

EXPLANATORY MEMORANDUM TO THE SERVICE CHARGES (SUMMARY OF RIGHTS AND OBLIGATIONS AND TRANSITIONAL PROVISION (WALES) REGULATIONS 2007

This Explanatory Memorandum has been prepared by the Department for Environment, Sustainability and Housing and is laid before the National Assembly for Wales.

Description

1. The regulations prescribe the content and the form of the summary of rights and obligations in relation to service charges which must accompany any demand for service charges made by a landlord to a tenant.

Matters of special interest to the Subordinate Legislation Committee

2. None.

Legislative Background

3. Service charges are costs which are sometimes payable to landlords by tenants. They are payable under the terms of the lease and cover matters such as charges for services, repairs, maintenance, improvements, insurance, or the landlord's costs of management. Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act"), gives the full meaning of "service charges" for this purpose, and new section 27A (inserted by the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")) sets out the rights to apply to a leasehold valuation tribunal ("LVT") for a determination on whether a service charge is payable, by whom, to whom, the amount and the date by which it is payable and the manner in which it is payable. Section 21B of the 1985 Act (inserted by section 153 of the 2002 Act) provides that a demand for payment of service charge must be accompanied by a summary of rights. The Secretary of State has the power to prescribe by regulations the form and content of such summary. That power was transferred to the National Assembly for Wales in relation to Wales, and is now vested in the Welsh Ministers by virtue of the Government of Wales Act 2006. Section 21B of the 1985 Act was commenced on 1 January 2003 in relation to Wales by SI 2002/3012, but only in so far as it conferred power to make regulations. The remainder of section 21B of the 1985 Act has not yet been commenced, and it is proposed that it will be commenced by a separate order simultaneously with these Regulations. The summary will be bilingual. Section 26 of the Welsh Language Act 1993 provides that where an Act confers a power to specify a form of words, that power shall include the power to prescribe bilingual form of words. The legislation will be made using the negative resolution process.

Purpose and intended effect of the legislation

4. The purpose of prescribing the content of the summary is to ensure that both tenants and landlords are clear as to what the summary should include and to ensure that all tenants are treated equally and consistently.

5. Minor matters relating to the form have been prescribed in the Regulations. The summary must be legible in printed or typewritten form and must be at least 10 point. Only prescribing minor matters relating to the form will, it is hoped, enable landlords to incorporate the summary into their current administration systems without too much difficulty, thereby avoiding costly changes which would probably be passed on to tenants.

6. An LVT may, under section 27A of the 1985 Act, determine-
the reasonableness of a service charge;
whether the charge is payable, or whether if costs were incurred the charge would be payable;
the person by whom and to whom it is payable;
the amount which is payable;
and the manner in which it is payable.

7. New section 21B of the 1985 Act provides that a demand for payment of a service charge must be accompanied by a summary of the rights and obligations of the tenant in relation to service charges. Where a demand for payment is made and a summary does not accompany it, a tenant may withhold payment without breaching the terms of the lease relating to non payment or late payment of service charge. These provisions have not yet been commenced but it is intended to commence them, by order, simultaneously with these Regulations.

8. The purpose of the summary is to ensure that the tenant is made aware of the rights available to them where they receive a demand for payment of a service charge, and their obligations in relation to the demand.

9. The Welsh Ministers have the power to make regulations prescribing the form and content of summaries under section 21B(2) of the 1985 Act. Section 21B of the 1985 Act was commenced on 1 January 2003 in so far as it relates to a regulation making power.

10. The effect of the Regulations is to set out what the summary, which is to be provided with a demand for service charges under section 21B(1), must contain.

11. During the lead up to the 2002 Act it became clear that one of the fundamental difficulties of the leasehold system was that many tenants were simply unaware of their rights in relation to the payment of service charges, one of the main areas for dispute. This was also confirmed by the level of correspondence and telephone calls received. While free literature on service charge rights has been available from the National Assembly for Wales and the Leasehold Advisory Service for some years, a more structured approach to making tenants aware of their rights was needed. This led to inclusion of Section 153 into the 2002 Act which itself inserts a new Section 21B into the 1985 Act, requiring landlords to inform their tenants of their rights and obligations in relation to service charges by way of a summary which must accompany a demand.

12. Two public consultation exercises took place on the content of the summary. The first consultation exercise in November 2002 consulted on the possibility of a few, very general statements being provided by way of a summary. Briefly, these

statements set out that a liability to pay a service charge may be set out in the lease; that the liability to pay and reasonableness of an administration charge can be determined by a LVT; and that while most leases provide the landlord with a right of re-entry or forfeiture, the law provides a number of restrictions on this. The majority of respondents agreed with the suggested summary or agreed but made a few alternative suggestions.

13. However, after further scrutiny it was felt that a brief summary would not properly comply with the requirements of the primary legislation which requires a summary of **the rights and obligations** rather than only some of the rights and obligations. A second consultation therefore took place in summer 2004, setting out all rights and obligations more specifically, including reference to forfeiture. This time the majority of respondents disagreed, with a large majority putting forward their own suggestions as to what the Regulations should (or should not) contain.

14. Respondents to the exercises put forward a number of different views and suggestions. These were of a more general nature however, rather than specific examples of what should or should not be included. Briefly, the main comments arising from these exercises are set out below, together with our responses in italics:

- They (landlords) were not in favour of a summary or it was too lengthy and unhelpful. *We do not agree that a summary of rights and obligations is not needed. This is because tenants were in some cases being asked to pay large sums of money without knowing their rights. However, we agreed to look at the summary's length and content to minimise it where possible.*
- That providing the summary would lead to an increase in costs for the tenants. *We accept the potential for additional cost but believe the benefits outweigh these and are creating as much flexibility as is felt reasonable for the landlord. We see no reason why the costs of providing the summary should be prohibitive.*
- There should be no need to issue the summary with every demand. *The legislation does not appear to allow the Welsh Ministers the ability to specify circumstances when the summary need not be sent. Such a provision could in any case be abused where, for example, 'reminders' are sent, alleging the summary was sent with an original demand when in fact it was not.*
- It should include reference points for advice. *We agree that the need to seek advice should be mentioned.*
- That it sets out the tenant's rights, but not the obligations, and will also encourage non-payment. *There are relatively few obligations specific to the payment of service charges, save those set out in the lease or resulting from a determination by a LVT or court in the event of a dispute etc. These are covered in the prescribed summary. We do not believe a culture of non-payment or abuse should arise as a result of tenants being actively informed of their rights.*
- That the summary should be clear and in large print, and there should be a minimum size of lettering. *We have made the summary*

as clear as possible bearing in mind the legislative requirements, and have required it to be legible in printed or typewritten form with a minimum font size of 10.

- *That the section on re-entry and forfeiture was not needed. We disagree. Forfeiture is a powerful right (of last resort) for landlords that can be used for non-payment of service charges.*
- *We should not seek to prescribe the form of the summary, only the content. We had some concern about the manner in which the summary could be used to potentially confuse tenants if the order of the contents of the summary were allowed to be moved around or other changes made, however unlikely this may be in practice. We have decided not to specifically prescribe the form but to prescribe the content as one statement rather than as individual statements, which should help resolve this concern.*
- *The language used needs to be understandable to those receiving the document. We agree, and have sought to simplify the language further while trying to ensure the summary contains information that will be useful to the tenants.*
- *There are some service charge rights missing from the summary. We examined the suggestions carefully and concluded that various rights suggested to us were not regarded to be a right(or obligation) specific to service charges as the summary requires. It would also make the summary much longer, which respondents did not want.*
- *A separate summary is needed for the public sector. On balance, we do not believe a separate summary is required. The summary is fairly specific in what it should contain, and few rights or obligations relating to service charges exist for the public sector that do not apply to the private sector. Those that do can refer specifically to their application in the summary.*
- *The word 'demand' should be clarified. We do not agree. This is not a matter for the regulations but for any supporting guidance (if necessary). It should also be fairly clear what a demand for service charges is without having to provide detailed clarification.*
- *The summary should not have to be sent every time a demand is made. Same point made previously. The legislation requires the landlord to send a summary with each demand. The Welsh Ministers have no powers to vary this content with the wording used. Such a provision could in any case be abused where, for example, 'reminders' are sent alleging the summary was sent with an original demand when in fact it was not (or even an original demand was not sent).*
- *It should include reference points for advice. We agree that the need to seek advice should be mentioned.*

15. These Regulations have been produced following consideration of the responses received.

16. The content of the summary being prescribed in the Regulations will be bilingual. This will mean that each demand served must be accompanied by a bilingual statement setting out the rights and obligations of the tenant. Providing a

bilingual statement will mean that both the landlord and tenant are able to send/receive the statement in their preferred language. This approach will not require any extra effort or inconvenience for the landlord or tenant and would not result in inequality for the Welsh speaking tenant or the non-Welsh speaking tenant. This approach sits with the Welsh Assembly Government's aim to make it effort free for the public, voluntary and private sector to produce and receive bilingual documentation.

Implementation

17. This Instrument was made on 5 November 2007 and is intended to come into force on 30 November. Similar legislation has been introduced in England and came into force on 1 October 2007. Implementation in Wales is later than England due to pressures on legislative timetabling and Assembly elections.

Consultation

18. Consultation has been undertaken (see paragraph 12-14 above and paragraphs 46-50 and further details are given in the Regulatory Impact Assessment below.

REGULATORY IMPACT ASSESSMENT

Options

19. Three options have been considered.

1. **Option 1**: Do nothing.
2. **Option 2**: Commence new section 21B (to the extent it is not yet commenced) and prescribe in regulations the content only of the tenants' summary of rights and obligations with regard to service charges (i.e. the wording that the landlord must use) and minor matters of form.
3. **Option 3**: Commence new section 21B (to the extent it is not yet commenced) and prescribe in regulations the specific form and content of the tenants' summary of rights and obligations with regard to service charges.

Option 1 - Do nothing:

Economic costs and benefits

20. Landlords - **No extra administrative work or costs should be incurred** as landlords would be under no obligation to inform tenants of their rights and obligations in relation to service charges.

21. Tenants - **No costs or benefits identified.**

Environmental costs and benefits

22. None.

Social costs and benefits

23. Doing nothing could perpetuate any worry and concern felt by tenants not knowing, or being unsure about the rights they have in relation to the payment of service charges. This can create unease, tension and sometimes misunderstanding between landlords and tenants leading to disputes.

Option 2 - Commence new s.21B and prescribe content only and minor matters of form (i.e. minimum font size):

Economic benefits

24. Landlords - This option allows landlords more flexibility to incorporate the information into existing administrative systems more easily than option 3 (prescribing the precise form and content) because the precise form itself is not being prescribed. Where information is already provided it will help keep changes to a minimum. It should also minimise any additional administrative work needed and therefore any additional costs that may prove necessary.

25. Tenants - This option helps keep any additional costs incurred by landlords when producing and providing the summary, which may be passed on to tenants, to a minimum.

Economic costs

26. Landlords - Costs are likely to be incurred in providing the summary where information is not already provided and administrative systems are not currently able to cater for providing such information. However, because of the flexibility allowed with this option, ongoing costs should be kept to a minimum once any one off set-up costs have been accounted for. Some landlords (or their managing agents) felt that cost could amount to as much as £1.50 per service charge demand to provide the summary, though a breakdown of specific cost details was not available or forthcoming. It is anticipated however that in the long term, costs should amount to no more than a few pence per document when sent in hard copy form rather than electronic form for what amounts to approximately two sheets of A4 size paper when the statement is printed back to back using the minimum font prescribed, particularly as the summary will go out with demands that are already sent as a matter of course. Costs for postage are not expected to increase as a result of the summary. Therefore, using industry estimates of £1.50 per summary, and assuming that tenants of flats receive on average between one and four demands per year (leasehold houses do not usually pay service charges), **costs could amount to between £1m and £4m per year industry wide, though as mentioned, these costs may prove to be an over-estimation.** Any such costs would be an increased administrative burden.

27. Tenants - May have to contribute towards the cost of the production of the summary, and towards any one-off costs for changes necessary to administrative

systems where such information is not already provided, if passed on by landlords to tenants.

Environmental benefits

28. Prescribing the content only and allowing flexibility in how the information is produced should keep to a minimum any impact on the environment in respect of the amount of recycled paper used where a summary is not sent in an electronic format. Where electronic format is used the landlord will not be required to use any additional paper resources.

Environmental costs

29. Where electronic communication is neither available or desirable and where similar information is not already provided, an increase in the amount of paper used is anticipated. The flexibility to incorporate the summary into existing systems will therefore help keep to a minimum any environmental costs, as should the size of the summary which should be about two sheets of A4 size paper when the statement is printed back to back using the minimum font prescribed.

Social benefits

30. It is apparent that not all tenants are aware of their rights when paying service charges. Receiving this information as a matter of course will help improve this situation and significantly increase tenants' awareness of the rights that they have in relation to service charges. This in turn should help mitigate any worry and concern felt by tenants when faced with a service charge problem (particularly the more vulnerable), and provide necessary reassurance and confidence. It will also inform and create a better understanding of the law, and may have a positive knock on effect on the community as a whole. It may also help the Welsh Ministers, together with advice services such as the Leasehold Advisory Service and Citizens Advice Bureau by creating more focused enquiries to enable better, more focused, advice to be given.

Social costs

31. Concern has been raised by those in the leasehold management sector that having to provide a summary of rights and obligations to tenants will create a charter for 'non payers', which will have a knock on effect on the ability to maintain properties in good order and in accordance with a landlord's obligations under the lease. There is no definitive evidence that this will be the case. Tenants are entitled to know their rights, and remedies exist allowing a landlord (or manager) faced with a tenant refusing to pay service charges to apply to a LVT for a determination of the liability to pay the charge and any questions of reasonableness where a dispute cannot be resolved between the parties.

Option 3 - Commence new s.21B and prescribe content and specific form:

Economic benefits

32. Landlords - No economic benefits arise from this option compared with options 1 and 2 above. It allows no flexibility for the landlord and prevents any additional costs that may be necessary being kept to a minimum.

33. Tenants - No real economic benefits arise compared with options 1 and 2 above. Tenants will be made aware of their rights and obligations, but are likely to have to pay more for the privilege of receiving it in a specified form.

Economic costs

34. Landlords - It has not proved possible to accurately quantify these costs, but it is accepted that costs will be incurred in addition to those identified in option 2 above (**paragraph 25 above**), to change existing administrative systems to allow the summary to be provided in a specified form. This will be both in respect of initial set up costs and possibly ongoing costs. These costs are likely to be passed on to the tenant. Any such costs would be as a result of the additional administrative burden.

35. Tenants - Will increase the costs tenants may be asked to contribute towards the production of the summary as well as any changes necessary to the landlord's administrative systems.

Environmental benefits

36. None identified.

Environmental costs

37. Where electronic communication is neither available or desirable and where similar information is not already provided, an increase in the amount of paper used is anticipated. The summary is estimated to constitute 1 sheet of A4 size paper using the minimum font prescribed.

Social benefits

38. As with option 2 above, it is apparent that not all tenants are aware of their rights when paying service charges. Receiving this information as a matter of course will help improve this situation and significantly increase tenant's awareness of the rights that they have in relation to service charges. This in turn should help mitigate any worry and concern felt by tenants when faced with a service charge problem (particularly the more vulnerable), and provide necessary reassurance and confidence. It will also create a better understanding of the law, and may have a positive knock on effect within the community as a whole. It may also help the Welsh Ministers, together with advice services such as the Leasehold Advisory Service and Citizens Advice Bureau by creating more focused enquiries to enable better, more focused advice to be given.

Social costs

39. As in option 2, concern has been raised by those in the leasehold management sector that having to provide a summary of rights and obligations to tenants will create a charter for 'non payers', which will have a knock on effect on the ability to maintain properties in good order, and in accordance with a landlords obligations under the lease. However, there is no definitive evidence that this will be the case. Tenants are entitled to know their rights, and remedies exist allowing a landlord (or manager) faced with a tenant refusing to pay service charges to apply to an independent leasehold valuation tribunal for a determination of the liability to pay the charge and any questions of reasonableness where a dispute cannot be resolved between the parties.

40. The majority of landlords of leasehold properties would be considered small businesses (although there are some landlords with larger portfolios of leasehold property). There will be an impact (administration and costs) on landlords as a result of this provision, including those landlords regarded as small businesses. However, we do not believe that the requirement to provide a summary of a tenant's rights and obligations relating to service charges should prove unnecessarily burdensome or costly on landlords when considered in terms of the overall benefits that the provision should have for the tenants. Where costs are incurred and they have to be passed on it will be the tenant who is asked to contribute to them through service charges. Because extensive consultation has already taken place with the landlord sector affected (see paragraphs 11 and 14) we feel that stage 2 of the test has already been satisfied and does not need to be pursued further. During the development of these proposals the Small Business Service was consulted and are content with our approach.

Competition assessment

41. The impact of the proposals have been assessed against the Office of Fair Trading competition filter and there is unlikely to be a negative competition impact as a result. The provisions will apply to all landlords/managers that are responsible for collecting variable service charges.

Enforcement, sanctions, monitoring, and post implementation review

42. Enforcement would be primarily through the right given in new section 21B of the Landlord and Tenant Act 1985 for a tenant to withhold service charges where the landlord fails to provide the summary of the tenant's rights and obligations when demanding payment of service charges. In most cases, this sanction should lead to landlords or their managers complying with the requirement from the outset, or rectifying matters quickly where necessary.

43. The new system would be monitored through the feedback provided in correspondence from the public, key stakeholders and others. We would also monitor it by maintaining the existing dialogue on the working of the new provision as part of our ongoing relations with key stakeholders. If appropriate, research could be undertaken to establish and review the impact of these provisions.

44. The following areas will be affected:

Leaseholders and service charge payers
Landlords
Managing Agents
Resident Management Companies

45. This proposal will affect the landlords of leasehold flats in Wales, other properties subject to variable service charges, and the agents that are employed by landlords to manage residential leasehold properties. Leaseholder owned (resident) management companies would also be affected. Unless market conditions make it difficult to raise costs, any additional costs incurred in providing the summary would likely be recouped through the service charges payable, which a tenant has the right to challenge where the charges vary, and are believed to be unreasonable.

Consultation

46. In November 2002 and summer 2004 consultation papers were sent to organisations and individuals known to have an interest, including landlords and representative bodies. They were also made available to the public in general having been placed on the Department for Communities and Local Government's website, and available in hard copy from the Department's free literature office. Leading up to these regulations meetings, phone calls and correspondence have also taken place, with comments being received prior to and throughout the consultation process from bodies representing the various leasehold interests, including landlords etc. Organisations consulted include:

Association of Residential Managing Agents
Federation of Private Residents Association
The Leasehold Advisory Service
Association of Retirement Housing Managers
Council of Mortgage Lenders
Housing Corporation
Independent Housing Ombudsman
Institute of Chartered Accountants in England and Wales
Law Society
Royal Institution of Chartered Surveyors
British Property Federation
Financial Services Authority
Chartered Institute of Public Finance and Accountancy

47. Various banks and building societies were also consulted, as were various tenant representative groups and individuals who had responded to previous consultation exercises on similar issues. A number of face to face meetings have also been held as well as visits to stakeholders.

48. As a result of the consultation exercise (see paragraph 12 above) and other comments received changes have been made. These include amending the wording of the summary to simplify it and reflecting the need to seek advice if in doubt; requiring a legible minimum font size when in typed or written form; and

pointing out the possible consequences of a failure to pay reasonable service charges (forfeiture).

49. Whilst the landlord/management sector raised concerns about the length of the summary, the number of times it may need to be sent (i.e. each time a demand for service charges is made), and the costs of providing it, no similar concerns were raised by tenants responding to the consultation exercises, nor was there any significant disagreement with the proposal in general. Demands are made in accordance with each lease and as such the number of times a demand is sent can vary. In general terms however this is recognised as between one and four times a year. The issue about the length of the summary was addressed by minimising the information necessary whilst ensuring it remains a useful document. This should help keep any costs of providing the summary to a minimum.

50. Also, because of the sometimes transient nature of the leasehold tenure, particularly for flats, consideration needs to be given to ensuring that all service charge payers are kept aware of their rights and obligations. Requiring only one summary per year to be sent out has the potential to leave some tenants at a disadvantage to others. For example, those purchasing a leasehold flat after a summary has already been provided to the previous service charge payer, may not then be made aware of their rights for some considerable time, potentially up to twelve months in this case, despite receiving demands for service charges in the meantime.

Post Implementation Review

51. Enforcement would be primarily through the right given in new section 21B of the Landlord and Tenant Act 1985 for a tenant to withhold service charges where the landlord fails to provide the summary of the tenant's rights and obligations when demanding payment of service charges. In most cases, this sanction should lead to landlords or their managers complying with the requirement from the outset, or rectifying matters quickly where necessary.

52. The Welsh Ministers would be able to monitor the new system through the feedback provided in correspondence from the public, key stakeholders and others. We would also monitor it by maintaining the existing dialogue on the working of the new provision as part of our ongoing relations with key stakeholders. If appropriate, the Welsh Ministers could also commission research to establish and review the impact of these provisions.

Summary

53.

Option	Total cost per annum Economic, Environmental, Social	Total benefit per annum, Economic, Environmental, Social
<p>Option 1. Do nothing</p>	<p>Economic None.</p> <p>Environmental None</p> <p>Social No major costs anticipated, but doing nothing fails to address any existing worry & concern felt by some tenants (particularly the more vulnerable) of being unaware of their rights when faced with a service charge problem.</p>	<p>Economic None.</p> <p>Environmental None</p> <p>Social None</p>
<p>Option 2. Commence new section 21B and prescribe content only and minor matters of form (minimum font size).</p>	<p>Economic Where information is not already provided initial set up costs may be incurred together with ongoing costs (e.g. changes to administrative systems). While industry estimates put costs in the region of £1.50 per summary, this is expected to prove an over-estimation, and minimal extra ongoing costs are expected where hard copies are required (as opposed to electronic copies) for what amounts to no more than 2 sheets of A4 size paper when the statement is printed back to back using the minimum font prescribed. If, however, it did cost £1 per summary, and based on an average of between 1 and 4 demands per year for tenants, costs would amount to between £1m and £4m per year.</p> <p>Environmental Where electronic communication is neither available or desired, and where information is not already provided, an increase in the amount of paper used is anticipated. However, the summary is estimated to constitute no more than 2 sheets</p>	<p>Economic The benefits of allowing landlords as much flexibility as possible for the summary are that costs for producing the summary which will inform, educate and reassure tenants, can be minimised, where they are incurred.</p> <p>Environmental See Environmental costs. Any impact on the environment is minimised.</p>

	<p>of A4 size paper when the statement is printed back to back using the minimum font prescribed, which should minimise any effects on the environment.</p> <p>Social The industry believes providing this information will create a charter for non-payers and affect the ability to maintain properties. No definitive evidence exists to support this belief. The rights to be referred to in the summary already exist, and remedies exist to resolve disputes that cannot be resolved locally.</p>	<p>Social Tenants will be made aware of their rights on a regular basis, helping to inform, reassure and reduce any worry and concern that may exist when faced with a service charge problem, particularly where the vulnerable are concerned. This may have an educational impact creating a better understanding of the existing rights, and may also help better more focused advice to be given by advice agencies such as the Leasehold Advisory Service.</p>
<p>Option 3. Commence new section 21B & prescribe both the content and form.</p>	<p>Economic Compared with options 1 and 2 additional costs are anticipated for having to provide the summary in a specified format.</p> <p>Environmental Where electronic communication is neither available or desirable & where information is not already provided an increase in the amount of paper used is anticipated (the summary is estimated to constitute no more than 2 sheets of A4 size paper when the statement is printed back to back using the minimum font prescribed . Prescribing the form allows no flexibility to keep costs down where this may otherwise be possible.</p> <p>Social The industry believes providing this information will create a charter for non-payers and affect the ability to maintain properties. No definitive evidence exists to support this belief. The rights to be referred to in the</p>	<p>Economic None compared with options 1 and 2.</p> <p>Environmental None compared with options 1 and 2.</p> <p>Social Tenants will be made aware of their rights on a regular basis in a specific format, helping to inform, reassure and reduce any worry or concern, particularly where the vulnerable are concerned. This</p>

	summary already exist, and remedies exist to resolve disputes that cannot be resolved locally.	may have an educational impact creating a better understanding of the existing rights, and may also help better more focused advice to be given by advice agencies such as the Leasehold Advisory Service.
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Conclusion

54. In light of the above the following conclusion was reached:

- Option 2 (paragraph 19.2 above) should be implemented. Commence s.21 (in so far as it is not yet commenced) and prescribe content only and minor matters form only.