

27th June 2018

Our vision

Everyone in Wales should have a decent and affordable home: it is the foundation for the health and well-being of people and communities.

Mission

Shelter Cymru's mission is to improve people's lives through our advice and support services and through training, education and information work. Through our policy, research, campaigning and lobbying, we will help overcome the barriers that stand in the way of people in Wales having a decent affordable home.

Values

- Be independent and not compromised in any aspect of our work with people in housing need.
- Work as equals with people in housing need, respect their needs, and help them to take control of their lives.
- Constructively challenge to ensure people are properly assisted and to improve good practice.

Introduction

Shelter Cymru welcomes the opportunity to provide evidence on this draft Bill. We've been calling for a ban on fees since our 2016 *Letting Go* campaign¹, which highlighted the cost of tenants' fees and the lack of transparency and consistency in agents' fee policies.

We warmly welcome the Welsh Government's commitment to ban fees. Doing so will help tenants to afford to find and keep a home; and it will assist local authority

¹ <https://sheltercymru.org.uk/letting-go/>

homelessness services by reducing demand on local 'spend to save' homelessness prevention budgets.

However, there are certain aspects of the Bill that need to be strengthened in order to avoid creating loopholes that could be exploited.

Default fees

Default fees are primarily levied against tenants on low incomes who are falling behind with their rent. In our experience it is the most vulnerable tenants who are the most likely to be hit by excessive or unfair default fees.

The Welsh Government's explanatory memorandum gives the rationale for not including default fees in the Bill as follows: '*The charging of payments in default is longstanding practice of which there is little evidence to show tenants within the PRS are being overcharged to a significant or consistent degree. On that basis, the Welsh Government sees no need to change such practice.*'

There is a great deal of evidence of unfair and excessive default fees being applied in Wales.

A letting agent in Swansea charges tenants for late payment of rent even if the tenant is not in arrears but is awaiting a payment of Universal Credit or Housing Benefit. This agent repeatedly refuses to change the rent due date to coincide with the UC payment date, and instead levies default fees every month, thereby increasing their profit at the expense of tenants on limited incomes.

We have tried to challenge this practice in court but the local District Judge has stated that it's a contractual matter.

We sampled 80 recent calls to our helpline where there was a problem relating to letting agents. One quarter of those calls related to agents' fees, half of which were default fees.

Agents claim that fees are only meant to cover their costs in chasing late payments, but we see many people who are charged fees that are completely out of proportion to the cost to the agent.

A woman called our helpline in desperation because her letting agent was charging her **£26.30 per day** for arrears. She had never had a written tenancy agreement so hadn't agreed to these charges.

Our caseworker's opinion was that the agent was charging this level of fees in order to increase the tenant's arrears over the eight-week limit that would trigger a mandatory possession ground.

The Welsh Government proposes that listing default fees in the tenancy contract will suffice in terms of transparency and fairness. The vast majority of agents already do this, and unfortunately it doesn't give tenants the protection they need. Contract terms can be written in ways that are hard to understand, and result in excessive fees being charged.

We are currently assisting a tenant in court for disputed rent arrears. Part of the claim against the tenant is late payment fees, described in the tenancy agreement as:

'3% above the bank of England base rate, payable on any rent which is more than 7 days overdue. Interest will be payable from the date on which the rent fell due until it is paid. If rent is overdue a 2nd time then a £25.00 charge will be made each time it is overdue in addition to the interest for the 1st week overdue and £10.00 per week that it remains overdue after that.'

This resulted in the tenant being charged **£366.60** over a four-month period.

Our mystery shopping exercise² carried out by our campaign supporters found that default fees were among the least transparent of all fees, with many agents appearing to make up fees on the spot.

We do recognise that there is a legitimate need for agents to recoup some cost when they are chasing arrears. However, if the Bill does not create consistency and fairness in the charging of default fees, this will become a loophole exploited by agents seeking to maximise profit. The Bill in its current form does not even require that default fees are reasonable and fair. It allows default fees to be summarily charged for any alleged 'breach by the contract-holder of a term of the contract'. This is open to abuse.

We propose an alternative approach. The Bill should require that default fees are limited to:

- Only two types of payment, to be defined in the Bill: late payment of rent, and lost keys. Other fees should be recovered via the security deposit
- No more than one fee for late payment of rent per month

² <https://sheltercymru.org.uk/wp-content/uploads/2016/08/Letting-Go-Email.pdf>

- Fees to be charged only for interest on the missed rent payment, capped at 3% above the bank of England base rate
- Fees not to apply until rent is 14 days late
- A requirement for landlords and agents to not unreasonably refuse a tenant's request to change a rent due date
- Default fees to be clearly set out in contract terms
- Fees for replacing lost keys should be limited to the cost of the actual key, not the agent's time, as this is part of their core function.

As an absolute minimum, the Bill should require that default fees be reasonable and fair. However it would be better for the Bill to set a cap, to reduce reliance on the courts to establish reasonableness. Many tenants are unwilling or unable to seek redress via the courts due to the costs and other difficulties. More detail on this is under the section on enforcement.

Holding deposits

We welcome that the Bill proposes to cap holding deposits at one week's rent and require them to be refundable. This is a great improvement on the current situation, where agents are able to charge excessive holding deposits on a non-refundable basis.

We advised a woman who was threatened with homelessness and being assisted by her local authority Housing Options team. She put down a £230 holding deposit on a property. The local authority agreed to assist her with the bond and rent in advance. In order to arrange this she had to wait 10 days for an appointment with the bond board.

Once this was done she contacted the letting agent promptly, only to find that the agent had let the property to another tenant. They refused to return the £230 holding fee. This meant that she had to return to Housing Options to seek further help as she was at increased risk of homelessness, with severely reduced financial resources due to the loss of the £230.

and unclear. There's a risk that holding deposits could be retained simply where a tenant has failed a credit check or referencing: ARLA have already suggested that this will be the case³. There is the possibility that minor, unintentional errors by tenants or normal fluctuations in income could be interpreted as false and misleading.

³ <http://www.arla.co.uk/news/november-2017/tenant-fees-bill-at-a-glance.aspx>

We query why the Bill allows holding deposits to be retained if the tenant fails a 'right to rent' check. The right to rent has not yet been enacted in Wales. Even if it is subsequently brought into force there is no requirement on Welsh Government to follow England in respect of how this affects letting fee regulation. Shelter highlights that right to rent checks in England can be complicated, and an individual may not always know whether they have the right to rent, or may fail simply because they don't have all their documents in order⁴.

The Bill should include a cooling-off period of 48 hours during which the holding deposit must be returned on request of the tenant. We often hear from tenants who say they've been pressurised during a viewing to pay money immediately to secure a property. A cooling-off period is consistent with principles of consumer law, and would give some protection to vulnerable tenants who are more at risk of feeling pressurised to hand over money.

Keith* was trying to help his daughter, Sharon*, along with her partner and young child, to secure a private tenancy. Sharon viewed a property and the agent told her she must pay £250 in cash if she wanted to proceed. The agent emphasised that others were also interested in the property and pressurised her to hand over cash then and there. Sharon made the payment, and Keith offered to act as a guarantor.

The agent sent Keith the guarantor information but when he read it he decided that he couldn't stand as guarantor as the requirements were so far-reaching. However, the agent informed Keith and Sharon that the £250 was non-refundable.

Keith contacted the Shelter Cymru helpline for advice. He described the agent's approach as 'predatory' and was very concerned that this was seen as acceptable behaviour in the letting agents' profession. At the time of writing Keith is pursuing a complaint through the agency, and will take it to the Ombudsman if it isn't resolved.

* Names changed to protect anonymity

There are times when a tenant is unable to take up a tenancy for good reasons, such as a family crisis or bereavement. Reputable agents will exercise discretion in these situations but unfortunately some take advantage to retain the deposit at all costs. The Bill should be amended to require holding deposits to be returned when the contract-holder has a good reason for withdrawing.

Hollie* was arranging to move from her home in England to be nearer to her mother, who had terminal cancer. Sadly, five days before Hollie was due to move, her mother died. Hollie could not bear to take up the tenancy, so she contacted the agent to ask for a refund of the holding deposit. The agent refused, stating that it was non-refundable.

Hollie sought help from Shelter Cymru. She felt strongly that the landlord was being very unfair in such cruel circumstances. We established that the agent had not been upfront about what the payment was for and the circumstances in which it would be refundable. We signposted Hollie to the specialist Citizens Advice Bureau consumer helpline.

Finally, we suggest it would be helpful if the Bill could require an agent to provide the tenant with a written explanation including evidence of why a holding deposit is being retained.

Enforcement

We broadly welcome the proposed use of Fixed Penalty Notices (FPNs). These are already being used effectively to enforce landlord licensing under Rent Smart Wales. Our view, however, is that £500 is too low to be an incentive, and will be even less of an incentive as time goes on. For this reason we would advise against setting the level of the FPN in the Bill itself as is currently proposed.

Instead, the Bill should allow for the level of the FPN to be set by the Minister and periodically revised in order to remain responsive to changing rent levels. We suggest that a fine set at 15 to 20 per cent of the average annual revenue for privately rented property in Wales would be appropriate.

It's welcome that the Bill requires convictions to be reported to Rent Smart Wales but this should also go for FPNs, since the licensing authority would want to know if an agent is repeatedly infringing the law.

The Bill proposes that contract-holders should apply to the County Court for recovery of fees. There are practical barriers to this and the Bill would be strengthened by also providing for alternative routes of redress. Applying to the County Court costs money and can be highly intimidating, especially for vulnerable tenants who may well be deterred from exercising this form of redress.

We have a number of suggestions:

- The Bill should also provide for contract-holders to apply via the existing redress bodies for recovery of fees: The Property Ombudsman, Property Redress Scheme, and Ombudsman Services: Property
- The Bill should allow the County Court to award compensation in addition to the recovery of the prohibited fee and costs, of up to three times the amount of the prohibited payment. This would be in line with existing legislation for security deposits

- A ban on possession actions while a prohibited payment has been taken and held would be a strong incentive for agents to refund. This measure has worked effectively in relation to landlord licensing. However, learning lessons from the implementation of the Housing (Wales) Act 2014, the ban should apply for section 8 fault-based possession proceedings as well as section 21 no-fault proceedings
- The Bill in England places much more emphasis on the role of Trading Standards, giving powers to local weights and measures authorities to require the repayment of prohibited fees, including interest. The English Bill also allows local weights and measures authorities to help tenants to make an application to recover prohibited payments. This would be very desirable for some tenants who may otherwise struggle with the process. The Welsh Bill would be stronger if it made similar provisions.

Security deposits

We welcome that the Welsh Government is prepared to set a limit on security deposits. It would be clearer for agents if this were included in the Bill rather than in regulations. We would argue for a cap of one month's rent, as was originally proposed for the Bill in England (subsequently revised upwards to six weeks).

Other issues: fees for ending a tenancy

The Bill makes it an offence for a landlord or agent to require payments as a condition of the granting, renewal or continuance of tenancy contracts. But the Bill doesn't mention fees for ending a tenancy, either in the form of checking-out fees (outside a fixed term) or cancellation fees (within a fixed term). These costs can be very high and we would urge the Government to ensure that the Bill explicitly bans fees for ending tenancies, to avoid creating a loophole. Our mystery shopping exercise found that tenants were being charged as much as £89 simply for handing their keys in at the end of the tenancy.

A young couple was living in shared accommodation when they found out they were expecting their first child. They needed to move to a new home suitable for raising a family, and this meant they had to leave their fixed-term contract early.

The couple were three months into a 12-month contract and they found a new home also managed by the same agent. Although they had found friends to replace them in the shared house, the agent wanted to charge £534 to change the contract, £450 for checks and references for the new tenants, and £500 for new checks and references for the couple despite this having already been done just three months previously.

The agent in question is one of the largest and most reputable agents in Wales.

It's possible that agents may argue that some charges for ending tenancies are legitimate, such as in the case study above when a tenant needs to move out during the fixed term and cancel the contract early. In these cases agents often require the outgoing tenants to find replacement tenants: in which case, the actual cost to the agent of establishing the new tenancy only includes credit and reference checks and getting the new agreement signed. However, if the agent re-advertises and recruits new tenants themselves, then costs to the agent might be higher. It may be fair to expect the outgoing tenant to pay a reasonable amount.

End-of-tenancy fees are by far the most common form of default fee that we have queries on. Problems arise frequently, so the Bill does need to address them.

In our view the Bill should:

- Include payments for ending a tenancy in the list of prohibited fees; and
- Allow agents to charge a reasonable fee for early cancellation of tenancies within the fixed term. Cancellation fees should be capped at one week's rent.