

Explanatory Memorandum to The Renting Homes (Fees Etc.) (Prescribed Limits of Default Payments) (Wales) Regulations 2020.

This Explanatory Memorandum has been prepared by the Welsh Government's Education and Public Services Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Renting Homes (Fees etc.) (Prescribed Limits of Default Payments) (Wales) Regulations 2020.

I am satisfied that the benefits justify the likely costs.

Julie James
Minister for Housing and Local Government
28 January 2020

PART 1

1. Description

- 1.1. Default payments are permitted payments under paragraph 6 of Schedule 1 to the Renting Homes (Fees etc.) (Wales) Act 2019. These Regulations specify limits (prescribed limits) for certain types of payments required in the event of a default by a contract-holder of a standard occupation contract. If the prescribed limits are exceeded, the excess is a prohibited payment.
- 1.2. The Regulations set out the method of determining the prescribed limit applicable where a contract-holder does not make a payment of rent to the landlord by the due date. The Regulations also specify two descriptions of default payment and prescribe a limit in respect of them. The first is a default payment in respect of the cost of changing, adding or removing a lock, where necessary as a result of a breach by the contract-holder of a term of the contract. The second is a default payment for the replacement of a key or other security device giving access to the dwelling where this is necessary as a result of a breach by the contract-holder of a term of the contract.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

- 2.1. None.

3. Legislative background

- 3.1. The Regulations are made under section 27(2)(a) of, and paragraph 6 of Schedule 1 to, the Renting Homes (Fees etc.) (Wales) Act 2019. Part 2 of the 2019 Act makes it an offence for a landlord or letting agent to require any payment of money in consideration of granting, renewing or continuing a standard occupation contract, or pursuant to a term of a contract, unless it falls within one of two categories. Any such payment which does not is a “prohibited payment” The first category are payments by a landlord to letting agent in respect of lettings work or property management work. The second category are “permitted payments” listed in Schedule 1 to the Act.
- 3.2. Paragraph 6 of Schedule 1 (payment in the event of default) provides that a payment that is required under a standard occupation contract, to be made in the event of a default (as defined in paragraph 6(2)) by the contract-holder is a permitted payment, but this is subject to sub-paragraph (3). That states that in the case of a default to which sub-paragraph (4) applies, if the amount of a payment required in the event of the default exceeds the prescribed limit, the amount of the excess is a prohibited payment. Sub-paragraph (4) applies to (a) a failure by the contract-holder to make a payment of rent by the due date to the landlord; (b) any additional description of default which is specified by regulations.

Paragraph 27(2)(a) provides power to make different provision for different purposes.

- 3.3. A statutory instrument containing regulations under paragraph 6 of Schedule 1 may not be made unless a draft of the regulations has been laid before, and approved by resolution of, the Senedd (“the affirmative procedure”) (section 27(3)).
- 3.4. Until the Renting Homes (Wales) Act 2016 comes into force, then by virtue of the Renting Homes (Fees etc.) (Wales) Act 2019 (Transitional Provision for Assured Shorthold Tenancies) Regulations 2019, these Regulations apply to assured shorthold tenants until such time those tenancies convert to standard occupation contracts under section 240 of the 2016 Act when the Regulations apply to standard occupation contracts.
- 3.5. These Regulations precede prescribed Model Contracts under section 29 of the Renting Homes (Wales) Act 2016 (“the 2016 Act”) and it should be noted that for default payments to be permitted under these Regulations a contract must contain a term so that if there is a default, a payment may be required to be made (eg for the late payment of rent, for a lock giving access to the dwelling or for a replacement key/security device).

4. Purpose and intended effect

- 4.1. Where a contract-holder is at fault, and breaches the term of the contract, costs may be incurred by the landlord for which the contract-holder should be liable. Permitting payments for these costs reflects a contractual commitment on the part of the contract-holder to agree to pay such sums.
- 4.2. The Explanatory Memorandum for the Act noted that charging of payments in default is a longstanding practice and there is little evidence to show tenants within the PRS are being overcharged to a significant or consistent degree.
- 4.3. The purpose of these Regulations is therefore to prescribe limits for certain types of payments required in the event of a default by a contract-holder of a standard occupation contract.
- 4.4. The Regulations prescribe default payments which may be required as a result of a contract-holder’s default and set limits in respect of those payments. There is a prescribed limit which applies in the case of a failure by the contract-holder to make a payment of rent by the due date. Two descriptions of default payments set a prescribed limit in respect of those payments. These are in relation to the cost of changing, adding or removing a lock and replacement of a key or other security device used to gain access to the dwelling where the contract-holder is at fault.

- 4.5. The Regulations prescribe the method of determining the prescribed limit applicable to late rent as the overall amount owing plus the Bank of England base interest rate + 3% as an annual percentage rate (APR). For example, a 30-day late payment of rent of £600, at a Bank of England base rate of 0.75%, plus 3%, would result in a charge of £1.85. A payment for late rent is only permitted once seven days has elapsed from the date the rent is due.
- 4.6. Where a prohibited payment has been made by or on behalf of the contract-holder (claimant), they may apply to the county court for the recovery of the amount of that payment under section 22 of the Act. If the court is satisfied beyond reasonable doubt that a prohibited payment has been made and all or part of that payment has yet to be repaid, the court may order repayment in respect of the amount of that payment or the outstanding amount (if part has been repaid).
- 4.7. In addition, Guidance under section 41(2A) of the Housing (Wales) Act may include provision about matters to be considered by a licensing authority in deciding whether a failure to repay the amount of any prohibited payment affects a person's fitness to be licensed under Part 1 of the 2014 Act.

5. Consultation

- 5.1. A full public consultation was held between 17 July and 27 September 2017, prior to the introduction of the Renting Homes (Fees etc) Wales Bill, on the proposals to address fees charged to tenants in the private rented sector.
- 5.2. 683 responses were received with 59% of responses from landlords or letting agents and 33% of responses from tenants.
- 5.3. Results found that 90% of respondents believed that fees charged as a result of a default on the part of a tenant, or for services provided at the request of a tenant, should continue to be allowed. <https://gov.wales/sites/default/files/consultations/2018-02/180226-fees-charged-to-tenants-responses.pdf>
- 5.4. A further eight week consultation was undertaken between 24 May 2019 and 19 July 2019 with regards to making these Regulations. In total 303 responses were received to the consultation. The majority of respondents were either landlords (77%) or letting agents (13%). Responses were also received from all major stakeholders.
- 5.5. The responses indicated that while landlords did not as a matter of course charge default payments, they did feel that there was a need to be able to charge where tenants had been at fault and breached a term of their tenancy agreement.

- 5.6. Of the 303 responses to the consultation, 250 respondents (83%) noted that they either charged, or had been charged with default payments as below:
- 5.7. 157 lost / replacement keys (52%)
107 late rent (35%)
57 emergency out of hours calls (19%)
207 damage caused by the tenant (68%)
33 missed appointments (11%)
67 for bounced cheques (22%)
94 for other (31%)
- 5.8. Tenants commented that the amount that had been charged varied. Most tenants had been charged a fixed fee which varied from £15 plus VAT as the lowest and £60 as the highest single charge.
- 5.9. Similarly there was a wide range of amounts charged by landlords / agents, some referred to different ways of requiring payment for different defaults e.g. rent at amount plus percentage; repairs at cost; keys at a fixed rate. There were a number of respondents that cited they would charge a fixed rate which would include some added amount to take account of the landlord's (or other's) time. An almost equal amount of landlord / agents did not specify an amount other than the total cost of the loss.
- 5.10. There was some consensus on the basis on which late rent payment should be calculated with reference to the Bank of England base rate, either with or without an additional administration fee or penalty charge. The majority felt that they would charge the tenant as soon as the rent became due and not paid. A smaller number would allow a grace period before then instigating a fixed fee or percentage and this ranged from seven to fourteen days after the rent's due date. .
- 5.11. The majority of respondents felt that they would charge the tenant as soon as the rent became due and not paid. A smaller number would allow a grace period before then instigating a fixed fee or percentage and this ranged from seven to fourteen days after the rent's due date. The Minister herself did when recommending that the Committee reject Leanne Wood's amendment to make it 14 days at Stage 2 scrutiny. The Committee agreed with the Minister, therefore 7 days was chosen for this purpose.
- 5.12. A detailed analysis of the responses to the consultation is available on the Welsh Government's website. <https://gov.wales/renting-homes-fees-etc-wales-act-2019-default-fees-and-prescribed-information>

6. Additional research

- 6.1. Research commissioned by the Welsh Government prior to introduction of the 2019 Act found 62% of agencies charged for lost keys, 40% for out of hours call outs and 34% for other maintenance call outs.
- 6.2. The average charge for lost keys was £20, for out of hours call outs £36 and for other maintenance call outs £30.
- 6.3. The research also found agents generally claimed that they would charge only the costs incurred for events such as replacing keys or unnecessary call outs. In many cases, they would simply ask the tenant to pay the contractor or key cutter directly. All of those interviewed said that tenants would not normally be charged for a callout unless they were in some way at fault. https://gov.wales/sites/default/files/statistics-and-research/2019-07/170817-research-letting-agent-fees-tenants-en_0.pdf

7. Stakeholder engagement

- 7.1. Regular engagement, including meetings and email contact took place during the passage of the Renting Homes (Fees etc.) Bill. Discussions on permitted payments were held with key stakeholders, including the RLA, ARLA and Shelter Cymru, and their views through these mediums, as well as their responses to the public consultations helped to advise the policy intentions for these regulations.

PART 2

REGULATORY IMPACT ASSESSMENT

8. Options

- 8.1. For the purpose of the Regulatory Impact Assessment two options have been modelled:

Option One: Not make regulations under Schedule 1 Paragraph 6

Option Two: Make regulations prescribing and limiting default payments.

- 8.2. The policy and approach around default payments were fully considered during the scrutiny of the Act. As such, alternative forms of legislation and non-legislative interventions have not been considered in this appraisal.

9. Costs and Benefits

- 9.1. The costs and benefits associated with the two options have been produced using the best available information at the time of drafting the Regulations. This information has been prepared taking into consideration:

- The consultation on the making of the regulations
<https://gov.wales/renting-homes-fees-etc-wales-act-2019-default-fees-and-prescribed-information>
- The consultation on the proposed legislation to ban fees
<https://gov.wales/fees-charged-tenants-private-rented-sector>
- Costs previously identified in the Regulatory Impact Assessment for The Renting Homes (Fees etc.) (Wales) Act 2019
<http://www.assembly.wales/laid%20documents/pri-ld11586-em-r/pri-ld11586-em-r-e.pdf>
- Research commissioned by the Welsh Government prior to introduction of the Renting Homes (Fees etc.) (Wales) Act
https://gov.wales/sites/default/files/statistics-and-research/2019-07/170817-research-letting-agent-fees-tenants-en_0.pdf
- Information publically available from the private rented sector industry

10. Option One: Not make regulations under Schedule 1 Paragraph 6

- 10.1. Paragraph 6 of Schedule 1 to the Renting Homes (Fees etc.) (Wales) Act 2019 permits a payment in the event of a default that is required under a standard occupation contract to be made in the event of a default by the contract-holder (subject to paragraph 6(3)) of Schedule 1).

- 10.2. If the regulations are not made there would be no prescribed limit in the case of rent not made by the due date and no limit placed on the additional description of default payments in respect of changing, adding or removing a lock giving access to a dwelling to which the contract relates and for a replacement key or other security device giving access to a dwelling..
- 10.3. From the consultation analysis 83% of respondents stated that fees were currently charged for defaults. The highest percentage charged for defaults were for damage (68%) and replacement keys (52%). Where the amount of fees were given they ranged from £30 - £80 for replacement keys or key cards; £15 - £100 for late rent; £30 - £40 for repairs arising from damages; emergency call outs £30 - £60; missed appointments £20 - £50; bounced cheques £20 - £50.
- 10.4. In addition research commissioned by the Welsh Government prior to introduction of the Renting Homes (Fees etc.) Act found the average charge for lost keys was £20, for out of hours call outs £36 and for other maintenance call outs £30.
- 10.5. Evidence suggests that the range of default payments currently being applied across the sector is not excessive and therefore we consider there is only a need to make Regulations in respect of two additional descriptions of default payments and to set a prescribed limit for late rent similar to that limit contained in paragraph 4 of the Tenant Fees Act 2019 (except in Wales, the default payment will accrue if rent is not paid before the end of seven days from the due date whereas in England the period is the end of 14 days from the due date).
- 10.6. Not making the Regulations in respect of a failure to make a payment of rent by the due date to the landlord could mean that contract-holders are pushed into financial difficulties as a result of excessive default payments most specifically for late rent. The Regulations will place a prescribed limit on these default payments to ensure landlords do not seek to recover income lost as a result of the prohibition on landlords and letting agents under sections 2 and 3 of the Act.
- 10.7. We will continue to monitor default payments and if there is evidence in the future of landlords and / or agents requiring disproportionate amounts, we will consider amending the Regulations or adding limits to additional default payments.

Option One Costs / Benefits	
Cost to landlord / agent	Cost to tenants
No additional cost as this option maintains the status quo.	Landlords /agents could increase payments where there is a breach of contract for replacement locks and / or late rent to offset losses incurred as a result of the 2019 Act.
Benefit to landlord / agent	Benefit to tenant
Landlords / agents could increase default fees for replacement locks / late rent to offset losses incurred as a result of the 2019 Act.	No benefit as this option maintains the status quo.

11. Option Two: Make Regulations to specify descriptions and limits of default payments in relation to replacing keys, changing, adding or removing locks and in relation to late rent. Option two limits the amount chargeable for a default in relation to:

- Replacing keys, changing, adding or removing a lock - actual costs
- Late rent - Bank of England base rate plus 3% on an APR basis

11.2. Replacement Keys, changing, adding or removing locks

11.3. Option two seeks to limit the payment in respect of replacing keys, changing, adding or removing a lock to the actual costs incurred by the landlord / agent.

11.4. Option two also makes provision for replacing keys and / or the changing of locks where this arises as a result of the fault of the contract holder. The restriction of this to actual costs is considered sufficient to prevent landlords seeking to use this as a way of maximising income from default payments.

11.5. Late Rent

11.6. Option two seeks to limit charges for late rent to the Bank of England base interest rate plus 3% as an annual percentage rate (APR). A late rent payment would only be permitted seven days after the rent due date.

Example:

Assuming that the Bank of England's (BoE) base rate is 0.75%. As any interest charged must not exceed the BoE's base rate +3%, the total interest that could be charged would be: (BoE base rate at 0.75%) +3% = 3.75%.

If a contract holder owed the landlord or agent £600:

1. The annual interest would be £22.50 (600 x 0.0375 = 22.5)
2. £22.5 divided by 365 leaves the daily interest: approximately 6p a day (22.5 / 365 = 0.0616)
3. after 30 days this would be £1.85 (30 x 0.0616 = 1.85)

11.7. Option two does not specify nor set a limits in respect of any other additional description of default payments. Although it should be noted that a payment in default cannot be charged unless there has been a breach of a term of the contract.

Option Two Costs / Benefits	
Cost to landlord / agent	Cost to tenants
<p>Replacing, changing, adding or removing locks - Landlords / agents would be able to charge for the cost of replacing, changing, adding or removing locks and therefore would not incur any additional cost for the replacement. Landlords would not be able to recover the cost of their time to replace locks/keys where a contractor/locksmith is not being used.</p> <p>Late Rent – Default payments for late rent would be calculated using the formula outlined above.</p> <p>It should be noted that payments in default are ad hoc payments that currently incur only a small charge it is therefore, unlikely to have any significant financial impact on the landlord / agent.</p> <p>Default payments for other breaches of contract is still permissible under the Act and therefore no additional cost will be incurred by the landlord / agent for other breaches.</p>	<p>Replacing, changing, adding or removing locks - Costs to the tenant would be the actual costs incurred by the landlord / agent for replacement of locks. There is a risk that landlords would use a locksmith routinely, instead of replacing locks/keys themselves as they are not able to charge the cost of their time, and this may result in slightly higher costs for tenants where a locksmith would previously not have been used.</p> <p>Late Rent – Cost to the tenant would be limited to the formula outlined above.</p>
Benefit to landlord / agent	Benefit to tenant

<p>Replacing, changing, adding or removing locks - Landlords / agents would have clearly defined limits for which they would be able to charge i.e. only for the actual cost of the replacement lock or if a locksmith has replaced the lock labour costs are able to be passed to the contract holder.</p> <p>Late rent - In the case of late rent a cap for payments for late rent would provide clarity.</p>	<p>Replacing, changing, adding or removing locks - Charges for replacing, changing, adding or removing locks would be prescribed and therefore remove uncertainty for the tenant.</p> <p>Late rent - Limiting the amount of late rent payments would also help to prevent tenants falling into further financial difficulty due to additional charges being imposed.</p>
<p>Where the landlord currently charges an amount for replacing locks/keys which is above the actual cost, these Regulations will result in a transfer¹ from the landlord to the tenant which is equal to the difference between the amount currently charged and the actual cost. Similarly, where a landlord charges an amount for the late payment of rent which is above the amount which will be permitted under these Regulations, there will be transfer from the landlord to the tenant which is equal to the amount currently charged less the permitted amount. No data is available on the frequency with which these charges are applied and so it is not possible to calculate the aggregate impact on landlords or tenants. However, the net economic impact of these transfers will be zero.</p>	

Option two is the preferred option.

¹ In this case, a cost to the landlord and an equivalent benefit to the tenant relative to the baseline scenario.

Specific impact tests

Welsh Language

These Regulations are not considered to have any direct positive or adverse impact on the Welsh Language.

Equalities Impact Assessment

The equalities impact assessment undertaken for the Act indicated that the legislation would not have any negative implications for people with protected characteristics. These regulations do not make any additional impact on equalities.

Children's Rights

The children's rights impact assessment undertaken for the Act indicated that the legislation would not produce any negative impacts on children and young people and there was no conflict with UNCRC identified.

Privacy

The privacy impact assessment undertaken for the Act indicated that the legislation would not produce any new requirements relating to privacy or the sharing of information. These regulations do not make any additional impact on privacy.

Justice Impact Assessment

The justice impact assessment undertaken for the Act indicated that the legislation was likely to have little or no impact on the justice system. These regulations do not make any additional impact on the justice system.

Competition Assessment

Competition Assessment The competition filter test	
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	No
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	No
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	No
Q4: Would the costs of the regulation affect some firms substantially more than others?	Yes – the regulations will only affect landlords / letting agents
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector characterised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	Yes

Post implementation review

The effects of these regulations will be reviewed alongside the implementation of Act in general. Rent Officers will be collecting information about rent levels so we can gauge whether there has been a marked increase in rent as a result of the ban on fees as some stakeholders suggested. Policy officials will be monitoring the effects of the legislation more widely through regular meetings with stakeholders, including Rent Smart Wales and local authorities.