

Report on the Renting Homes (Fees etc.) (Wales) Bill

October 2018



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Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: **0300 200 6565**

Email: **SeneddCLA@assembly.wales**

Twitter: **@SeneddCLA**

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October 2018



About the Committee

The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Committee Chair:



Mick Antoniw AM

Welsh Labour
Pontypridd

Current Committee membership:



Dawn Bowden AM

Welsh Labour
Merthyr Tydfil and Rhymney



Suzy Davies AM

Welsh Conservative Party
South Wales West



Mandy Jones AM

Independent
North Wales



Dai Lloyd AM

Plaid Cymru
South Wales West



Lee Waters AM

Welsh Labour
Llanelli

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- why the Explanatory Memorandum and Impact Assessment Gateway document suggest the Bill produces no new requirements relating to privacy or the sharing of information;
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1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.
2. In our scrutiny of Bills introduced in the National Assembly, our approach is to consider:
 - matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
 - the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
 - whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
 - any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

3. On 11 June 2018, the Renting Homes (Fees etc.) (Wales) Bill³ (the Bill), and accompanying Explanatory Memorandum, was introduced by Rebecca Evans AM, Minister for Housing and Regeneration (the Minister).
4. The National Assembly's Business Committee referred the Bill to the Equality, Local Government and Communities Committee on 22 May 2018, and set a deadline of 26 October 2018 for reporting on its general principles.⁴

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, October 2018

² Functions under Standing Order 21.8 are the responsibility of the External Affairs and Additional Legislation Committee

³ Available on the National Assembly's website.

⁴ Business Committee, Report on the timetable for consideration of the Renting Homes (Fees etc.) (Wales) Bill, June 2018

5. We took evidence from the Minister at our meeting on 24 September 2018.⁵

Background

6. The Explanatory Memorandum accompanying the Bill states that the Bill will prohibit certain payments made in connection with the granting, renewal or continuance of standard occupation contracts. The Bill also makes provision in respect of the treatment of holding deposits.⁶

7. Under the *Renting Homes (Wales) Act 2016* (the 2016 Act), standard occupation contracts will replace the current assured shorthold tenancy as the default tenancy in the private rented sector (PRS). The Bill has been developed to apply to these new arrangements.⁷ The Bill includes powers for the Welsh Ministers to make regulations so that the provisions of the Bill apply to assured tenancies in the event that the 2016 Act is not fully in force by the time the Bill is passed (see chapter 4 for more detail).

8. Standard contracts under the 2016 Act will set out the responsibilities of both landlord and contract-holder.⁸

9. The Welsh Government undertook a consultation on fees charged to tenants in the PRS between July and September 2017. The outcome was published in February 2018, which indicated that 56% of all respondents agreed with an outright ban on fees.⁹

10. In August 2017, the Welsh Government published the outcome of a study¹⁰ commissioned from the Cambridge Centre for Housing and Planning Research study. The research identified a number of issues relating to fees charged to tenants and the potential difficulties these can pose for tenants in securing a tenancy.¹¹

11. The introduction of the Bill follows the introduction of the Tenant Fees Bill¹² (England only) to the UK Parliament in May 2018, and clarification of the law in

⁵ CLA Committee, 24 September 2018, RoP

⁶ Explanatory Memorandum, paragraph 1.1

⁷ Explanatory Memorandum, paragraph 3.5

⁸ Explanatory Memorandum, paragraph 3.27

⁹ Welsh Government, [Consultation – summary of response. Fees charged to tenants in the private rented sector](#), February 2018

¹⁰ [Research into letting agent fees to tenants](#), August 2017

¹¹ Explanatory Memorandum, paragraph 3.6

¹² [Tenant Fees Bill 2017-19 HL Bill 129](#)

Scotland in 2012¹³ where most fees payable by tenants have been prohibited for some time.

12. On 11 June 2018 the Minister issued a statement of policy intent to accompany the Bill.¹⁴

¹³ Private Rented Housing (Scotland) Act 2011, section 32

¹⁴ [Renting Homes \(Fees etc.\) \(Wales\) Bill Statement of Policy Intent for Subordinate Legislation to be made under this Bill](#) (Statement of Policy Intent)

2. Legislative Competence

The Welsh Government is satisfied that the Bill is within the legislative competence of the National Assembly.

General

14. The Bill is the second Bill we have considered under the new reserved powers model of legislative competence (as set out in section 108A of the *Government of Wales Act 2006* (the 2006 Act)).

15. The Welsh Government is satisfied that the Bill is within the legislative competence of the National Assembly. The Explanatory Memorandum states:

“The National Assembly for Wales has the legislative competence to make the provisions in the Renting Homes (Fees etc.) (Wales) Bill (the Bill) pursuant to Part 4 of the Government of Wales Act 2006 (GOWA) as amended by the Wales Act 2017.”¹⁵

16. In her statement on legislative competence,¹⁶ the Llywydd, Elin Jones AM, stated that in her view the provisions of the Bill would be within the legislative competence of the National Assembly for Wales.

17. We asked the Minister to provide further detail on how she reached her decision on legislation competence. In doing so, we drew attention to the references within the Explanatory Memorandum to addressing an inequality of bargaining position within the private rental market. We are aware that these are matters which the Supreme Court¹⁷ believes relate to consumer protection law and consequently to the regulation of the sale and supply of goods and services, which is a reservation under the current devolution settlement.

18. The Minister said:

“The core purpose of the Bill is very much within the housing domain... [...] the full consideration that you would expect has been given to this –

¹⁵ Explanatory Memorandum, paragraph 2.1

¹⁶ [Presiding Officer’s Statement on Legislative Competence: Renting Homes \(Fees etc.\) \(Wales\) Bill](#), 11 June 2018

¹⁷ *Imperial Tobacco v Lord Advocate* [2012] UKSC 61

that this is very much a matter that is within the Welsh Government's competence...

[...] it is a housing matter rather than anything that relates to consumer protection, for example.”¹⁸

19. The Welsh Government legal adviser said “the consumer protection reservation is not engaged”.¹⁹

20. The Minister went on to say that the fact that the UK Government has introduced an England-only tenants' rights Bill in itself sends a strong message that the UK Government sees this Bill as being within devolved competence.²⁰

21. Whilst not a matter of legislative competence, a Bill may not be passed without the consent of Her Majesty the Queen or the Duke of Cornwall when that consent is required, by virtue of Standing Order 26.67, which implements section 111(4) of the 2006 Act. The Bill would bind the Crown and may affect the personal interests of Her Majesty the Queen and the Duke of Cornwall. We asked the Minister whether consent had been sought and obtained. The Minister told us:

“Not yet, and the reason for that is that this is something that we would seek to obtain after we know the amendments that might come forward to this piece of legislation. [...] we need to see the fullness of the Bill in terms of any amendments that might come forward before seeking Crown consent.”²¹

22. This is the second Bill to be assessed for legislative competence under the new devolution settlement. With the first Bill (the Childcare Funding (Wales) Bill), the Explanatory Memorandum set out in 11 paragraphs the basis on which the National Assembly had the necessary competence to legislate. However, the Explanatory Memorandum accompanying this Bill gives no detailed analysis and only states that the Bill is within competence. We asked the Minister about the different approach. She said the Bill does not raise any novel or contentious issues,²² and added:

¹⁸ CLA Committee, 24 September 2018, RoP [8] and [10]

¹⁹ CLA Committee, 24 September 2018, RoP [13]

²⁰ CLA Committee, 24 September 2018, RoP [15]

²¹ CLA Committee, 24 September 2018, RoP [27]

²² CLA Committee, 24 September 2018, RoP [25]

“I think that the approach we’ve taken is certainly appropriate to the Bill itself. So, there’s no one type of approach that is taken for all legislation...”²³

Human rights

23. To be within the legislative competence of the National Assembly, section 108A(2)(e) of the 2006 Act requires all provisions of a Bill to comply with the ECHR.

24. We asked the Minister what consideration has been given to human rights issues, particularly with regard to section 18 of the Bill which gives powers to the Welsh Ministers that will allow them to apply more than one penalty to be imposed on a letting agent in relation to the same breach of a duty. The Minister told us:

“(...) you’ll see in the explanatory memorandum that we have undertaken the human rights assessment, and the assessment overall concludes that the Bill would have a positive impact on human rights because many people with one or more protected characteristics are more likely to be renting in the private sector. So, in a sense the Bill overall will have a positive impact there.”²⁴

25. With regards to section 18 the Minister told us the Bill is “both fair and proportionate in terms of deterring poor practice”.²⁵

Our view

26. We note the evidence from the Minister and the information provided in the Explanatory Memorandum.

27. We also note that the Llywydd has stated that in her view the provisions of the Bill would be within the legislative competence of the National Assembly for Wales.

28. We acknowledge that the change to the reserved powers model of devolved competence may have made explaining the basis on which the Welsh

²³ CLA Committee, 24 September 2018, RoP [22]

²⁴ CLA Committee, 24 September 2018, RoP [18]

²⁵ CLA Committee, 24 September 2018, RoP [20]

Government is able to legislate more difficult because of the complex way in which the model has been drafted.

29. However, when we sought further information, we found the evidence provided by the Minister (and her officials) to be lacking in detail and precision. The suggestion that the Bill's core purpose relates to housing does not negate the fact that a Bill can have more than one purpose, a point which we tried to probe during questioning. That questioning was not an attempt to undermine the Welsh Government's assessment on legislative competence. As the National Assembly committee responsible for monitoring legislative matters relating to the competence of the Assembly or the Welsh Ministers, our approach is to ensure such issues are laid out in a coherent and transparent way.

30. We were particularly disappointed at the level of detail given in reply to our questioning on legislative competence in relation to consumer protection. Given the case law that exists which relates to this particular point, we believe the answers provided by the Minister and her officials did not provide any reassurance of the detailed analysis that would had to have been undertaken in considering this matter.

31. We acknowledge the Minister's evidence regarding the introduction by the UK Government of an England-only tenants' rights Bill and her view that this sends a strong message that the UK Government sees the Welsh Government Bill as being within devolved competence. However, in our opinion, this is irrelevant as to whether the Bill under scrutiny relates to the consumer protection reservation in Schedule 7A of the 2006 Act.

32. It is our opinion that the one sentence explanation within the Explanatory Memorandum of how the National Assembly has the legislative competence to make the provisions in the Bill lacks sufficient detail. In expressing this view, we draw attention to our comments in our report on the Childcare Funding (Wales) Bill.²⁶ In that Report, we highlighted that the Welsh Government's assessment of how the National Assembly has the legislative competence to proceed with the Childcare Funding (Wales) Bill spans 11 paragraphs in the Explanatory Memorandum, something which we suggested may relate to the complexity of the reserved powers model of competence introduced by the *Wales Act 2017*. While we do not suggest that a "one size fits all" approach should be adopted in

²⁶ Constitutional and Legislative Affairs Committee, [Report on the Childcare Funding \(Wales\) Bill](#), June 2018

this regard, the stark difference between the approaches taken with these two Bills merits explanation.

Recommendation 1. The Minister should use the Stage 1 debate as an opportunity to provide Assembly Members, and the wider audience, with more detail on the Welsh Government's legislative competence assessment for the Bill.

Recommendation 2. The Welsh Government should ensure information regarding legislative competence provided in its Explanatory Memorandums contains sufficient detail to ensure transparency and to enable effective scrutiny of Bills.

33. We note that the Bill would bind the Crown and may affect the personal interests of the Her Majesty the Queen and the Duke of Cornwall and, as such, the consent of the Crown is required before the Bill may be passed by the National Assembly. We further note that the Minister has not yet sought consent because she is awaiting the fullness of the Bill following the amending stages.

34. While we consider there are merits to this approach, we also believe that there may be advantages to earlier engagement with the Crown on consent matters as a way of mitigating the risks of a delay to the passing of a Bill towards the end of its passage through the National Assembly. Earlier engagement may be by way of advanced notice to the Crown of the expected date of when consent will be sought, or a request for a provisional decision on consent pending any changes that may be made to the Bill during the amending stages. These comments are based on the assumptions that first, these actions do not already take place and secondly, that this approach is acceptable to both the Welsh Government and the Crown. If the former assumption has been made in error and a form of early engagement does occur, we believe this fact should be drawn to the attention of the National Assembly.

35. We have considered the Minister's responses to the questions we posed in relation to the Bill's compatibility with human rights and consider the approach adopted to be reasonable. However, in arriving at this view we highlight the power in section 18 of the Bill which gives regulation-making powers to the Welsh Ministers to impose more than one penalty on a letting agent in relation to the same breach of a duty. We believe particular attention will need to be given to these regulations if and when they are laid before the National Assembly.

3. General observations

The Bill contains nine powers for the Welsh Ministers to make subordinate legislation

The need for legislation

36. The Explanatory Memorandum notes that consideration was given to taking a non-legislative approach. This could have included a more rigorous approach to enforcing existing consumer rights legislation and introducing a voluntary fees code that standardised and capped charges.

37. In evidence to us on 24 September, the Minister said:

“We have considered all options in terms of achieving the goal of ensuring that tenants do not pay fees. A voluntary approach simply wouldn’t work, because we’ve tried, for example, with the landlord accreditation system in the past to encourage a voluntary approach; only 2,000 of what we understood to be around 70,000 landlords engaged with that at the time.”²⁷

38. The Welsh Government Bill Manager added:

“The consensus that emerged from the views from stakeholders was that the arguments in favour of legislation were more compelling for the sector and more appropriate and, based on that, the conclusion was that legislation was appropriate.”²⁸

Interaction with the Renting Homes (Wales) Act 2016

39. This Bill follows and interacts with the Welsh Government’s *Renting Homes (Wales) Act 2016* (the 2016 Act). With a limited number of exceptions, the 2016 Act will replace all current tenancies and licences with just two types of occupation contract: secure and standard. This Bill will create offences in relation to standard occupation contracts. However the relevant parts of the 2016 Act that will establish standard occupation contracts have yet to be commenced.

²⁷ CLA Committee, 24 September 2018, RoP [29]

²⁸ CLA Committee, 24 September 2018, RoP [34]

40. We asked the Minister when the 2016 Act would be commenced, and why had it taken so long. The Minister told us:

“Implementing the renting homes Act 2016 [...] requires a substantial amount of work in terms of developing the regulations that sit underneath that. That said, work has progressed very well and things are very much developing there, but, again, when we introduced the regulations there was a commitment to consult on them, so obviously that does take some time.

One of the key issues really, though, is that it does require changes to the civil procedure rules and the court information technology systems, and, obviously, these are non-devolved matters. And we are working closely with the Ministry of Justice and Her Majesty’s Courts and Tribunals Service to effect these changes, but, unfortunately, to a large degree, the timing of that is outside of our hands...”²⁹

41. Despite standard occupation contracts being defined in the 2016 Act, for clarity, we asked the Minister whether this Bill should include a full definition or at least specify that the provisions in this Bill relate to properties wholly in Wales. The Minister said she didn’t think it was necessary to specify that detail on the face of the Bill. She added:

“It follows on from the renting homes Act where this issue was fully described, and I think that there is clarity there.”³⁰

42. This is the Welsh Government’s second “renting homes” Bill. It also interacts with the *Housing (Wales) Act 2014*. We asked the Minister whether this Bill formed part of a plan to create a body of subject-specific law ahead of more formal consolidation and codification plans. The Minister told us:

“(...) the Bill is titled as it is to show that it is part of a suite of legislation, so it maintains that link to the previous renting homes legislation. But, yes, the Counsel General is very keen on a programme of work to improve the accessibility of law, and I think that it’s no more important, really, in any area than housing...

So, yes, this is part of a wider approach, but I do think that there is important work that has to be done in due course in terms of

²⁹ CLA Committee, 24 September 2018, RoP [46] and [47]

³⁰ CLA Committee, 24 September 2018, RoP [52]

consolidation and the codification of Welsh law, particularly, I think, in the area of housing law.”³¹

Balance between what is on the face of the Bill and what is left to subordinate legislation

43. The Bill contains 25 sections and two Schedules, and nine powers for the Welsh Ministers to make subordinate legislation. The delegated powers are summarised in Chapter 5 of the Explanatory Memorandum. As mentioned earlier in this report, the Welsh Government has also provided a Statement of Policy Intent.

44. With the exception of the order making power in section 24 of the Bill, the delegated powers provided by the Bill will take the form of regulations.

45. We asked the Minister whether the Bill strikes the appropriate balance between provisions on its face and what is left to regulations. The Minister said:

“I do think that we have that right balance between what’s on the face of the Bill and what’s to be set out in regulations, and that’s because we need to futureproof the Bill, really, and to allow for flexibility in future.”³²

46. We also asked the Minister when it is anticipated the consequential regulations will be laid, and whether any of those regulations will be available in draft before Stage 1 consideration of the Bill ends. On this point the Minister told us that she would not be in a position to provide draft copies of the regulations while the Bill is being scrutinised, partly because she has committed to consulting widely as those regulations are being developed. The Minister went on to say:

“However, I do think that we’ve set out the policy intent quite clearly of all of these things within the documentation that we’ve already provided.”³³

Impact assessments

47. We raised with the Minister issues relating to the impact assessments contained within the Explanatory Memorandum. Chapter 9 of the Explanatory

³¹ CLA Committee, 24 September 2018, RoP [54] and [55]

³² CLA Committee, 24 September 2018, RoP [59]

³³ CLA Committee, 24 September 2018, RoP [61]

Memorandum contains a summary of impact assessments required when bringing forward new legislation.

48. Standing Order 26.6(xii) requires the Welsh Government to undertake a Justice Impact Assessment. Sections 2, 3, 4, 9, 11, 12 and 20 of the Bill create criminal offences relating to the prohibition of fees and the failure to provide information or misleading information to an authorised housing officer of a local authority. Such offences will be triable in the Criminal Courts. Section 17 of the Bill also creates a civil remedy for contract holders to recover prohibited payments in the Civil courts.

49. We drew to the Minister's attention the fact that the Explanatory Memorandum for the Childcare Funding (Wales) Bill contained an useful link to a Justice System Impact Identification assessment,³⁴ and asked her why a similar approach had not been followed with this Bill. The Minister told us that she "came at it from the assumption that Assembly Members and interested parties would be familiar with the impact assessment gateway", but that she would be happy to add this to the Explanatory Memorandum if the committee would find it helpful.³⁵

50. The Impact Assessment Gateway (IAG), as referred to by the Minister, appears to be a checklist applied to the preparation of Bills. An IAG document specific to the Renting Homes (Fees etc.) (Wales) Bill, signed by a Welsh Government official, can be found on the Welsh Government website.³⁶ As far as we are aware, the document was not drawn to the attention of National Assembly Members when the Bill was introduced. Paragraph 3.3.3 of the IAG states "A Justice impact assessment will be included as part of the Regulatory Impact Assessment for the Bill."³⁷ The RIA within the Explanatory Memorandum contains a brief summary of the Justice Impact Assessment; however, the more detailed assessment is contained in Annex 5 to the IAG, something which is not signposted in paragraph 3.3.3 of that document.

51. The Explanatory Memorandum also gives a summary of the Privacy Impact Assessment. It states that:

³⁴ [Childcare Funding \(Wales\) Bill, Justice System Impact Identification assessment](#), February 2018

³⁵ CLA Committee, 24 September 2018, RoP [94]

³⁶ [Welsh Government Impact Assessment Gateway, Renting Homes \(Fees etc.\) \(Wales\) Bill](#)

³⁷ [Welsh Government Impact Assessment Gateway, Renting Homes \(Fees etc.\) \(Wales\) Bill, paragraph 3.3.3](#)

“The Bill does not produce any new requirements relating to privacy or the sharing of information. The impact assessment undertaken has found that there will be no impact as a result of this legislation.”³⁸

52. However, section 10 of the Bill allows an authorised officer of a local authority to require a person to produce documents and share information. We asked the Minister whether this apparent error was an oversight. The Minister told us:

“This is an area where we’ve considered that, actually, thing might be more complicated, and we’ll be revisiting this area when we redraft the explanatory memorandum.”³⁹

53. Paragraph 3.1.6.1 of the Impact Assessment Gateway document asks the question “Will the proposal involve processing information that could be used to identify individuals?”; the question is answered “No”.⁴⁰

Other matters

A Draft Bill

54. A similar Bill (the Tenants Fees Bill) has been introduced by the UK Government in the House of Commons. However, before introduction in England, the UK Government consulted on a draft Bill. We asked the Minister why the Welsh Government did not take a similar approach, which is generally regarded as good legislative practice. The Minister told us that the Bill is “very much as per the consultation document” and that there were “no surprises”. She also stated that engagement with the sector had been “extensive”.⁴¹

“Appropriate”

55. We raised with the Minister a specific issue regarding the use of the word “appropriate” in both the Explanatory Memorandum and the Statement of Policy Intent. The wording “appropriate”, as it relates to the Welsh Ministers’ intention to consult, has become a standard inclusion in Welsh Government Explanatory Memorandums. We asked the Minister what “appropriate” means in the context of this Bill. The Minister said:

³⁸ Explanatory Memorandum, paragraph 9.15

³⁹ CLA Committee, 24 September 2018, RoP [98]

⁴⁰ [Welsh Government Impact Assessment Gateway, Renting Homes \(Fees etc.\) \(Wales\) Bill, paragraph 3.1.6.1. See also page 17.](#)

⁴¹ CLA Committee, 24 September 2018, RoP [43]

“We’ll consult on either the point of policy or on draft regulations in all cases. (...) this phrase is meant to mean that we’ll choose the most appropriate way in which to undertake that consultation. So, for example, it would be good practice, I think, to consult very widely, as I’ve said, on the issue of any cap on security deposits, but then, at the same time, it might be more appropriate to undertake a more focused engagement with relevant stakeholders on areas that (...) might be of a more technical nature. But, either way, we would seek to undertake the engagement fully in line with what is established as good practice.”⁴²

56. The Minister added that she would revisit the use of the wording to try to seek a way forward that would allow the Government to take “appropriate and proportionate routes of consultation”, and that she would be happy to undertake this review when redrafting the Explanatory Memorandum as a way of providing “more clarity as to what the intention would be”.⁴³

Our view

57. We acknowledge the information within the Explanatory Memorandum and the Minister’s evidence with regard to the need for a Bill as opposed to a non-legislative approach.

58. We note the Minister’s evidence about the Bill’s interaction with the *Renting Homes (Wales) Act 2016* and welcome these initial steps to the creation of an easily identifiable, subject-specific body of Welsh law. This is a positive development ahead of the Welsh Government’s more comprehensive plans regarding consolidation and codification, and should assist in the aim of making law in Wales more accessible.

59. We are content with the balance between what is on the face of the Bill and what is left to subordinate legislation. However, “future-proofing” and “flexibility” are not terms we wish to continually see being used by Welsh Minister’s to justify the inclusion of a regulation-making power in a Bill. We reiterate a conclusion made by our predecessor committee in the Fourth Assembly⁴⁴ – the need to future-proof Bills and allow for flexibility is becoming a stock argument used by Welsh Ministers to justify what we perceive to be an over-reliance on regulation-

⁴² CLA Committee, 24 September 2018, RoP [83]

⁴³ CLA Committee, 24 September 2018, RoP [87] and [91]

⁴⁴ Fourth Assembly Constitutional and Legislative Affairs Committee’s report on *Making Laws in Wales* (October 2015)

making powers in Bills. We will continue to monitor the use of regulation-making powers in all future Bills that are introduced to the National Assembly.

60. We are also concerned with the Welsh Government’s approach to determining the scrutiny procedure assigned to a regulation-making power. It would appear that the decision is based on what the relevant Welsh Minister considers to be technical in nature. “Technical” is a subjective judgement, whereas an assessment of the appropriate scrutiny procedure should be based on sound principles. We comment further on this, with regards to the specific regulation-making powers within this Bill, in the next chapter.

61. We have significant concerns with both the content of, the approach to, and the accessibility of the impact assessments accompanying the Bill.

62. We are disappointed with the Minister’s statement that her and her team had made an assumption that Assembly Members and other interested parties would be familiar with where to find the impact assessment gateway. As the Committee responsible for scrutinising all Bills laid before the Assembly, we are not aware of this gateway. We are now aware that, in contrast to what was implied during the scrutiny session, this Bill appears to be one of the first Welsh Government Bills to be accompanied by impact assessments which has used this “gateway” approach. For that reason, we do not believe it reasonable to assume or suggest that relevant parties would have been familiar with its existence.

Recommendation 3. The Minister should use the Stage 1 debate as an opportunity to provide Assembly Members, and the wider audience, with more detail about the Welsh Government’s impact assessment gateway and, in particular, its significance to the Bill.

63. We believe greater accessibility to both Welsh laws and accompanying explanatory material (including impact assessments) should be encouraged and promoted. We are concerned that the Impact Assessment Gateway document for the Bill lacks clarity and coherence, to the extent that it could be viewed as misleading. We do not believe it is the Welsh Government’s intention for relatively new requirements aimed at promoting accessibility, such as the justice impact assessment, to become tick box exercises but we believe there is a danger this could happen. Our examination of these matters is a way of ensuring the overall aim of accessible and transparent Welsh law is not lost.

Recommendation 4. The Welsh Government should ensure that its Explanatory Memorandums include direct links to all explanatory material available in regard to the relevant Bill, including the relevant impact assessment gateway document (if this approach to impact assessments is to continue).

64. Finally, regarding the Privacy Impact Assessment, we acknowledge the Minister's response on this but believe clarification on this matter is needed. This is of particular importance because we are concerned that the information within the Impact Assessment Gateway document suggests that the assessment regarding impact on privacy was not robust.

Recommendation 5. In light of section 10 of the Bill, the Minister should explain, during the Stage 1 debate:

- why the Explanatory Memorandum and Impact Assessment Gateway document suggest the Bill produces no new requirements relating to privacy or the sharing of information;
- why there appear to be inconsistencies between the Privacy Impact Assessment summary in the Explanatory Memorandum and the Impact Assessment Gateway document, as it relates to privacy.

Recommendation 6. The Minister should publish a full Privacy Impact Assessment for the Bill before the start of Stage 3 proceedings.

65. In addition to highlighting the importance of improving the accessibility of Welsh law, we have also taken an interest in promoting best practice in the making of laws in Wales. It is our view that the Welsh Government should, as a priority, aim to prepare and consult on draft Bills, ahead of formal introduction to the National Assembly. As regards this Bill, we note that the Minister held a public consultation on the wider policy matters ahead of its introduction. However, we believe consultation on draft Bills is a better practice and is more effective at drawing attention to the planned legislative changes.

66. With regards to our examination of the word "appropriate" when used to caveat the Welsh Government's plans to consult on the content of the subordinate legislation that will follow on from the Bill, in our opinion it should not be used frivolously. We acknowledge that the Minister has, in evidence to us, given a commitment to consult on either the point of policy or on draft regulations. However, from the outset, the Welsh Government needs to be clear on its plans for consultation. We draw attention to this wording because its meaning within the Explanatory Memorandum and Statement of Policy Intent lacks clarity.

Recommendation 7. The Minister should revisit the approach to using the word “appropriate” when setting out a commitment to consult on the content of the subordinate legislation that will follow on from the Bill.

4. Specific observations including powers to make subordinate legislation

During our consideration of the Bill we focused on the specific sections of the Bill that provide powers to make subordinate legislation, including two sections (section 7 and 13) which provide Henry VIII powers.⁴⁵

67. Our scrutiny session focused on those powers of most interest to us and our consideration below considers the specific matters that we wish to draw to the attention of the National Assembly.

Section 4 and Schedule 1 – Permitted Payments, security deposit and changing the meaning of “permitted variation”

68. Section 4 and Schedule 1 define prohibited and permitted payments. Any payment required as a condition of granting, renewing or continuing a standard occupation contract is a prohibited payment unless it is a payment by a landlord to a letting agent in respect of “lettings agency work” or “property management work”, or it is a type of permitted payment set out in Schedule 1.

69. Security deposits are permitted payments. They must be dealt with in accordance with an authorised deposit scheme. Paragraph 2(4) of Schedule 1 allows the Welsh Ministers to make regulations to specify a limit to any security deposit.

70. A “permitted variation” to the amount of rent payable (as a permitted payment) is one made by agreement between a landlord and contract-holder. Paragraph 6 of Schedule 1 enables Welsh Ministers to use regulations to change the meaning of “permitted variation”.

71. The regulations made under Schedule 1 will be subject to the negative procedure. The Explanatory Memorandum states that the negative procedure is appropriate for these regulations which will, if necessary, set a cap (power in

⁴⁵ A Henry VIII power is a provision within a Bill that enables primary legislation to be amended or repealed by secondary legislation (e.g. statutory instrument), which may or may not be subject to the approval of the National Assembly.

Schedule 1 paragraph 2(4)) and which will make technical amendments (power in Schedule 1 paragraph 6).⁴⁶

72. Given that the power in Schedule 1 paragraph 2(4) has the ability to directly affect a person’s financial capability of renting a property, we asked the Minister why the power is not subject to the affirmative procedure. The Minister told us:

“(…) this is an area where we’ve committed to consulting widely before using or making that regulation, and again, it’s another area where I’m keen to hear the committee’s views as to whether they believe that we’ve chosen the right procedure for it.”⁴⁷

73. The Statement of Policy Intent states that the regulation making power in Schedule 1 paragraph 6 may be needed if there are changes in the future of Welsh Government policy. Should this be the case, we asked the Minister why this regulation-making power is not subject to the affirmative procedure. The Minister said:

“This is one of the areas I referred to earlier in terms of our attempts to futureproof the legislation—to avoid any additional terms that might be set by landlords or agents in order to try and recoup some of the money that they will not be receiving as a result of the legislation.”⁴⁸

74. The Welsh Government policy lead for the Bill said they were confident that the Bill as drafted covers all eventualities but, were changes to be made, those changes would be technical and therefore appropriate for the negative procedure.⁴⁹ The Welsh Government legal adviser said the power “allows that flexibility in case there are any loopholes that come to light as the Bill is implemented”.⁵⁰ On this point, the Minister concluded by saying she would give extra consideration to this particular issue.⁵¹

Our view

75. We note the evidence from the Minister on the regulation-making powers in Schedule 1.

⁴⁶ Explanatory Memorandum, Table 5.1

⁴⁷ CLA Committee, 24 September 2018, RoP [72]

⁴⁸ CLA Committee, 24 September 2018, RoP [74]

⁴⁹ CLA Committee, 24 September 2018, RoP [75]

⁵⁰ CLA Committee, 24 September 2018, RoP [76]

⁵¹ CLA Committee, 24 September 2018, RoP [78]

76. We note that the regulations made under Schedule 1 are subject to the negative procedure.

77. We disagree with the argument put forward by the Minister and her officials that regulation-making powers that are to be subject to the negative procedure should be permitted to bring forward changes in future Welsh Government policy. We also disagree that changing the meaning of “permitted variation” is something which can be categorised as “technical”. On this point, we repeat a conclusion made earlier in this report. “Technical” is a subjective judgement, as shown by the difference in opinion between this committee and the Minister on this issue. An assessment of the appropriate scrutiny procedure that will bring forward regulations should be based on sound principles.

78. We acknowledge that, in many cases, it is appropriate to enable changes to laws to be made via a delegated power. However, it is incumbent on the Welsh Minister exercising that power to do so responsibly. We reiterate a point that was made during the scrutiny session with the Minister - there is a line as to where flexibility intrudes into the exercise of significant powers, which must be held to a higher level of scrutiny.

Recommendation 8. The Bill should be amended so that regulations made under Schedule 1, paragraph 2(4) of the Bill are subject to the affirmative procedure.

Recommendation 9. The Bill should be amended so that regulations made under Schedule 1, paragraph 6 of the Bill are subject to the affirmative procedure.

Section 7 – Power to amend definition of “permitted payment”

79. Section 7 provides Welsh Ministers with the power to use regulations to amend the list of permitted payments. The power is a Henry VIII power as it will enable Schedule 1 to be amended by subordinate legislation.

80. The objective behind the regulation-making power is to enable regulations to reflect any unforeseen changes in landlord behaviour and practices.⁵² The Welsh Ministers are not permitted to remove the payment of rent from the categories of permitted payment.⁵³

⁵² Explanatory Notes, paragraph 34 (Explanatory Memorandum, page 91)

⁵³ Explanatory Memorandum, Table 5.1

81. The regulations made under section 7 will be subject to the affirmative procedure. The Explanatory Memorandum states that the affirmative procedure is appropriate for these regulations as the power enables Welsh Ministers to amend primary legislation.

82. Given that the power in section 7 will enable the Welsh Ministers to change what a landlord or letting agent can do, we asked the Minister whether she had considered applying a super-affirmative procedure to the regulation-making power. The Minister, in response, asked us “What would a superaffirmative process add to the process than the regular affirmative process wouldn’t?” She added:

“(…) this is something that I’d be more than interested in the committee’s thoughts on when you provide your report. Again, these are areas where we have committed to full engagement with stakeholders before any of this comes into force...”⁵⁴

Our view

83. We note the evidence from the Minister on the regulation-making power in section 7 of the Bill.

84. Our established practice has been to seek the use of the affirmative procedure for any subordinate legislation that would change primary legislation. For that reason, we welcome that the Minister has, from the outset, drafted the Bill so that the affirmative procedure will be used for the regulations made under section 7.

85. However, we believe these regulations, which would enable the list of permitted payments to be altered, would benefit from the additional scrutiny which a superaffirmative procedure would allow. Given that the Minister has committed to full engagement with stakeholders, we do not believe that placing this commitment in statute through a superaffirmative procedure would be onerous. This view is also influenced by the Minister’s reliance (and indeed the wider Welsh Government’s reliance) on the basic “consult where appropriate” approach. This approach lacks transparency and may not instil confidence in those who will be affected by the changes that can be made through regulations.

86. The power to amend the definition of a permitted payment could alter the effect of the overall aim of the Bill as currently drafted or, by shortening the list of permitted payments, widen the number of criminal offences created by the Bill. Key stakeholders and relevant Assembly committees should have the opportunity

⁵⁴ CLA Committee, 24 September 2018, RoP [63]

to comment on draft regulations that would change a significant element of the legislation. We believe the regulations should be made via a superaffirmative procedure which requires the Welsh Government to consult stakeholders in advance of laying the regulations before the National Assembly. The period of consultation would also provide time for Assembly committees to consider the regulations in draft format.

Recommendation 10. The Bill should be amended so that regulations made under section 7 are subject to a superaffirmative procedure.

Section 13 – Fixed penalty notices

87. Section 13 enables an authorised officer of a local housing authority to give an individual a fixed penalty notice if that officer believes the individual has committed an offence under section 2 or 3 of the Bill. The amount of the fixed penalty is £500. Section 13(3) provides the Welsh Ministers with the power to use regulations to amend the level of fixed penalty notice. The power is a Henry VIII power as it will enable section 13 to be amended by subordinate legislation.

88. The Statement of Policy Intent indicates that the Welsh Ministers will wish to act swiftly to amend the amount of the penalty should evidence emerge that the penalty is set too low or too high.⁵⁵

89. The regulations made under section 13 will be subject to the affirmative procedure. The Explanatory Memorandum states that the affirmative procedure is appropriate for these regulations as the power enables Welsh Ministers to amend primary legislation.

90. Given that the power in section 13 can amend the level of fixed penalty in respect of an offence, we again asked the Minister whether she had considered applying a super-affirmative procedure to the regulation-making power.

91. The Minister's answer to our question on the regulation-making power in section 7 also applies to the power in section 13; that's she is unsure what a superaffirmative process would add, and she has committed to full engagement with stakeholders before the powers come into force.⁵⁶

⁵⁵ [Statement of Policy Intent](#)

⁵⁶ CLA Committee, 24 September 2018, RoP [63]

Our view

- 92.** We note the evidence from the Minister on the regulation-making power in section 13 of the Bill.
- 93.** We draw attention to the conclusions made in relation to section 7 of the Bill.
- 94.** Section 13(3) provides the Welsh Ministers with the power to increase the level of fixed penalty, from £500 to an unknown maximum amount. The UK Government’s Tenants Fees Bill will enable an enforcement authority in England to impose a fee of up to £30,000.⁵⁷ While we acknowledge that the Minister has given no indication that the current Welsh Government is considering penalty amounts at this level, we believe the potential for a significant increase in the amount of the fixed penalty should be subject to additional scrutiny.
- 95.** As with section 7, we believe section 13 regulations should be made via a superaffirmative procedure which ensures key stakeholders will be consulted before the amount of the fixed penalty is changed.

Recommendation 11. The Bill should be amended so that regulations made under section 13 are subject to a superaffirmative procedure.

Section 18 – Publicising letting agents’ fees

- 96.** Section 18 permits Welsh Ministers to use regulations to amend the *Consumer Rights Act 2015* (the 2015 Act) to require letting agents to publicise online fees on third party websites.
- 97.** Section 18 also provides Welsh Ministers with the power to amend the 2015 Act to ensure that more than one penalty may be imposed on the same letting agent in respect of the same breach under Chapter 3 of Part 3 of the 2015 Act. The Statement of Policy Intent indicates that such a provision may address concerns that letting agents might commit repeated offences against which no further penalty is currently able to be imposed.⁵⁸
- 98.** The regulations made under section 18 will be subject to the negative procedure. The Explanatory Memorandum states that the negative procedure is “appropriate for these regulations given the nature of the proposed amendments”.⁵⁹

⁵⁷ Section 8(3)(b) Tenant Fees Bill 2017-19 HL Bill 129 (as introduced.)

⁵⁸ Statement of Policy Intent

⁵⁹ Explanatory Memorandum, Table 5.1

99. This regulation-making power provides the potential for serious financial penalties to be applied to letting agents. For that reason, we asked the Minister why these regulations will not be subject to the affirmative procedure. The Minister told us:

“(…) Welsh Ministers wouldn’t have any discretion beyond whether and when to exercise those two powers. The way in which those powers would be exercised would already be agreed through the Bill through the Assembly, were it to be passed.”⁶⁰

100. The Welsh Government policy lead for the Bill added:

“(…) the Bill has sought to limit those powers so that they don’t extend beyond what’s absolutely necessary in order to achieve the policy objective. The different treatment of this particular section was as the Minister describes, because we have so very specifically set out on the face of the Bill what the restriction in use of that power is, so it was felt that this scrutiny process would leave little else to be scrutinised...”⁶¹

Our view

101. We note the evidence from the Minister on the regulation-making powers in section 18 of the Bill.

102. We disagree with the views expressed by the Minister and the Welsh Government policy lead for the Bill that there are sufficient restrictions set out on the face of the Bill and that this means there will be little else to scrutinise during the subsequent regulation-making process. The Bill as drafted does not put any limit on the potential penalties that may be imposed upon a letting agent. We also believe the explanation put forward in the Explanatory Memorandum regarding the appropriateness of the negative procedure is weak.

Recommendation 12. The Bill should be amended so that regulations made under section 18 of the Bill are subject to the affirmative procedure.

103. We repeat a conclusion made earlier in this report when we focused on legislative competence and human rights considerations. We believe particular attention will need to be given to regulations made under section 18, in respect of

⁶⁰ CLA Committee, 24 September 2018, RoP [67]

⁶¹ CLA Committee, 24 September 2018, RoP [68]

human rights considerations, if and when those regulations are laid before the National Assembly.

Section 19 – Power to make transitional provision in respect of assured tenancies

104. The Bill is written on the assumption that the 2016 Act will be fully commenced before the Bill receives Royal Assent. Should the relevant sections of the 2016 Act not be in force when this Bill is commenced, Section 19 provides Welsh Ministers will the power to make transitional provision for the Bill to apply to assured tenancies as defined in the *Housing Act 1988*.

105. The Statement of Policy Intent indicates the Welsh Government’s preference is for the 2016 Act to be implemented before this Bill comes into force, in which case no regulations would be needed.

106. The regulations made under section 19 will be subject to the negative procedure. The Explanatory Memorandum states that the negative procedure is appropriate for these regulations.

107. We asked the Minister to clarify the need for this regulation-making power. She told us:

“(…) this is to ensure that the Bill is relevant under both systems and to make sure that any issues that there might be in terms of a delay to the implementation of the renting homes Act doesn’t cause an issue for this piece of legislation. […] were there to be a delay, it would be due to the issues that we’re having with the courts systems.”⁶²

Our view

108. We note the evidence from the Minister on the regulation-making power in section 19 of the Bill. We acknowledge the Minister’s explanation for the need for this power and are content with this approach.

109. We note that the regulations made under section 19 are subject to the negative procedure, and are satisfied with this approach.

⁶² CLA Committee, 24 September 2018, RoP [70]