector and reducing access to housing in rural communities.