

Explanatory Memorandum to the Renting Homes (Wales) Act 2016 (Amendment of Schedule 9A) Regulations 2022

This Explanatory Memorandum has been prepared by the Education and Public Services Department and is laid before Senedd Cymru 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 (Wales) Act 2016 (Amendment of Schedule 9A) Regulations 2022. I am satisfied that the benefits justify the likely costs.

**Julie James MS,
Minister for Climate Change
12 January 2022**

PART 1

1. Description

These Regulations amend schedule 9A of the Renting Homes (Wales) Act 2016 (“the 2016 Act”) to include two additional requirements which landlords are required to comply with.

Schedule 9A itself is titled ‘*Standard Contracts: restrictions on giving notice under section 173, under section 186, and under a landlord’s break clause*’. It was inserted into the 2016 Act by the Renting Homes (Amendment) (Wales) Act 2021. The Schedule already prevents a landlord from issuing a notice under sections 173, 186, or under a landlord’s break clause, in certain circumstances. These are:

- If the landlord has failed to provide the contract-holder with a written statement of the occupation contract in accordance with sections 31(1) or 31(2) of the 2016 Act;
- If the landlord has failed to provide the contract-holder with an address to which the contract-holder may send documents that are intended for the landlord, as required under section 39 of the 2016 Act;
- If the landlord has not returned any security required under section 43, or failed to comply with the requirements relating to authorised deposit schemes in section 45 of the 2016 Act; or,
- If the landlord has breached the requirements of the *Renting Homes (Fees etc.) (Wales) Act 2019*.

These Regulations now place two further restrictions on a landlord’s ability to issue a notice: if an Energy Performance Certificate (“EPC”) has not been provided, or the requirements of the Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022 are not met.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

None.

3. Legislative background

These regulations amend Schedule 9A (*Standard Contracts: restrictions on giving notice under section 173, under section 186, and under a landlord's break clause*) of the 2016 Act, using the power in paragraph 8 of Schedule 9A.

Schedule 9A already sets out certain restrictions on giving notice under section 173 (landlord's notice under a periodic standard contract), under section 186 (landlord's notice in connection with end of fixed term contract within Schedule 9B), and under a landlord's break clause in a fixed term standard contract, if certain statutory obligations have not been met. These restrictions have to be included as Fundamental Terms in the relevant contract types to which they apply.

The two additional restrictions being added to Schedule 9A by means of these regulations are:

Regulation 3 – Prohibition on giving notice seeking possession if an energy performance certificate has not been provided

A landlord may not give notice under sections 173, 186 of the 2016 Act, or under a landlord's break clause, at any time when the landlord has failed to comply with Regulation 6(5) of the *Energy Performance of Buildings (England and Wales) Regulations 2012*, which is the requirement to provide a valid Energy Performance Certificate (EPC).

A valid EPC is required whenever a property is built, sold, or rented. They contain information about a property's energy use and typical energy costs, and recommendations about how to reduce energy use and save money.

Regulation 4 – Prohibitions on giving notice seeking possession relating to health and safety

A landlord who has not complied with the requirements of the *Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022* will not be able to issue a notice under sections 173, 186, or a landlord's break clause. The relevant circumstances are:

- the landlord has failed to ensure working smoke alarms and, where required, carbon monoxide alarms, are installed;
- the landlord has failed to obtain an electrical condition report, or to give the contract holder such a report or written confirmation of certain other electrical work; or,
- the landlord has failed to comply with the *Gas Safety Regulations 1998* by providing to the contract-holder, or displaying, a relevant gas safety certificate.

4. Purpose and intended effect of the legislation

The 2016 Act will make it simpler and easier to rent a home in Wales, replacing various complex pieces of existing legislation and case law with one clear legal framework. The new 'occupation contracts', which will replace most existing tenancy and licence types, will make the rights and obligations of both landlord and 'contract-holder' (currently the tenant or licensee) much clearer.

The main purpose of these regulations is to encourage landlords to meet the standards required of them in relation to the safety and energy efficiency of the properties they let by preventing them from being able to issue so-called "no-fault" landlord notices, or trigger break clauses in occupation contracts, unless they are in full compliance with the requirements referenced in Regulations 3 and 4.

These regulations will operate alongside other relevant provisions in Part 4 of the 2016 Act, which deals with the condition of dwellings let by landlords, and associated subordinate legislation, including the *Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022* and the *Renting Homes (Supplementary Provisions) (Wales) Regulations 2022*. They are intended to make landlords' obligations and responsibilities clearer and more easily enforceable. For instance, one of the main purposes of these regulations is to prevent unscrupulous landlords from attempting to take so-called 'retaliatory eviction' in situations where a contract-holder has brought to their attention an issue of safety or disrepair. By ensuring that the landlord cannot give notice if they have failed to meet any of the requirements set out in these regulations, contract-holders will be able to raise concerns they may have with the landlord, for example if a smoke alarm is not working or a gas safety certificate has not been provided, without any concern that the landlord may seek to evict them from the property rather than ensuring that the necessary work is undertaken.

By way of background, over recent years concerns have been raised by organisations that support tenants' rights regarding the use of such so-called "no-fault" notices by some unscrupulous landlords in a 'retaliatory fashion'. This manifests itself in a landlord issuing a notice to end the tenancy simply because the tenant has complained about a repair or conditions in a property.

The Welsh Government has undertaken a considerable amount of work in recent years to tackle poor practice by landlords in Wales. This includes a landlord registration and licensing scheme designed to raise professional standards in the sector, which prevents any landlord who has failed to register or, as necessary, become licensed, from issuing a notice seeking possession. Furthermore, section 217 of the 2016 Act makes specific provision to address issues of retaliatory eviction by removing the mandatory nature of a section 173 notice, or a notice issued under a landlord's break clause, where the court is satisfied the landlord made the possession claim in order to avoid complying with their obligations relating to fitness or disrepair (under sections 91 & 92

respectively). Removing the mandatory nature of such notices in these instances allows the court to consider whether the landlord has issued the notice in a retaliatory fashion before it grants any possession. Schedule 9A reinforces the protection against retaliatory eviction provided for by section 217 by preventing the issuing of a notice under sections 173, 186, or a landlord's break clause, where a landlord has failed to comply with their statutory obligations.

5. Consultation

No formal consultation has been undertaken specifically in relation to these Regulations. This is because the Welsh Government's public consultation on [Increasing the minimum notice period for a 'no-fault' eviction](#) in 2019 sought stakeholders' views on the possibility of restricting the issue of a section 173 notice where a landlord has not complied with particular relevant legislation. That consultation explained that such an approach would "further drive up standards in the sector and...ensure that both the current and any future contract-holder live in properties of a safe and suitable standard. Key areas for consideration here are compliance with Gas Safety Certificates and Energy Performance Certificates." Responses to that consultation confirmed that a majority of stakeholders from across sectors supported this proposal.

PART 2 – REGULATORY IMPACT ASSESSMENT

This part sets out the two options considered by Welsh Ministers in making these regulations. It describes both in turn, estimating the additional costs, if any, of each option, and summarising the potential benefits.

6. Options (including costs and benefits)

Two options have been considered:

- **Option 1:** Do not make these regulations to amend Schedule 9A and rely instead on the current schedule as drafted.
- **Option 2:** Amend schedule 9A to include the additional restrictions on the issuing of a 'no fault' notice.

Option 1: do not make these Regulations to amend Schedule 9A and rely instead on the current schedule as drafted

Not making these regulations would allow a landlord to issue a notice under sections 173, 186, or a landlord's break clause, in circumstances where:

- no Energy Performance Certificate has been provided for the dwelling;
- no smoke or carbon monoxide alarms are installed;
- no electrical condition report, or written confirmation of electrical work undertaken, has been provided; or
- no gas safety certificate has been provided.

This would undermine two of the key aims of the 2016 Act – namely, improving security of tenure, and ensuring that rented dwellings meet acceptable standards of safety and repair. Preventing landlords from being able to issue a no fault notice where the significant health and safety requirements referenced in these regulations are not met will help to ensure landlords comply with those requirements.

It is conceivable that, were these regulations not to be made, a contract-holder might be able to challenge any notice issued by a landlord following a complaint by the contract-holder that, for example, no gas safety certificate had been provided, on the basis that the notice was retaliatory in nature. However, the court would need to agree that such action by the landlord was retaliatory in

any particular instance. These regulations prevent the landlord from being able to issue such a notice in the first place.

Costs

There would not be any direct financial costs to landlords or contract-holders if these regulations were not made. Irrespective of whether these regulations were made, landlords would still be required to meet the Energy Performance of Buildings (England and Wales) Regulations 2012 requirement to provide a valid EPC, and the Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022 requirements relating to smoke and carbon monoxide alarms, and electrical condition reports (the costs of which are set out in the Explanatory Memorandum to that Statutory Instrument).

At an individual level, not making these regulations would result in dis-benefits (as opposed to direct financial costs) for contract-holders living in accommodation which does not meet the requirements, as some unscrupulous landlords may feel less inclined to meet these requirements if they know that they are able to threaten a contract-holder who complains with eviction. In a wider sense, not making these regulations would also potentially mean that those landlords whose properties are not currently meeting the requirements would be less inclined to take the steps necessary to ensure compliance if they know that they can threaten a contract-holder with eviction should they complain. This would likely have the effect of ensuring that those rental properties which do not already meet the requirements would remain noncompliant for longer than would be the case if these regulations were made.

Benefits

There are no benefits in not making these regulations, other than the potential cost savings to any unscrupulous landlords who may be less inclined to meet the requirements referenced in regulations 3 and 4 than would otherwise be the case - and this is clearly not an outcome that Welsh Government would wish to support.

Option 2: Amend schedule 9A to include the additional restrictions

Amending Schedule 9A through these regulations to include the additional restrictions will help to ensure landlords comply with important requirements relating to the health and safety of people who rent their homes.

Costs

Any landlord not meeting the requirements referenced in these regulations is placing contract-holders in significant potential harm. These regulations will

remove a landlord's ability to issue a no-fault notice to evict to avoid compliance with the requirements. Any landlord who has not complied with their statutory obligations and wishes to seek possession by issuing a notice under sections 173, 186, or a landlord's break clause, will first need to comply with their statutory obligations.

We do not consider there to be any additional costs for landlords as a result of making these regulations. As mentioned in relation to option 1 above, landlords are already required to meet the Energy Performance of Buildings (England and Wales) Regulations 2012 requirement to provide a valid EPC. The costs of meeting the requirements of the Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022 requirements relating to smoke and carbon monoxide alarms and electrical condition reports were set out in the Explanatory Memorandum for that SI. That Explanatory Memorandum also confirmed that those duties will apply from the occupation date of a new contract issued under the 2016 Act, but that existing contracts which convert under the 2016 Act will have a twelve month grace period to undertake electrical safety testing and the installation of smoke alarms. This will ensure that those landlords with sitting tenants/contract-holders on the day the 2016 Act comes into force have sufficient time to gain access to the dwelling and carry out the necessary work.

Landlords of properties which fall short of these requirements may choose to either take the necessary actions to ensure that the requirements are met, or remove such properties from the rental market. Whilst a small number of landlords may face significant costs as a result of complying with these regulations, this would largely reflect a lack of adequate investment previously.

Either way, it is not considered that these regulations will lead to an increase in average rents in the PRS as a result of landlords passing on costs to contract-holders given that the majority of landlords are already in compliance. It is also possible that, over time, these regulations could potentially lead to savings to local authorities if fewer renters are leaving the PRS and seeking social housing because of poor conditions.

There are no costs to contract-holders of making these regulations.

Benefits

In broad terms these regulations will support the wider aims of the 2016 Act in increasing security of tenure and improving the quality and safety of rented sector accommodation in Wales.

The benefits for landlords will be the certainty that if they are compliant with the requirements of the legislation they should be able to gain possession of their property under sections 173, 186, or a landlord's break clause, subject to providing the necessary notice. Landlords who already provide good quality

accommodation which meets the required standards will not be adversely affected by these regulations.

For contract-holders these regulations will ensure greater security of tenure and safer living conditions. As the Explanatory Memorandum for the Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022 notes, whilst it is not possible to quantify the whole range of health and wellbeing benefits which would arise from these regulations, it is certain that the requirements around smoke and carbon monoxide alarms and electrical and gas safety testing will result in fewer deaths or injuries, and protect properties and possessions.

Conclusion

The findings of the most recent Welsh Housing Conditions Survey¹, confirm that the majority of landlords in Wales are already providing accommodation which is of a reasonable standard and free from hazards. Those landlords are unlikely to incur any significant additional costs as a result of the requirements of these regulations.

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Either way, it is not considered that these regulations will lead to an increase in average rents in the PRS as a result of landlords passing on costs to contract-holders given that the majority of landlords are already in compliance. It is also possible that, over time, these regulations could potentially lead to savings to local authorities if fewer renters are leaving the PRS and seeking social housing because of poor conditions.

The primary purpose of these regulations is to seek to ensure that all landlords are meeting their responsibilities with regards to property standards and safety. The Welsh Government's aim in making these regulations is to support the majority of good landlords who provide decent and well-maintained homes, and compel those landlords who do not maintain safe properties to improve their practice or leave the market.

Option 2 is therefore the preferred option as it will support Welsh Government's aims of increasing security of tenure for contract-holders, and improving conditions within the rented sector in Wales.

¹ <https://gov.wales/welsh-housing-conditions-survey>

9. Competition Assessment

The changes these regulations will introduce will apply to all landlords. The broad application of the proposals means that no changes to the overall structure or size of the rental market is expected. Nor is any change expected in terms of competitiveness for businesses, the voluntary sector and charities. There is therefore no risk of a detrimental effect on competition. Indeed, for the minority of landlords currently providing poor quality or unsafe accommodation it is damaging to the operation of an effective and competitive rental market where all landlords should operate on an equal footing. These regulations will ensure that unscrupulous landlords are no longer able to undercut competitors, who are providing decent quality accommodation, by avoiding maintenance and repair costs and their statutory obligations.

10. Post-implementation review

The impact of the implementation of these regulations on the quality of housing stock over time will be undertaken as part of any future Welsh Housing condition surveys.

The guidance for landlords and contract-holders that will be published to support implementation will also be reviewed after a period of three years to ensure it is as helpful as possible.