

Report on the Renting Homes (Amendment) (Wales) Bill

October 2020



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About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.senedd.wales/SeneddLJC

Committee Chair:



Mick Antoniw MS
Welsh Labour

Current Committee membership:



Carwyn Jones MS
Welsh Labour



Dai Lloyd MS
Plaid Cymru



David Melding MS
Welsh Conservatives

The following Member was also a member of the Committee during this inquiry.



Suzy Davies MS
Welsh Conservatives

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1. Introduction

On 10 February 2020 Julie James MS, the Minister for Housing and Local Government (the Minister), introduced the Renting Homes (Amendment) (Wales) Bill (the Bill)¹ and accompanying Explanatory Memorandum (the EM).²

1. The Senedd's Business Committee referred the Bill to the Equality, Local Government and Communities (ELGC) Committee on 11 February 2020, and set a deadline of 22 May 2020 for reporting on its general principles.³ On 13 July 2020 the Business Committee agreed to extend the deadline for reporting on the Bill's general principles to 2 October 2020.⁴
2. On 13 February 2020 the Minister issued a Statement of Policy Intent to accompany the Bill.⁵

Background

3. In his legislative statement of July 2020, the First Minister stated that he would be moving forward with the implementation of the *Renting Homes (Wales) Act 2016* (the 2016 Act) and committed to bringing forward legislation to address the "no-fault evictions issue".⁶
4. The Explanatory Notes to the Bill state:

"The Bill increases security of tenure in relation to standard occupation contracts, primarily by increasing the minimum period of notice that a landlord must give before making a claim for possession under section 173 of the Renting Homes (Wales) Act 2016 ("the 2016 Act") from two to six months. This is commonly referred to as a 'no fault' possession claim.

¹ [Renting Homes \(Amendment\) \(Wales\) Bill](#), as introduced

² Renting Homes (Amendment) (Wales) Bill, [Explanatory Memorandum](#), incorporating the Regulatory Impact Assessment and Explanatory Notes, February 2020

³ Business Committee, [Report on the timetable for consideration of the Renting Homes \(Amendment\) \(Wales\) Bill](#), February 2020

⁴ Business Committee, [Revised timetable for consideration of the Renting Homes \(Amendment\) \(Wales\) Bill](#), July 2020

⁵ Renting Homes (Amendment) (Wales) Bill, [Statement of Policy Intent](#), February 2020

⁶ [First Minister's statement on the Legislative Programme](#), July 2019

The period before which a notice under section 173 can be issued following the occupation date of the contract is also increased from four months to six months. Other associated changes are also made to the 2016 Act, primarily with a view to ensuring the increased security arrangements cannot be undermined. This includes the removal of the ability of a landlord to issue a notice to end fixed term standard contracts (other than contracts of a type listed in new Schedule 9B).⁷

5. The Bill makes provision relating to:

- minimum notice periods for landlord’s notices (section 1 to 3, and Schedule 1);
- when a landlord’s notice may be given (sections 4 and 5);
- the giving and withdrawing of a landlord’s notice (sections 6 to 9, and Schedule 2);
- the termination of fixed term standard contracts (sections 10 and 11, and Schedules 3 and 4);
- notice of variation of periodic standard contracts (section 12);
- temporary exclusion of a contract-holder from a dwelling for specified periods (section 13).

6. Sections 1 to 5 and 7 to 13 of, and Schedules 1 to 4 to, the Bill make substantive amendments to the 2016 Act.

7. The Bill also makes miscellaneous amendments to the 2016 Act and other general provisions (see sections 14 to 18, and Schedules 5 and 6).

8. Section 6 of the Bill amends the 2016 Act, the *Renting Homes (Fees etc.) (Wales) Act 2019* (the 2019 Act) and the *Housing (Wales) Act 2014* (the 2014 Act). Schedule 6 to the Bill, also amends the 2019 Act.

9. The EM states that the Bill will amend the 2016 Act “prior to its coming into force to provide greater security for people who rent their homes in Wales, in particular those who live in the private rented sector.”⁸

⁷ EM, Explanatory Notes, paragraph 2

⁸ EM, paragraph 1

10. The EM further states:

“The 2016 Act is yet to be implemented. This provided us with an opportunity to consider emerging evidence in relation to security of tenure, to further engage with landlords’ and contract-holders’ representatives, and to monitor legislative changes introduced or proposed by governments in other parts of the UK since the 2016 Act received Royal Assent.”⁹

The Committee’s remit

11. The remit of the Legislation, Justice and Constitution Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other matter relating to legislation, justice and the constitution within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.

12. In our scrutiny of Bills introduced in the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, 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.

13. We wrote to the Minister setting out a series of specific questions in relation to the Bill on 9 March 2020.¹⁰ The Minister replied on 11 August 2020.¹¹

14. We had been scheduled to take evidence from the Minister on 20 April 2020 but, as a result of the circumstances caused by the Covid-19 pandemic, the evidence session did not take place.

⁹ EM, paragraph 3.24

¹⁰ [Letter to the Minister for Housing and Local Government](#), 9 March 2020

¹¹ [Letter from the Minister for Housing and Local Government](#), 11 August 2020

2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.¹²

15. In her statement on legislative competence the Llywydd, Elin Jones MS, concluded that, in her view, the provisions of the Bill would be within the legislative competence of the Senedd.¹³

16. Following this statement, on 4 March 2020 the Llywydd wrote to us¹⁴ and to the Chair of the ELGC Committee¹⁵, and said:

“...this conclusion was qualified on the basis that the Bill engages with Article 1 of Protocol 1 (Protection of Property) of the European Convention on Human Rights. In considering the legislative competence of the Bill, I came to the assessment that while it engages Article 1 of Protocol 1 it does not breach it.

I feel it is appropriate to share this with you, so as to recognise and facilitate the role of Assembly Members on your Committee in scrutinising the Bill.”¹⁶

Human rights

17. To be within the competence of the Senedd, section 108A(2)(e) of the *Government of Wales Act 2006* requires all provisions of a Bill to be compatible with the ECHR.

18. The EM states:

“The Welsh Government has considered the impact of the Bill provisions on human rights and has concluded that the Bill is compatible with the European Convention on Human Rights (ECHR).

¹² EM, Member’s Declaration, page 2

¹³ Presiding Officer’s Statement on Legislative Competence, February 2020

¹⁴ Letter from the Llywydd to the Chair of the Legislation, Justice and Constitution Committee, 4 March 2020

¹⁵ Letter from the Llywydd to the Chair of the Equality, Local Government and Communities Committee, 4 March 2020

¹⁶ Letters from the Llywydd, 4 March 2020

The new provisions engage the rights of landlords under Article 1 Protocol 1 ECHR (which protects the right to peaceful enjoyment of property) and the rights of contract-holders under Article 8 ECHR (right to a home and family life). The Welsh Government considers that the provisions strike a fair and proportionate balance between these rights. Some provisions (the restriction on serving further notices under a standard periodic contract; and the restrictions on serving notices following a retaliatory possession claim) apply to preexisting contracts but are not truly retrospective as they apply only to future actions by the landlord. The Welsh Government considers that they are compatible with Article 1, Protocol 1 ECHR.”¹⁷

19. We asked the Minister what the impact of the Bill will be on the human rights of both tenants and landlords, and how has she assessed these impacts. The Minister told us:

“We have conducted a human rights analysis in respect of the Bill provisions, so far as their impact on landlords and tenants are concerned. We consider that there will be an impact and ECHR rights are engaged but we consider any interference with those rights to be justified and proportionate to the public interest.”¹⁸

20. We also asked the Minister a number of specific questions on how particular provisions in the Bill are justified on human rights grounds.

21. Section 7 of the Bill allows a landlord to give a further section 173 notice without having to wait for six months to pass after the date of withdrawal of the first notice, provided the subsequent notice is given within 14 days of the first. Outside of this 14 day window, landlords who wish to give a further section 173 notice, due to making a mistake, for example, have to wait another six months before they can issue another notice.

22. We asked the Minister how this provision is justified on human rights grounds where there is only a minor error which does not lead to any confusion or any detriment to the contract-holder. Further we asked her whether a 14 day ‘cooling off period’ is long enough to justify restricting a landlord’s access to their property for an additional six months in such circumstances. The Minister said:

¹⁷ EM, paragraph 10.3

¹⁸ Letter from the Minister, 11 August 2020, response to question 5

“A specific form will be provided for landlords to use when issuing this notice to a contract-holder, which should reduce the risk of errors being made. Given the serious consequences associated with issuing possession notices, we would expect landlords to behave professionally and responsibly so as to avoid making mistakes when issuing a notice, as far as possible.

However, it is recognised that a small proportion of notices may still contain an error which may affect a landlord’s ability to regain possession and create uncertainty for the contract-holder. In such circumstances it is considered appropriate to allow a window of two weeks during which time a landlord can review the notice and where necessary correct any such errors. A 14 day ‘cooling off’ period is routinely a feature of other types of contractual transactions where a period of time to reassess and carry out checks is thought to be beneficial to the parties. Extending this two week period would risk extending the period of uncertainty for the contract-holder. We have conducted a human rights analysis in respect of this provision and we consider any interference with the landlord’s rights to be justified and proportionate to the public interest.”¹⁹

23. As drafted, section 10 of the Bill amends the 2016 Act so that a landlord has to wait, in most cases, for a fixed term contract to end before giving six months’ notice’. Section 10 removes a landlord’s ability to give notice to terminate a fixed term standard contract, unless the fixed term contract is one of those listed in Schedule 9B of the 2016 Act (as inserted by Schedule 3 to the Bill). We asked the Minister whether this places a landlord at a distinct disadvantage when trying to make future plans for the property, and how was this provision justifiable on human rights grounds. In asking these questions, we noted that, for example, the requirement to provide six months’ notice applies even if the contract has run for three years, by which point the contract holder will have had more than the 12 months’ security of tenure, which the Minister has said is the policy aim of the Bill. The Minister told us:

“The Bill only requires a landlord to give notice at the end of the fixed term if the landlord would like to regain possession of the property six months thereafter. The vast majority of current tenancies are provided on the basis of a six month fixed term, with the intention of both

¹⁹ Letter from the Minister, 11 August 2020, response to question 7

parties being that this fixed term will lead seamlessly into a periodic contract.

Amendments to the way in which fixed term standard contracts operate are essential to ensure that the Bill provisions which seek to increase security of tenure in periodic standard contracts are not undermined. Allowing a landlord to terminate a fixed term standard contract of, say, six months, at the end of the fixed term would fundamentally undermine the improved security of tenure being sought by the Bill. This would present a potential 'loophole'...

Provision was clearly required to prevent landlords from circumventing the Bill provisions which increase security of tenure in respect of periodic standard contracts.”²⁰

24. The Minister also said:

“We have conducted a human rights analysis in respect of this provision and we consider any interference with the landlord’s rights to be justified and proportionate to the public interest. This provision is the least intrusive means of achieving that aim and balances the competing interests of landlords (who may desire the certainty of income offered by a fixed term contract) with those of the contract-holder, (who should expect to benefit from the increased security of tenure offered by periodic standard contracts provided by the Bill, without the prospect of a landlord circumventing those provisions by only offering fixed term standard contracts).

As well as offering increased security of tenure, the Bill seeks to offer contract-holders sufficient notice to move to alternative accommodation, regardless of the length of time a contract-holder has been in occupation. Indeed, the longer the contract-holder has been in occupation, the more challenging a move might prove to be. We cannot therefore see a justification for allowing a contract-holder who has been in occupation for three years (as per the example in the question) less notice to secure alternative accommodation than a contract-holder who has been in occupation for a shorter period.

²⁰ Letter from the Minister, 11 August 2020, response to question 8

These provisions simply afford contract-holders commensurate safeguards with respect to termination, whether they occupy dwellings under fixed term or periodic arrangements.”²¹

25. In relation to a landlord’s ability to make future plans for a property, the Minister said:

“...these provisions are prospective so landlords will be aware of this position prior to entering into a fixed term standard contract and will therefore be aware that they may not be able to rent to a different contract-holder at the end of the fixed term.”²²

26. We also asked the Minister for her to clarify the human rights justification for a landlord being prevented from obtaining possession of their property after six months, in circumstances where the parties to a tenancy may have originally agreed that the tenancy would only be for six months. The Minister told us that, if it is the intention of both parties that the contract should come to an end at the end of the fixed term, then the contract-holder can leave the property at the end of the fixed term, and that “There is nothing in the Bill to prevent this.”²³ The Minister added:

“However, the Bill offers 12 months’ security of tenure to those contract-holders who wish to benefit from it.

We have conducted a human rights analysis in respect of this provision and we consider any interference with the landlord’s rights to be justified and proportionate to the public interest.”²⁴

Crown consent

27. We gave consideration as to whether the Bill may affect the prerogative, private interests or hereditary revenues of the Queen or the Duke of Cornwall, and whether that Crown consent may be required.

²¹ Letter from the Minister, 11 August 2020, response to question 8

²² Letter from the Minister, 11 August 2020, response to question 8

²³ Letter from the Minister, 11 August 2020, response to question 9

²⁴ Letter from the Minister, 11 August 2020, response to question 9

28. When questioned the Minister told us:

“The necessary consents will be sought at the appropriate time during the passage of the Bill through the Senedd.”²⁵

Our view

29. We note the evidence from the Minister and the information provided in the EM.

30. We also note that the Bill may affect the prerogative, private interests or hereditary revenues of the Queen or the Duke of Cornwall, and that Crown consent may be required.

31. We raised the matter of the Welsh Government process for seeking Crown consent in our report on the Renting Homes (Fees etc.) (Wales) Bill²⁶. We note that the Welsh Government has advised that it follows procedures agreed with the Queen’s advisers²⁷. We note that the necessary consent for this Bill will be sought by the Minister at ‘the appropriate time’ during the Senedd’s scrutiny of the Bill.

32. With regards to human rights implications of the Bill for both tenants and landlords, the Minister told us that “that there will be an impact and ECHR rights are engaged”. We note that the Minister considers that any interference with those rights is justified and proportionate to the public interest.

33. While we acknowledge that the EM does provide some further detail about the impact of the Bill on Article 1 Protocol 1 and Article 8 of the ECHR, we believe the Minister should have provided a more thorough response to this question. In our view, it is not sufficient to state that there will be an impact without directly providing us with an analysis of that impact, and a fuller assessment of the human rights implications of the Bill would have been welcome.

Recommendation 1. The Minister should publish a full analysis of the impact of the Bill’s provisions on human rights.

²⁵ Letter from the Minister, 11 August 2020, response to question 18

²⁶ Constitutional and Legislative Affairs Committee: Report on the Renting Homes (Fees etc.) (Wales) Bill, October 2018, paragraph 21

²⁷ Letter from the First Minister to the Chair of the Constitutional and Legislative Affairs Committee, 14 November 2018

3. General and specific observations

The response to Covid-19 and the existing legislative framework

34. The scrutiny of the Bill by Senedd Committees was paused at the start of the Covid-19 pandemic.

35. In response to the public health emergency caused by Covid-19, the Welsh and UK governments have made both legislation which have temporarily altered the existing legislative framework around the possession process and landlords' notice periods.

36. Schedule 29 to the *Coronavirus Act 2020* (the 2020 Act) temporarily increased the notice period a landlord in England or Wales had to give before they could ask a court for a possession order to three months.

37. The Welsh Government subsequently made regulations²⁸ - the *Coronavirus Act 2020 (Assured Tenancies and Assured Shorthold Tenancies, Extension of Notice Periods) (Amendment) (Wales) Regulations 2020* - which further temporarily extended, from three months to six months, the notice periods that landlords must give tenants under section 8(4A) or (4B) (notice of proceedings for possession: assured tenancies) and 21(1) or (4) (recovery of possession on expiry of assured shorthold tenancy) of the *Housing Act 1988* (the 1988 Act). These Regulations came into force for all notices issued on or after 24 July 2020 and initially applied to all notices issued until 30 September.

38. On 25 September 2020, the Minister for Housing and Local Government made the *Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Wales) Regulations 2020*²⁹. These Regulations, which came into force on 29 September, extend until 31 March 2021 the period during which increased notice must be given to tenants granted tenancies under the 1988 Act, the *Rent Act 1977* and the *Housing Acts 1985* and *1996*. The Regulations also increase from three months to six months the period of notice required for most notices served in respect of protected and statutory tenancies, secure tenancies, introductory and demoted tenancies, to bring those tenancies into line with the period of six months' notice already required in relation to assured tenancies and assured

²⁸ [The Coronavirus Act 2020 \(Assured Tenancies and Assured Shorthold Tenancies, Extension of Notice Periods\) \(Amendment\) \(Wales\) Regulations 2020](#)

²⁹ These Regulations were laid before the Senedd on 28 September 2020 and will be scrutinised after this report has been laid.

shorthold tenancies. It should be noted that, in the case of all tenancies, these Regulations suspend the longer notice periods required under Schedule 29 to the 2020 Act in relation to cases where the ground or reason for giving notice relates to antisocial behaviour or domestic violence.

39. Our scrutiny of the Coronavirus Act 2020 (Assured Tenancies and Assured Shorthold Tenancies, Extension of Notice Periods) (Amendment) (Wales) Regulations 2020 highlighted the engagement of a landlord's rights under Article 1 Protocol 1 of the ECHR. We also highlighted, under Standing Order 21.3(ii), that the Regulations came into force one day after they were laid before the Senedd.

40. We draw attention to these matters because the temporary but significant shifts to the existing legislative framework as a result of the Covid-19 pandemic have coincided with the Welsh Government's pursuance, and the Senedd's scrutiny, of more fundamental changes through the Bill.

The need for legislation

41. The responses to the Welsh Government's consultation³⁰ on increasing the minimum notice period for a no fault eviction were not all positive, with a number of responses highlighting some difficulties that this legislation could create in the rented sector in Wales.

42. Further, in the Minister's evidence session with the ELGC Committee on 27 February 2020³¹, she suggested that the Welsh Government were relying on an anecdotal evidence base.

43. We therefore asked the Minister to clarify why she considers the Bill to be necessary. The Minister told us that she had made a policy commitment to improve security of tenure in the private rented sector and that the Bill is necessary to achieve that policy objective.³² She added:

“The Bill will, if passed, add a further significant benefit for contract-holders to those already set out in the Renting Homes (Wales) Act 2016 (“the 2016 Act”). (...)

³⁰ Welsh Government consultation, [Increasing the minimum notice period for a no fault eviction](#), 2019

³¹ [Equality, Local Government and Communities Committee](#), 27 February 2020

³² Letter from the Minister, 11 August 2020, response to question 18

The Bill will particularly affect those who live in the private rented sector and occupy their homes under a ‘standard occupation contract’, the equivalent to the current assured shorthold tenancy, after the 2016 Act comes into force. This will provide valuable time for individuals and families, and the organisations and agencies that support them, to find a new home that is right for them and to make all necessary arrangements for a smooth transition to their new home.”³³

44. With regards to the Welsh Government’s own consultation, the Minister said:

“As far as responses to our consultation are concerned, as I have previously stated, we would have been surprised if there hadn’t been some objections from the private landlords’ sector, given the reliance on section 21 of the Housing Act 1988 (the equivalent to section 173 of the 2016 Act in existing legislation) that has grown up over time.

There is plenty of independent evidence of the problems that ‘no-fault’ evictions cause tenants, from third sector organisations and others. What is harder to pinpoint in absolute terms is the number of occasions on which section 21 is being used in circumstances where other possession grounds would be more appropriate – and that is because the very nature of section 21 possessions does not require that information to be disclosed.”³⁴

45. In relation to the Minister’s evidence to the ELGC Committee, she told us:

“The reference to ‘anecdotal evidence’ that I made during the ELGC Committee session on 27 February, referred to the casework that I and fellow AMs who sit on the Committee deal with on an all too regular basis, which confirms to us that there are clearly issues with existing arrangements.”³⁵

46. With regards to the reviewing the effectiveness of the legislation, the EM states:

“The 2016 Act, and this amending Bill, are part of the Welsh Government’s commitment to do more to help people meet their housing needs. Subject to the Bill being passed by the National

³³ Letter from the Minister, 11 August 2020, response to question 18

³⁴ Letter from the Minister, 11 August 2020, response to question 18

³⁵ Letter from the Minister, 11 August 2020, response to question 18

Assembly for Wales, the implementation of the legislation will be subject to monitoring and evaluation as set out originally in relation to the 2016 Act.”³⁶

Amending the 2016 and 2019 Acts and accessibility of the law

47. As mentioned earlier in the report, the Bill amends both the 2016 and 2019 Acts.

48. The EM states:

“The 2016 Act is yet to be implemented. This provided us with an opportunity to consider emerging evidence in relation to security of tenure, to further engage with landlords’ and contract-holders’ representatives, and to monitor legislative changes introduced or proposed by governments in other parts of the UK since the 2016 Act received Royal Assent. As a result, we have concluded that retaining an arrangement which enables a landlord to end a contract with only two months’ notice, where the contract-holder is not at fault, undermines the security of tenure we are seeking to achieve, and believe that addressing this is in the interests of both contract-holders and the wider sector. Furthermore, it could be argued that a failure to address this issue could potentially result in contract-holders in Wales being subject to a less favourable set of arrangements than apply in other parts of the UK.

We have, therefore, decided to introduce this amending legislation now, before the 2016 Act is implemented, and to bring the Act, as amended, into force before the end of the current Assembly term. We believe that taking this approach will minimise the disruption that might otherwise occur if we were to allow the 2016 Act arrangements to come into effect and then change key elements of these within a short time of the new regime having been implemented.”³⁷

49. Many Welsh citizens will need to be able to access and understand the provisions contained in the Bill within the context of the existing 2016 Act. We put it to the Minister that, without access to commercial subscription services such as Westlaw and LexisNexis, this may prove difficult. For that reason, we asked the Minister if she considered bringing forward a single Bill that would restate the

³⁶ EM, paragraph 11.1

³⁷ EM, paragraphs 3.24 and 3.25

provisions of the 2016 Act with the modifications and additions that she would wish to see made to that legislation. We also asked her if she was concerned that her decision not to do so will affect the accessibility of this important legislation. The Minister told us:

“All of the information which is needed by stakeholders will be provided within the model written statements and a range of guidance will be made available details of which will be widely circulated. For landlords and contract-holders, these will be the principal means by which they will access and understand the legislation and what it will mean for them.

The Bill will amend the 2016 Act, so that, once in force, the 2016 Act will be a single piece of legislation incorporating all amendments made by the Bill. It will not be necessary to read the Bill alongside the Act, citizens will only need to access an up to date version of the 2016 Act. Members will be aware the Counsel General is keen to ensure that legislation is available in an up to date form and free at the point of use, therefore we are working closely with legislation.gov.uk to enable amendments to existing primary legislation, such as those being made by this Bill, to be incorporated swiftly and in both languages.”³⁸

50. We also asked why the Minister had chosen to amend an Act of the Senedd which is not yet in force. The Minister told us:

“As far as amending an Act which is not yet in force, the 2016 Act sets out the legal framework under which people in Wales will rent their homes in future. This amending Bill is intended to make amendments to the 2016 Act which do not radically overhaul that system but rather improve specific aspects of it, to better reflect the changing nature of the private rented sector and those who rent their homes in Wales. That said, we consider it would have caused citizens more confusion to implement the 2016 Act and then make the amendments proposed by this Bill shortly afterwards. One set of changes all taking place at the same time was therefore the preferred approach.”³⁹

51. Schedule 6 to the Bill contains consequential amendments to the 2016 Act and 2019 Act. We asked the Minister to explain the effect of paragraph 24 of

³⁸ Letter from the Minister, 11 August 2020, response to question 2

³⁹ Letter from the Minister, 11 August 2020, response to question 2

Schedule 6 and the interaction between this Bill and the 2019 Act. The Minister told us:

“Paragraph 24 of Schedule 6 to the Bill amends the Renting Homes (Fees etc.) (Wales) Act 2019 (“the 2019 Act”) to take account of the fact that some of the provisions in the 2019 Act will be redundant upon implementation of the 2016 Act. The provisions omitted by paragraph 24 to Schedule 6 of the Bill will no longer be required. Section 25 of the 2019 Act was required to make transitional provision by regulations, applying the 2019 Act to assured shorthold tenancies under the Housing Act 1988, pending implementation of the 2016 Act.”⁴⁰

52. Commencement and implementation of the 2016 Act and this Bill is discussed further below.

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

53. The Bill contains six powers for the Welsh Ministers to make regulations, in sections 13(2) and (3) and in Schedule 1 (paragraph 14 of new Schedule 8A), Schedule 2 (paragraph 10 of new Schedule 9A), Schedule 3 (paragraph 12 of new Schedule 9B) and Schedule 4 (paragraph 12 of new Schedule 9C).

54. The Bill also contains one power for the Welsh Ministers to make an order, in section 17(2). This order making power provides for the commencement of the Bill’s provisions, and is discussed later in the report.

55. A full list and summary of the powers can be found in table 5.1 of the EM. All regulations provided for within the Bill are subject to the affirmative procedure, and all are Henry VIII powers.

56. The regulation-making powers in section 13(2) and (3) of the Bill relate to the power to restrict the right to exclude contract-holders of both periodic standard contracts and fixed term standard contracts from a dwelling for specified periods. As regards both powers, the Statement of Policy Intent states:

“The reason for the power is to address instances where certain landlords currently exclude tenants or licensees for periods that are predefined in the contract. (...)”

⁴⁰ Letter from the Minister, 11 August 2020, response to question 13

The policy intention is to limit the use of the exclusion power to tightly defined circumstances... thereby preventing use of the exclusion power in an inappropriate way.”⁴¹

57. Schedules 1 to 4 to the Bill each insert a new schedule into the 2016 Act, as follows:

- Schedule 1 inserts new Schedule 8A into the 2016 Act and relates to standard contracts which can be terminated on two months’ notice under section 173 of the 2016 Act or a landlord’s break clause;
- Schedule 2 inserts new Schedule 9A into the 2016 Act and relates to standard contracts and the restrictions on giving notice under sections 173 and 186, and under a landlord’s break clause;
- Schedule 3 inserts new Schedule 9B into the 2016 Act and relates to fixed term standard contracts which can be terminated by giving notice under section 186;
- Schedule 4 inserts new Schedule 9C into the 2016 Act and relates to fixed term standard contracts which may contain a landlord’s break clause even if made for a term of less than two years.

58. In the Statement of Policy Intent, the reason given for including regulation-making powers in Schedules 1 to 4 is to “reflect changes in the provision of housing”.⁴² In relation to Schedule 2, there is an additional reason included for including the regulation-making power, which is to reflect “legislative changes”. We asked the Minister to explain what is meant by this, and why a different approach has been taken in relation to Schedule 2. The Minister told us:

“This approach has been taken because there may be legislative changes, made outside of the Renting Homes legislative framework, which may need to be reflected in new Schedule 9A. For example, a statutory duty may be placed upon landlords at some point in the future, which may need to be included in the list in new Schedule 9A. It is not possible to predict now what those duties might be. This power therefore provides the necessary flexibility to deal with those legislative

⁴¹ Renting Homes (Amendment) (Wales) Bill, Statement of Policy Intent, February 2020, pages 2 and 3

⁴² Renting Homes (Amendment) (Wales) Bill, Statement of Policy Intent, February 2020, page 4

changes. In this respect, Schedule 2 to the Bill is different from Schedules 1, 3 and 4 to the Bill.”⁴³

59. As regards to the Henry VIII powers in the Bill we asked the Minister to clarify the justification for the fact that every regulation-making power in the Bill is a Henry VIII power. We also asked her why is it not preferable to include in the Bill a regulation making power to include, for example, certain classes of contract which will not be subject to some or all of the changes the Bill will introduce. The Minister said:

“The Bill exclusively amends the 2016 Act (and other primary legislation). It does not contain any stand-alone provision so it would be unusual to amend the Bill once commenced because its provisions will be live within the 2016 Act (if this is indeed the alternative suggested by the question). The majority of the Schedules to the Bill will be inserted into the 2016 Act. The Schedules to the 2016 Act contain a power for the Welsh Ministers to amend them, as we will need to review the matters contained within those Schedules as the housing landscape evolves over time. We need to have the flexibility to react to those changes and make appropriate provision within the various Schedules, as necessary. The Bill therefore adopts the same approach. The alternative would seem to be regulations which would also amend primary legislation or, alternatively, would need to be read alongside the primary legislation, resulting in detail falling outside of primary legislation into secondary legislation, which can itself attract criticism so far as scrutiny and accessibility of the law issues are concerned.”⁴⁴

Commencement of the Bill and the making of the necessary secondary legislation

60. The 2016 Act is yet to be implemented. We asked the Minister when she intends that this Bill, if it is approved by the Senedd, and the 2016 Act would come into force. The Minister said:

“Prior to the suspension of scrutiny as a result of the coronavirus outbreak it had been our intention to bring the provisions of the 2016 Act, as amended by this Bill, into force before the end of the current Senedd term (i.e. before April 2021). A revised timetable for the Bill has

⁴³ Letter from the Minister, 11 August 2020, response to question 4

⁴⁴ Letter from the Minister, 11 August 2020, response to question 3

now been agreed which will see scrutiny completed in January, and, if passed by the Senedd, the Bill should receive Royal Assent in March. However, the provisions of the Bill, and the 2016 Act it amends, will not be brought into force before the autumn of next year. This is because I remain committed to my promise that the sector should have six months lead-in time to prepare themselves for the new arrangements.”⁴⁵

61. We also asked the Minister when will the secondary legislation that is necessary to implement the 2016 Act be made, particularly the regulations containing supplementary terms and model contracts. The Minister told us:

“We had intended to undertake a public consultation on the model written contracts during the spring. However, we have postponed this exercise for the time-being in order to allow stakeholders to focus on coronavirus-related priorities. The consultation will begin as soon as it appropriate to do so.

As far as the Supplementary Provisions and other secondary legislation which has already been subject to public consultation is concerned, we will publish the consultation responses, which will include the draft regulations themselves, as soon as possible, although again we are holding-off doing so until the current public health emergency pressures have receded and the Senedd has resumed its wider scrutiny work.

We had planned to lay all of the necessary secondary legislation within the current Senedd term. However, coronavirus priorities mean this is not now possible. All of the subordinate legislation will be made as soon as possible in the next Senedd term.”⁴⁶

62. The order making power in section 17(2) of the Bill enables the Welsh Ministers to provide for commencement of section 6(5) of and paragraph 24 to Schedule 6 the Bill. The commencement order will not be subject to a Senedd scrutiny procedure. We asked the Minister what assessment was undertaken before it was decided that an order made under section 17(2) would not follow a formal Senedd scrutiny procedure. The Minister said:

⁴⁵ Letter from the Minister, 11 August 2020, response to question 14

⁴⁶ Letter from the Minister, 11 August 2020, response to question 15

“Section 17(2) of the Bill is a very narrow power and any ‘transitory, transitional or saving provision’ made under that power must be connected to commencement of the provisions referred to in section 17(2). We would need to use section 255 of the 2016 Act to make wider transitory, transitional or saving provisions.”⁴⁷

63. We asked the Minister whether there are any provisions in the Bill that she considers to have retrospective effect. In doing so, we drew the Minister’s attention to paragraph 10.3 of the Explanatory Memorandum to the Bill which states that the restrictions on serving certain notices in respect of some pre-existing contracts will not be “truly retrospective”, and asked her to clarify what this meant. The Minister provided the following detail:

“The following Bill provisions will apply to converted contracts, that is, tenancies existing prior to the coming into force of the 2016 Act, which convert to standard contracts:

Restrictions on giving further landlord’s notices under periodic standard contract

The Bill will prevent landlords under a periodic standard contract from serving a notice under section 173 of the 2016 Act within six months of the expiry or withdrawal of a previous section 173 notice. This restriction on serving notices in immediate succession will apply to landlords under converted contracts, as well as to landlords under contracts created after the Bill comes into force. As this provision applies to converted contracts, it is retrospective in the very limited sense that it will apply to existing contracts but only in a way that has prospective effects. This approach is necessary in order to avoid the problems created for tenants by the practice of issuing notices, such that a tenancy is always subject to a possession notice. If the provision were to apply only to new contracts, entered into after the coming into force of the Bill and 2016 Act, contract-holders under converted contracts would be treated less favourably than those under new contracts because they would continue to be open to the threat of repeat notices, until such time as that converted contract comes to an end. These provisions will not have effect in respect of repeat notices issued

⁴⁷ Letter from the Minister, 11 August 2020, response to question 15

before the 2016 Act comes into force, but would affect landlords of tenancies which were in place prior to the 2016 Act coming into force.

Restriction on giving notice under section 173 under a periodic standard contract and under landlord's break clause under a fixed term standard contract following retaliatory possession claim.

The Bill will prevent landlords from serving a notice under section 173 under a periodic standard contract or under a break clause in a fixed term standard contract for a period of six months, from the date upon which a court finds that a previous possession claim was retaliatory.

This restriction will apply to landlords under converted contracts, as well as to landlords under contracts created after the Bill comes into force. This will mean that the provision will have an element of retrospectivity.

The finding of a retaliatory claim would post-date the Bill's enactment and therefore the element of retrospectivity (insofar as the matter might be deemed to be retrospective) is limited to the fact that it only affects landlords of tenancies which have converted (and therefore is of limited effect). This will protect contract-holders who have been subject to a retaliatory claim from receiving a further notice immediately after that court order. Any claim which is retaliatory in nature (namely made for the purpose of avoiding obligations to keep a dwelling in good repair) will be one wrongly and unreasonably brought.

A six month period will offer a contract holder a period of security following a claim to which they should never have been subjected in the first place. It offers a period of security and stability following that court process.

The restriction does not prevent a landlord from serving notice under any other ground, it simply restricts the service of a further notice under section 173 or a landlord's break clause. Other notices for possession, where appropriate, will be capable of being served during the restriction period.

These restrictions will bite on prospective actions only and in that respect they are not ‘truly retrospective’.”⁴⁸

64. We also asked the Minister what impact the commencement of the 2016 Act, and the amendments to it made by this Bill, will have on tenancies made before the date the 2016 Act, as amended, comes into force. The Minister told us that the vast majority of tenancies made before the date the 2016 Act, as amended, comes into force, will convert to occupation contracts and will be governed by the provisions of the Act. The Minister added that the effect of the 2016 Act on those tenancies was considered at the time the 2016 Act was passed, and she also highlighted that her response to our question 10 (see paragraph 63) sets out the provisions of this Bill which will impact on converted contracts.⁴⁹

65. In order to ensure that the Bill does not apply retrospectively to tenants and landlords who enter into contracts based on the current legal framework, we asked the Minister what transitional provisions will need to be in place. The Minister told us that provision is made within the Bill itself to guard against Bill provisions having retrospective effect. She added:

“Paragraph 23 of Schedule 6 to the Bill amends Schedule 12 to the 2016 Act to make provision that retains the position under the 2016 Act as originally enacted in so far as deemed necessary for tenancies and licences entered into before the 2016 Act is commenced. We don’t anticipate further transitional provision being required to deal with the changes being made by the Bill. The response to question 10 above, sets out the provisions of this Bill which will impact on converted contracts.”⁵⁰

Impact on the justice system

66. With regards to the impact the Bill may have on the justice system, we asked the Minister whether she had explored whether the courts will have the necessary capacity to deal with a potentially increased number of claims, particularly if there is an increase in the use of breach of contract claims, rather than a continued use of no fault eviction grounds. The Minister said:

“As I have made clear in my evidence to other Committees scrutinising this Bill, my view is that landlords in Wales, particularly our social

⁴⁸ Letter from the Minister, 11 August 2020, response to question 10

⁴⁹ Letter from the Minister, 11 August 2020, response to question 11

⁵⁰ Letter from the Minister, 11 August 2020, response to question 12

landlords, should only consider eviction proceedings as an absolute last resort. I expect all of our landlords to provide support and intervention at an early stage when problems first start to emerge with a tenancy. They should work proactively with tenants to address those issues, rather than evict and simply pass the problem on. Having said that, whilst we accept that there is likely to be a small increase in the number of claims requiring hearings from private landlords as a result of the Bill, this needs to be set alongside the significant reduction in evictions by social landlords that we are seeking to achieve through other means, which should provide the courts with sufficient capacity to deal with any increase in claims from private landlords.”⁵¹

67. The Minister also told us:

“The Ministry of Justice agreed with our Justice Impact Assessment conclusion that the overall impact of the new legislation on caseload for the court system in Wales is likely to be negligible over time. This is based on the fact that around two-thirds of current possession claims are from social landlords and the Welsh Government’s policy is to significantly reduce social landlord repossessions. This will free up sufficient court time to offset any increase in claims from private landlords that may result from the longer section 173 notice period incentivising landlords’ to use alternative grounds to end contracts⁵².”⁵³

Our view

68. We acknowledge the Minister’s comments regarding the need for legislation.

69. However, in doing so, we note that the Welsh Government’s own consultation on the proposed reforms to notice periods did not provide evidence of strong favourable support. We also note the Minister’s suggestion that there has been some reliance on using anecdotal evidence as a way of corroborating the policy intention.

⁵¹ Letter from the Minister, 11 August 2020, response to question 17

⁵² Letter from the Minister, 11 August 2020, response to question 17, footnote 1 “During 2018, 3,640 possession orders which required a court hearing were granted by the courts in Wales, of which 3,050 were granted to social landlords and 590 to private landlords. In addition, 616 orders were granted under the Section 21 ‘accelerated procedure’ which does not require a court hearing.”

⁵³ Letter from the Minister, 11 August 2020, response to question 17

70. We acknowledge that there may be a more widespread issue regarding a lack of data about the private rented sector in Wales. Notwithstanding this issue, and while we accept that engaging with this particular sector may come with difficulties, we make a general point of principle that the Minister's evidence-base is weakened by the informality of the data and it is not good practice to rely on such evidence as grounds for changing primary legislation. We would welcome efforts by the Welsh Government to increase engagement and formal links with contract-holders in the private rented sector in Wales.

Recommendation 2. The Welsh Government should increase engagement and develop more formal links with contract-holders in the private rented sector in Wales as a means of facilitating more robust data-gathering from this sector to better inform future legislative proposals.

71. We note that it is the Minister's intention that a review of the implementation of the Bill will be included as part of the planned evaluation of the 2016 Act. We welcome this planned review, particularly because of the limitations of the Welsh Government's own evidence base for the legislative reforms.

Recommendation 3. The planned evaluation of the 2016 Act as amended by this Bill should give consideration to the necessity and potential urgency for the full consolidation of housing law as it is applicable in Wales.

72. Furthermore, we believe that the 2016 Act as amended should be considered as a key priority for post-legislative scrutiny by a Senedd Committee at the earliest and most appropriate point post-commencement of the provisions of the 2016 Act (as amended). We believe that any such post-legislative scrutiny should also include consideration of the need for, and merits of, the full consolidation of housing law.

73. We believe the Minister's decision to seek to substantially amend an Act not yet in force via a subsequent Bill, brought forward four years after that principal legislation was enacted, is an irregular approach to legislating. The 2016 Act was also previously amended by the provisions of the 2019 Act, meaning that the 2016 Act has already been changed. We are not convinced of the merits of this approach, not least because of issues relating to accessibility of the law, which is discussed further below.

74. We also wish to draw attention to the time period between enactment of the 2016 Act and the coming into force of its provisions. Legislation passed in the Fourth Assembly is to be commenced during the Sixth Senedd; not only is this irregular but it does not represent good law-making.

- 75.** The unusual approach adopted by the Minister is concerning because of its potential impact on the accessibility of important legislation that will affect a significant number of people in Wales.
- 76.** The Minister's response, that Welsh citizens will only need to access an up to date version of the 2016 Act, is precisely what gives us cause for concern. We note that the Minister has said the Welsh Government is working closely with legislation.gov.uk to enable amendments to existing primary legislation to be incorporated swiftly and in both languages. While this is to be welcomed, it is not clear when and how this will be achieved.
- 77.** In the meantime, the Minister will be aware that, without access to commercial subscription services such as Westlaw and LexisNexis, locating an up to date version of the 2016 Act may prove a difficult task for a typical contract-holder in Wales.
- 78.** In our view, the approach adopted by the Minister and the resulting complexity of the legislative landscape provides further justification for timely evaluation of the need for full consolidation of housing law in Wales.
- 79.** With regards to the balance between the detail on the face of the Bill and what is left to subordinate legislation, we note that the Bill contains six powers for the Welsh Ministers to make regulations, and one power for the Welsh Ministers to make an order.
- 80.** We note that all six regulation making powers in the Bill are Henry VIII powers. The use of so many Henry VIII powers is unwelcome, not least because the Bill is itself amending an Act that has yet to be commenced. Nevertheless, we consider it appropriate that these regulation making powers are subject to the affirmative procedure.
- 81.** With regards to the single power for the Welsh Minister to make an order, under section 17(2) of the Bill, we note that this power provides for the commencement of the Bill's provisions. We further note that an order made under section 17(2) of the Bill may make transitory, transitional or saving provision. We consider that the use of this power will need to be monitored.
- 82.** The remit of our committee includes consideration of matters relating to justice in Wales. In more recent months, we have taken on more in-depth consideration of the justice system in Wales.
- 83.** We note the comments from the Minister regarding the impact on the justice system and acknowledge her evidence that the Ministry of Justice has

agreed with the Welsh Government's Justice Impact Assessment conclusion that the overall impact of the new legislation on caseload for the court system in Wales is likely to be negligible over time.

84. Nonetheless, we note that the Minister has accepted that there is likely to be an increase in the number of claims requiring hearings from private landlords as a result of the Bill. We agree with the Minister on this point and believe that the court system is very likely to see an increase in workload.

85. Potential delays to court proceedings as a result of an overburden on, and lack of capacity within, the system must be avoided. The court system should not result in high costs being incurred and there must be an emphasis on the need for timely resolution. This is especially important because of the impact the Bill will have on a landlord's right to access their own property.

86. We believe there would be merit in examining whether there should be a role for a standalone and specific tribunal as a means of addressing this issue. Such a tribunal could, amongst other things, consider possession claims made by landlords.

Recommendation 4. The Minister should investigate the need for a dedicated housing tribunal in Wales, and the result of that investigation should be reported to the Senedd.