

Explanatory Memorandum to the Renting Homes (Supplementary Provisions) (Wales) Regulations 2022 and the Renting Homes (Supported Standard Contracts) (Supplementary Provisions) (Wales) Regulations 2022

This Explanatory Memorandum has been prepared by Education and Public Services Group of the Welsh Government 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 (Supplementary Provisions) (Wales) Regulations 2022 and the Renting Homes (Supported Standard Contracts) (Supplementary Provisions) (Wales) Regulations 2022. I am satisfied that the benefits justify the likely costs.

Julie James
Minister for Climate Change
12 January 2022

PART 1

1. Description

The Renting Homes (Supplementary Provisions) (Wales) Regulations 2022 set out the supplementary provisions which are incorporated into occupation contracts, except supported standard contracts, as supplementary terms. The Renting Homes (Supported Standard Contracts) (Supplementary Provisions) (Wales) Regulations 2022 set out the slightly different supplementary provisions which are incorporated as supplementary terms into those contracts which relate to supported accommodation, and take into account the specialist nature of that particular type of contract.

In addition, both SIs also prescribe that the minimum notice period a joint contract-holder who wishes to withdraw from a joint occupation contract may provide to the landlord is one month.

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

None.

3. Legislative background

Section 23 of the Renting Homes (Wales) Act 2016 (“the 2016 Act”) provides a power for Welsh Ministers to prescribe supplementary provisions which are then incorporated into occupation contracts as supplementary terms.

In addition, Sections 112 and 131 of the 2016 Act require the Welsh Ministers to prescribe supplementary provisions specifying a minimum time period between the date on which a notice under section 111 (joint contract-holder: withdrawal in relation to a secure contract) and under section 130 (joint contract-holder: withdrawal in relation to a periodic standard contract) is given to the landlord by a joint contract-holder.

Section 256(1) of the 2016 Act provides that any power to make regulations under the Act—

- (a) is exercisable by statutory instrument,
- (b) may be exercised so as to make different provision for different cases or descriptions of case or different purposes or areas,
- (c) may be exercised so as to make different provision for different kinds or descriptions of occupation contract, unless the power applies only in relation to particular kinds or descriptions of occupation contract, and

(d) includes the power to make incidental, supplementary, consequential, transitory, transitional or saving provision.

These Regulations are being made under the negative resolution procedure.

4. Purpose and intended effect of the legislation

The 2016 Act makes it simpler and easier to rent a home in Wales, replacing various, complex pieces of existing legislation with one clear legal framework. New 'occupation contracts' will replace current residential tenancies and licenses, making the rights and obligations of both landlord and tenant or licensee (referred to in the 2016 Act as the 'contract-holder') much clearer.

All occupation contracts will include the relevant fundamental terms, which are set out in the 2016 Act as fundamental provisions. These deal with the essential rights and obligations of landlords and contract-holders.

Supplementary terms deal with practical matters which help to make the occupation contract work, such as enabling a landlord to access a property to undertake repairs or maintenance, or requiring the contract-holder to keep the property properly secured. The supplementary terms are set out as provisions in regulations rather than in the 2016 Act itself. This is to more easily allow for any future changes in housing legislation or practice to be incorporated into occupation contracts than would otherwise be the case.

When a new occupation contract is entered into by a landlord and contract-holder the parties can agree to omit or modify any of the supplementary terms. The default position, however, is that all supplementary provisions are incorporated, unmodified, as supplementary terms of a new occupation contract unless otherwise agreed. Importantly, if a term is modified, that change must not render the occupation contract incompatible with any relevant fundamental term of the contract.

During the lifetime of a contract, it is also possible for a landlord and contract-holder to agree for a supplementary term to be changed; this is known as a variation. An agreement to vary a supplementary term can be reached at any time between the landlord and contract-holder, although a landlord may vary certain supplementary terms of a secure contract by giving the contract-holder notice that they intend to do so.

These Regulations set out all of the default supplementary provisions applicable to each particular type of secure and standard contract, and, separately, to those contracts which relate to the provision of supported accommodation. These supplementary terms are also included in the relevant model written statements published by the Welsh Government.

A description of each of the supplementary provisions, and details of the contract types to which they apply, are included in the Explanatory Note which accompanies this Statutory Instrument.

5. Consultation

A twelve-week public consultation was held in 2018 on the two sets of draft Regulations. The consultation was drawn to the attention of a wide audience of key stakeholders including private landlord representative groups, social landlords, tenant representative groups and housing charities.

80 responses to the consultation were received from a broad range of stakeholders. There was general agreement amongst those responding that the supplementary provisions proposed by the Welsh Government were appropriate. Some respondents felt that particular draft provisions may not be appropriate for certain types of contract, whilst others thought that further provisions might have been included. In addition, changes to the wording of particular draft provisions was suggested in some cases.

The Welsh Government published its consultation response in March 2021. The response was delayed in order to take account of any changes to the supplementary provisions as a result of the Renting Homes (Amendment) (Wales) Act 2021 (“the 2021 Act”) that was passed by the Senedd in February 2021. The final versions of these regulations take into account both changes suggested by stakeholders and those necessary as a result of the 2021 Act.

The full consultation document and the Welsh Government response are available [here](#).

Further post-consultation changes

A number of further changes to certain provisions have been included in the final version of these Regulations in addition to those made in response to the public consultation. The relevant provisions, and an explanation of the changes made are as follows:

Permitted occupiers

This provision has been further redrafted to remove the reference to ‘overcrowding’ within the meaning of Part 10 of the Housing Act 1985. This is because only possession claims permitted under provisions set out in the 2016 Act itself will be possible following commencement. However, the Renting Homes (Explanatory Information for Written Statements of Occupation Contracts) (Wales) Regulations 2022 require that all written statements of occupation contracts include reference to a contract-holder’s responsibility to ensure the dwelling does not become overcrowded.

Security of the dwelling

In response to concerns raised by consultees that it should be the responsibility of the landlord rather than the contract-holder to regularly check that smoke alarms and carbon monoxide detectors are in working order, the Welsh Government indicated in its consultation response that we would amend these requirements to only require a contract-holder to perform such checks on a smoke alarm where they are able to do so. On reflection, however, we have concluded that this would be an unsatisfactory compromise, and we have instead removed this obligation on the contract-holder. Guidance will, however, reference that it is in the contract-holder's interest to perform such checks.

Payment of rent during periods when the dwelling is unfit for human habitation

The Welsh Government has condensed what was Regulation 13 in the consultation version of the Supplementary Terms Statutory Instrument, and which now appears as Regulation 10 in the final version of the Statutory Instrument (Regulation 7 in the Supported Standard Contracts SI). Having given this further consideration, the original version was felt to be unnecessarily complex.

Landlord's right to enter the dwelling

The original Regulations, as consulted on, included a reference that the landlord may force entry to a dwelling in the event of an emergency. This reference has not been included in the final version. This is because the Welsh Government is concerned that the inclusion of this reference may be perceived as implying that express permission was being given for the landlord to use force against the contract-holder to gain entry – which is not the case. The landlord may only enter the dwelling without the permission of the contract-holder in certain limited circumstances as specified in the regulations.

PART 2 – REGULATORY IMPACT ASSESSMENT

6. Options

Three options have been considered:

- Option 1 – Do Nothing: the regulation-making power at section 23 of the 2016 Act states that Welsh Ministers *may*, rather than *must*, set out provisions to be included in occupation contracts as supplementary terms¹.
- Option 2 – Do Minimum: make regulations only in respect of requiring contract-holders to take care of the dwelling in a similar way to the implied duties to behave in a *tenant like manner* and not permit *waste*, which will be abolished under the 2016 Act.
- Option 3 – Make Regulations to provide for default supplementary terms for each type of occupation contract (the 2016 Act provides for supplementary terms to be omitted, modified or varied if there is agreement between the landlord and the contract-holder).

Option 3 is the preferred option.

7. Costs and benefits

The potential costs and benefits of each of the options considered have been estimated as follows:

Option 1 – Do Nothing

It would theoretically be possible to allow for the 2016 Act to come into force and for it to operate without the Welsh Ministers making any supplementary provisions, other than those relating to the minimum notice period a joint contract-holder who wishes to withdraw from a joint occupation contract may provide to the landlord.

Such an approach would place the onus on landlords to devise their own terms equivalent to supplementary terms and to agree these terms with contract-holders.

In particular, it might be anticipated that landlords would wish as an absolute minimum to include a term to replace the implied common law duties on a tenant to '*behave in a tenant-like manner*' and to '*not permit waste*', which are being abolished in Wales by the 2016 Act. Behaving in a '*tenant-like manner*' is based in common

¹ The options considered in this RIA relate to the Supplementary Provisions made under section 23 of the 2016 Act. Those made under sections 112 and 131, which relate to the minimum notice period a joint contract-holder who wishes to withdraw from a joint occupation contract may provide to the landlord, have not been included as the 2016 Act requires that Welsh Ministers must make these.

law dating back to the 1950s, and addresses a tenant's responsibilities in terms of taking care of the dwelling, such as unblocking sinks and replacing light bulbs. Not permitting waste refers to ensuring the property is not damaged deliberately and is kept clean and free from rubbish.

The Welsh Government's preferred approach is to replace the implied terms relating to *waste* and *tenant like manner* with up to date provisions set on a statutory footing through supplementary terms. This will provide much greater clarity and consistency for landlords and contract-holders. Furthermore, if supplementary terms addressing these matters were not set out in regulations, it would be unreasonable to expect individual landlords to prepare and agree with contract-holders equivalent terms with the certainty that these terms were appropriate and fair. For example, whilst a contract-holder is not currently liable for fair wear and tear in their use of the dwelling, there is no guarantee that this position would be preserved if individual terms were negotiated between the landlord and contract-holder.

Costs

If supplementary provision regulations were not made by the Welsh Ministers, landlords would not incur any of the potential costs outlined at option 3 below. However, any such savings of this kind would likely be outweighed by the additional costs that would potentially be incurred by landlords who, in the absence of supplementary terms set out by the Welsh Government, would be required to either:

- seek professional or legal advice as to what terms should be included or draft and agree terms themselves, according to what they consider appropriate for each individual occupation contract entered into, ensuring that the wording of those terms is fair, which may be difficult to determine in the absence of the common law precedents; or,
- not include any terms at all to offset the abolition of the implied duties regarding waste and behaving in tenant-like manner.

In either scenario landlords would potentially incur greater costs – be that from the risk to themselves of including terms which may not be deemed fair by a court, the cost of seeking professional or legal advice to ensure any terms included are fair, or from their exposure due to the omission of terms. This would not be the case if appropriate supplementary terms are set out in Regulations by the Welsh Ministers, as per the preferred option. This would particularly be the case in the event of any dispute arising between a landlord and contract-holder, and especially where any such case is escalated to the court for a decision.

It is difficult to accurately estimate what the potential financial costs to landlords or contract-holders would be if supplementary provisions were not made by the Welsh Ministers. This is because of the large number of potential scenarios that could arise and the multitude of variables that may be involved. However, by way of example, if in attempting to prepare a generic standard occupation contract which is compliant

with the requirements of the 2016 Act and related legislation, a private landlord were to seek legal advice on the inclusion of particular terms equivalent to the proposed supplementary terms, and the solicitor instructed took one hour to check whether such terms were legally correct, this could result in an additional cost to the landlord of £200. Furthermore, if a landlord who had included their own self-drafted terms in an occupation contract were to seek an order from the courts to gain possession in the event of one such term being breached by the contract-holder, and a court were to find that the term was unfair, the landlord would likely incur additional costs both from seeking to correct and reissue the contract, and in subsequently seeking possession through the court a further time.

Benefits

There appear to be few, if any benefits to such an approach. The fact that the implied terms relating to *waste* and *tenant-like manner* are being abolished by the 2016 Act in Wales means that landlords and contract-holders would both stand to incur potential financial costs unless they are able to agree individual terms that replicate the expectations and protections currently understood to exist within these implied terms.

In the absence of supplementary terms prescribed by the Welsh Ministers, landlords wishing to develop their own terms for occupation contracts would have to ensure that the particular circumstances of each contract were accurately reflected in the terms, and the fairness of any such term would potentially need to be tested in court on a case by case basis in the event of a dispute arising between the landlord and contract-holder which could not be otherwise resolved. As stated above, such an approach would potentially lead to much higher legal costs for landlords than the preferred approach.

Option 2 – Do minimum: make regulations to require tenants to take care of the dwelling in an equivalent way to the current implied duties to behave in a tenant-like manner and not permit waste

As mentioned above, the current responsibilities on tenants to act in a *tenant-like manner* and to not permit *waste* are implied terms in all current tenancies. *Tenant-like manner* is typically defined by reference to the Denning judgement: i.e. that the occupier is responsible for taking care of the property and fixtures and fittings on a day to day level – for example unblocking a sink, or replacing a fuse.

Under option 2, because the 2016 Act abolishes the duties relating to behaving in a *tenant-like manner* and *waste* in Wales, the Welsh Ministers would make regulations to place duties equivalent to *waste and tenant-like manner* on contract-holders. However, whilst this would address the deficiency resulting from the abolition of these implied duties by the 2016 Act, this option lacks the legal certainty in relation to the wide range of other matters which would be provided by the preferred option, option 3.

Costs

As with option 1, the costs of this approach in financial terms are difficult to quantify, although it is likely that the lack of legal certainty on other matters such an approach would produce – not least as a result of the practical difficulties that would arise if a dispute were escalated to the court for a decision – would be likely to incur similar additional costs to landlords (and potentially contract-holders) as those set out in relation to option 1 above.

Benefits

As with option 1 above, this approach would provide neither the detail nor the certainty that the preferred option would achieve. Regulations which simply replaced common law implied terms relating to behaving in a *tenant-like manner* and not permitting *waste* with similar statutory terms would not encompass the wider range of matters that can be addressed via the preferred option. Furthermore, and again as is the case with option 1, this approach would make it more difficult for landlords or contract-holders involved in a dispute concerning a matter not covered by the regulations to settle any such dispute. It would also be more difficult for the courts to reach decisions in such cases in the absence of supplementary terms set out in legislation, as per the preferred option.

Option 3 – Make Regulations to provide for default supplementary terms for each type of occupation contract (the 2016 Act provides for supplementary terms to be omitted, modified or varied if there is agreement between the landlord and the contract-holder)

Costs

Two of the supplementary terms could potentially incur some nominal costs for landlords: Regulation 11, which requires the landlord to provide, within 14 days of any request by the contract-holder, a written receipt for rent paid; and Regulation 27, which requires the landlord to provide an inventory. The cost of providing a written rent receipt would be negligible, whilst an inventory could be provided electronically by email, or included as part of the paper copy of the occupation contract – the cost estimates for which are set out in the Regulatory Impact Assessment for the Renting Homes (Model Written Statement of Contract) (Wales) Regulations 2022 (inventories are routinely provided by landlords already in any case, so making this a requirement under a supplementary term is unlikely to incur additional costs for most landlords, and an agreed inventory at the start of a contract will decrease the potential for dispute and additional costs – for either landlords or contract-holders – at the end of a contract).

In addition, under Regulation 10 a contract-holder is not liable for rent during any period that the dwelling is not fit for human habitation. This means that any landlord

who fails to comply with the Fitness for Human Habitation requirements set out in the Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022 may incur a financial penalty in the form of unpaid rent. The scale of this cost will depend on the rent charged on a property and the period for which it is deemed to be not fit for human habitation. This will vary on a case by case basis.

The remaining supplementary terms are not expected to impose any additional costs on landlords or contract-holders.

Benefits

The provision of Welsh Government-drafted default supplementary terms will reduce the potential financial costs to landlords of having to seek professional or legal advice in drawing up their own terms for individual occupation contracts and to ensure that such terms are legally correct. This approach also provides assurance to landlords who can be certain that, in the event of a dispute arising with a contract-holder in relation to breach of a particular term, they will be able to rely on that term when seeking possession, which may not be the case in relation to a term drafted by the landlord themselves. This is especially so if a case were escalated to the courts for a decision. A further benefit of this approach will be the flexibility available to landlords and contract-holders to omit, modify, or vary each supplementary term to reflect the particular circumstances of individual occupation contracts.

Regulation 10 has potential economic and health benefits for contract-holders by providing landlords with a financial incentive to resolve in a timely manner any issue which makes a property not fit for human habitation.

8. Competition Assessment

The Regulations are not expected to impact on levels of competition in Wales or the competitiveness of Welsh businesses.

9. Post implementation review

The implementation of these Regulations will be monitored and evaluated as part of the wider independent evaluation project commissioned for the 2016 Act.

It is proposed that this project will be commissioned for a two to three year period. It will commence prior to the new legislation coming into effect, which will allow relevant baseline information to be collated and future information needs identified. The evaluation will include both process and impact evaluation. The process evaluation, which will be a more frequent element in the study, will consider the way in which landlords are implementing the legislation, identifying examples of good practice and what is working well. It will also consider any problems and difficulties encountered by all stakeholders so that action may be taken to resolve them at an

early stage. The findings would be used to improve the adoption of the new legislation including, importantly, the use of the model contracts. The impact evaluation will consider the impact(s) of the new legislation against the desired effects of the 2016 Act.

A programme of monitoring and evaluation activity will be developed to allow reporting one year after the legislation has been commenced and at appropriate points thereafter.

The evaluation will use both qualitative and quantitative methods. The quantitative indicators may include:

- (i) Use of web-based information on the new legislation;
- (ii) The frequency of downloads of model contracts for use by landlords;
- (iii) Landlords' knowledge of their rights and obligations (sample survey);
- (iv) Contract-holders' knowledge of their rights and obligations (sample survey);
- (v) Landlords' views and experiences of the new legislation;
- (vi) Contract-holders' views and experiences of the new legislation;
- (vii) Level of requests for advice from agencies;
- (viii) Nature of requests for advice from agencies;
- (ix) Number of court cases;
- (x) Reason(s) for cases proceeding to court.

The above Information, and other information identified as relevant to the evaluation, would be compared and contrasted with the baseline data collected prior to the commencement of the new legislation.