

Renting Homes (Fees etc.) (Wales) Bill
Written comments from ARLA PropertyMark
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Background

1. ARLA PropertyMark is the UK's foremost professional and regulatory body for letting agents; representing over 9,000 members. ARLA PropertyMark agents are professionals working at all levels of letting agency, from business owners to office employees.
2. Our members operate to professional standards far higher than the law demands, hold Client Money Protection and we campaign for greater regulation in this growing and increasingly important sector of the property market. By using an ARLA PropertyMark agent, consumers have the peace of mind that they are protected, and their money is safe.

Executive Summary

3. A ban will make buy-to-let investment even less attractive and result in the extra costs borne by landlords being passed on to tenants through rent rises.
4. Banning fees will reduce competition in the market and agents will become more selective about the tenants they choose.
5. Clarification in the Bill is needed on the role of portals in displaying information, payments for utilities (contract for services), and the Green Deal requirements.
6. The Welsh Government need to specify whether Change of Sharer and Surrender of Tenancy will be classed as payments in default and if the premium associated with Deposit Replacement Insurance Schemes will be acceptable.
7. The Welsh Government should exempt reference checks from the legislation to ensure that tenants are not overstretching themselves in terms of what they can afford.

General comments

8. ARLA Propertymark does not support the banning of letting agents charging fees to tenants. We believe fees should be open, transparent and reasonable. They represent legitimate costs to business that need to be covered.
9. When renting a property, a tenant is taking a legal interest in land for the duration of their tenancy and the fees charged to tenants are broadly like those charged when purchasing a property (referencing checks equate to mortgage application fees, contract negotiation charges are akin to conveyancing, and inventory costs are like a survey).
10. In terms of fees, the only difference between renting a home and buying a property is that when purchasing a property, the fees are paid to three different parties and generally cost the purchaser much more, whereas when renting a property, the letting agent acts in a quasi-legal capacity, undertaking these tasks on behalf of the tenant.

Response to the Renting Homes (Fees etc.) (Wales) Bill

Intended effect

11. ARLA Propertymark does not believe that banning fees to tenants will ensure that the private rented sector remains functional and affordable for those who wish to access it. The Renting Homes (Fees etc.) (Wales) Bill will not increase accessibility and transparency for tenants and prospective tenants. Furthermore, we do not believe that the Bill will help tenants find homes within the private rented sector and move more easily. A ban on letting agent fees will have a profoundly negative impact on the rental market in Wales and not increase accessibility and transparency for tenants and prospective tenants. Currently, tenants know and understand what they are committing to at the start of the tenancy. A ban will reduce the services that letting agents provide and cost the sector jobs. It will make buy-to-let investment even less attractive and ultimately, as the Impact Assessment notes on page 20¹, result in the extra costs borne by landlords being passed on to tenants.
12. The Bill will not ensure that the private rented sector remains functional for those who wish to access it. If less professional and part-time landlords turn away from agents due to increasing costs, they will likely be unaware of new (and existing) legal requirements, causing widespread non-compliance and putting tenants in danger. This could result in more tenants having to seek assistance from their local authority. In the current fiscal climate, many local authorities are dispensing with their Tenancy

¹ <http://www.assembly.wales/laid%20documents/pri-ld11586-em/pri-ld11586-em-e.pdf>

Relations Officers and their Housing, Environmental Health and Trading Standards teams. These teams are already over-stretched and under resourced. They will struggle to enforce the laws. This will leave tenants, particularly vulnerable tenants, living in substandard conditions with nowhere to turn.

13. The Welsh Government outline in the Explanatory Memorandum on page 10² that the Bill has been developed in the context of helping tenants find homes within the PRS. However, we fundamentally believe that the Welsh Government is misguided in its approach for two reasons. Firstly, banning fees will reduce competition in the market by driving some agents out of business. Smaller agents will struggle, their turnover will become smaller, with some driven out of business altogether or taken over by larger agencies creating corporate monopolies rather than increasing competition in the sector. Secondly, those agents that remain in the sector will become more selective about the tenants they choose. Furthermore, the private rented sector in Wales is regulated through Rent Smart Wales with both landlords and agents complying with the additional burdens that the new legislation has imposed. However, with the proposal of this ban the mainstream providers of rental accommodation are faced with further financial pressure which, in many cases, will lead to fewer agents and landlords operating in the market giving tenants far fewer opportunities to get into good quality, affordable rented housing. The average fee charged by ARLA Propertymark agents is £202 per tenant, which we think is fair, reasonable and far from exploitative for the service tenants receive. As the ban shifts the focus of the agent from the tenant to the landlord this will lead to agents selecting the best tenant for the landlord; ultimately leading to some tenants finding it almost impossible to find property to rent.

14. The ban will not make the sector more affordable to tenants. Fees charged by letting agents represent legitimate business costs that need to be covered as outlined on pages 19 and 20 in the Impact Assessment³. As a consequence of a ban, these costs will be passed on to landlords, who will need to recoup the costs elsewhere; inevitably through higher rents. Independent research commissioned by ARLA Propertymark and carried out by Capital Economics, predicts that because of a full ban on fees tenants will pay an increased rent of £103 per year.⁴ Their analysis shows that as rents will increase by less than the average tenant fees, those tenants who move more frequently will enjoy savings on overall costs. However, those that move property less

² <http://www.assembly.wales/laid%20documents/pri-ld11586-em/pri-ld11586-em-e.pdf>

³ <http://www.assembly.wales/laid%20documents/pri-ld11586-em/pri-ld11586-em-e.pdf>

⁴ <http://www.arla.co.uk/media/1045728/letting-the-market-down-assessing-the-economic-impacts-of-the-proposed-ban-on-letting-agents-fees.pdf>

often will not reap the same benefits in savings. Typically, these are likely to be lower income families who will probably move less often than younger, wealthier millennials. For savings to accrue to tenants from the change in policy they would need to move as often as every two-and-a-half to three years. Consequently, those tenants in long term tenancies will end up worse off. Rather than creating a system which is more affordable and encourages long-term tenancies, the proposed ban will financially disadvantage tenants unless they move on a regular basis.

15. The Welsh Government's approach will not increase accessibility and transparency for tenants and prospective tenants. Letting agent fees should be open, transparent and reasonable. Under the Consumer Rights Act all letting agents in Wales must openly display a list of all fees, charges or penalties which may be incurred by a landlord or tenant.⁵ However, there has been very little enforcement of these rules meaning that tenants and landlords are not getting the control and clarity they need to make informed decisions. Rather than pressing ahead with plans for more legislation in the sector to ban letting agent fees, the Welsh Government could provide greater control and clarity by using the powers they already have to improve transparency and introduce tougher penalties for agents found to be breaching the law.

Provisions in the Bill

16. Clarification in the Bill is needed on the role of portals in displaying information, payments for utilities (contract for services), and the Green Deal requirements. The Welsh Government also need to specify whether Change of Sharer and Surrender of Tenancy will be classed as payments in default and if the premium associated with Deposit Replacement Insurance Schemes will be acceptable. We also strongly believe that the Welsh Government must exempt reference checks from the legislation to ensure that tenants are not overstressing themselves in terms of what they can afford.
17. It is sensible that the Renting Homes (Fees etc.) (Wales) Bill extends the requirement for agents to display all fees, charges and penalties under the Consumer Rights Act to any online advertiser such as property portals and third-party websites. Most tenants now search for rental accommodation by using the portals and will not visit the letting agent's own website or go into a branch until later in their property search. However, the Welsh Government need to clarify that once agents have provided the relevant information to the portals, it will be the legal responsibility of the portals to ensure

⁵ <http://www.legislation.gov.uk/wsi/2015/1904/made>

that the fees are showing correctly. Agents pay to advertise on portals and by ensuring that liability is with them, it will guarantee that every agent provides this information in a unified way; reducing the risk of agents opting out from using some portals and not others. It is also very difficult to display fees if properties are being advertised on third party websites like Twitter that require users to provide information in 280 characters or less.

18. Despite the Renting Homes (Fees etc.) (Wales) Bill banning landlords and agents from requiring tenants to secure and pay for services from any third party, the Welsh Government must be clear that loans under the Green Deal (or any subsequent energy efficiency scheme) which are payable by the tenant must be excluded from the ban. The Energy Act 2011 introduced a series of energy efficiency targets for residential properties.⁶ The Green Deal helps tenants and landlords make energy-saving improvements to the property. Tenants pay for the agreed proportion of the improvements through their energy bill during their tenancy. Therefore, tenants must agree to the non-optional Green Deal Charge as a condition of granting, renewing or continuing a tenancy. In its present form, this would fall foul of Clause 3 (2) of the Renting Homes (Fees etc.) (Wales) Bill. If the Welsh Government wants the sector to use the Green Deal, then the loans which are payable by the tenant must be exempt from the ban.

19. The Bill should be amended to clarify that landlords and their agents can require tenants to secure and pay for utilities (electricity, gas or other fuel, water or sewerage), communication services (such as telephone, internet, cable/satellite television), Council Tax and payments for a television licence where they are required by the tenancy agreement to make the payment. In its current form it is unclear from Clause 2 (2) and (3) in the Bill whether these payments are permitted. The Welsh Government should re-word this part of the Bill and confirm that these are “Permitted Payments” where they are in the tenancy agreement.

20. We believe letting agents should be able to charge tenants for dealing with Change of Sharer / Tenant or where a tenant wants to leave their tenancy early (Surrender of Tenancy). This is a breach of their tenancy agreement and almost every service provider (e.g. mobile phone contracts) comes with a default payment for early termination. By enshrining this into law it will give agents ultimate certainty and not create a “PPI moment” for the industry. Furthermore, a significant amount of time and resources are involved by agents in either a Surrender of Tenancy or Change of

⁶ <http://www.legislation.gov.uk/ukxi/2015/962/contents/made>

Tenant / Sharer as effectively an entire new agreement, referencing and Right to Rent checks (when introduced in Wales) need to be undertaken. Such a situation will only ever occur at the request of the tenant or due to the tenant's actions. It will never be instigated by either a landlord or letting agent and therefore, we would argue that these should be exempt from the ban. Additionally, if they are not classed as a default payment by the tenant we are concerned that this service may not be provided at all, restricting tenant's ability to move and reducing choice.

21. Recently, we have seen the emergence of Deposit Replacement Insurance Schemes whereby the tenant pays a non-refundable insurance premium (usually around one week's rent) before they sign the tenancy agreement. This insurance product then acts in place of a deposit and should the tenant go into rent arrears or damage the property, the landlord will be able to claim on the insurance policy. These schemes are not mentioned in the Renting Homes (Fees etc.) (Wales) Bill. Clarification is needed as to whether it will be acceptable to pay the premium rather than a tenancy deposit under the legislation. If they are permitted, will the annual insurance premium payment become a Prohibited Payment to a third party under Clause 3 (2) of the Renting Homes (Fees etc.) (Wales) Bill or will these schemes be deemed acceptable. The issue arises because essentially the option is only available at the beginning of the tenancy and not at renewal. Therefore, if the option is chosen it will become a premium for continuing the tenancy and breach Clause 3 (3) of the Bill.

22. We believe that there should be an exemption for checks involved in referencing tenants. Reference checks are an essential part of the letting process, ensuring that tenants are who they say they are, work where they say they work and can make rental payments. If a tenant falls into rent arrears this could result in County-Court Judgments made against them, which could have a significant impact on their credit rating and their subsequent ability to obtain credit. In addition, tenant referencing is time consuming for letting agents and often involves significant time spent chasing all parties to complete the referencing process. Checks are frequently complex procedures and under the Phase Three roll out of the Immigration Act 2014, Right to Rent checks will soon be required by law in Wales.⁷ With such a chronic shortage of rental housing, a ban on fees for tenant referencing may make securing a rental home very difficult for those on low incomes or those who have a poor credit rating. To ensure that a tenant takes on manageable levels of financial commitment and help to ensure that they are not subsequently made homeless, reference checks should be exempt from legislation banning letting agent fees to tenants.

⁷ <http://www.arla.co.uk/media/1045722/immigration-act-2016-phase-3-response.pdf>

Corrections

23. A correction to Schedule 2, 7 (b) of the Bill should be made so that it says, “the landlord did not know, and could not reasonably have been expected to know, that was the case before the landlord accepted the holding deposit.” In the Bill’s current form “holding” is not included and must be added to make it clear which deposit the legislation is referring to.
24. In Schedule 1, 2 (1) (4) Security deposit, the “prescribed limit” should be set out in the Act and if not, subject to Affirmative Resolution rather than “a limit specified by, or determined in accordance with, regulations”. This will ensure that the prescribed limited is outlined clearly in the Act and approved by the Welsh Assembly.

Enforcement

25. The Renting Homes (Fees etc.) (Wales) Bill outlines that local authorities will enforce any ban. We are concerned about the low level of fines currently prescribed in the Bill and the resources available to local authorities. It is imperative that the fines for breaching the ban are reflective of the amount of money involved in a tenancy and act as an effective deterrent to rogue operators. It is vital that local authorities are adequately resourced and funded.
26. The fines set out in the Bill for a breach of the ban are too low. As outlined in Clause 11 (3) a fine not exceeding level four on the standard scale is not a deterrent to those looking to flout the rules. Furthermore, a fine of £500 for a Fixed Penalty Notice is much too low. For instance, if a letting agent has 200 tenancies and charges £202 in fees per tenant this amounts to £80,800 if there is an average of two tenants per tenancy. Therefore, over the length of time the agent manages these properties the local authorities would need to issue 162 Fixed Term Penalty notices at £500 each for the agent to be out of pocket. A breach of the fees ban must result in a significantly larger fine to deter rogue operators. Fines should amount to a financial penalty of up to £5,000. Successive breaches of the ban within five years (where a financial penalty has been issued or conviction secured in respect of the earlier breach) should be a criminal offence with an unlimited fine. The local authority should be able to impose a financial penalty of up to £30,000 as an alternative to criminal prosecution. Local authorities should also be notifying Rent Smart Wales to prevent the worst offenders from operating.

27. Local authorities need extra support to enforce any ban on fees. Unless specific funding is set aside for the sole purpose of enforcing these new laws, then we expect the same lack of effective enforcement on the ban on lettings fees as has been demonstrated on the transparency rules under the Consumer Rights Act 2015. This will result in professional agencies complying with the ban and rogue operators continuing to charge fees with impunity; thus creating a two-tier market. Furthermore, the level of enforcement across all aspects of landlord and tenant law is woefully inadequate. Until this issue is addressed and existing laws are properly enforced, we do not believe that new laws should be introduced as the result will be history repeating itself over again – professional landlords and agents will comply, and the criminal element will continue operating under the radar.

Impact of the legislation on key stakeholders including tenants, letting agents and landlords

28. In response to the UK Government's announcement in November 2016 that they will ban letting agent fees to tenants, ARLA PropertyMark surveyed 1,008 letting agents across England and Wales to ask what the impact of a ban on fees would be. The majority of agents (90%) responded saying that rent prices will increase as a result of banning fees. 60% said the quality of properties will decline and 40% think the ban will result in a fall in employment in the medium to long term.⁸

29. Letting agents deliver a hugely valuable service in ensuring that properties are safe, compliant and professionally managed. Up to June 2015, there were 145 laws with over 400 regulations that landlords need to abide by to legally let a property in England and Wales.⁹ Legislation on residential lettings is amended regularly with new laws introduced frequently. If less professional and part-time landlords turn away from agents due to increasing costs, they will likely be unaware of new (and existing) legal requirements, causing widespread non-compliance and putting tenants in danger.

30. An outright ban on letting fees will likely mean that agents become unable to continue offering a full service to tenants; particularly Local Housing Allowance tenants who often require the assistance of their agent to fill in increasingly complex benefit applications. If agents withdraw the services they currently provide, the Department for Work and Pensions will likely see an increase in the number of failed Housing Benefit and Universal Credit applications because tenants have been unable to

⁸ <http://www.arla.co.uk/media/1045477/tenant-fees-research-report.pdf>

⁹ http://www.propertychecklists.co.uk/downloads/20170508_1

complete the forms on their own.¹⁰ Exempting referencing, as we suggest above, should effectively mitigate against this eventuality as letting agents will be able to retain current service levels to tenants.

31. The private rented sector is now the largest housing tenure outside of owner-occupation, set to grow and with an increasing number of families and longer-term tenants. The professional services that letting agents provide will become even more important as a growing percentage of the population, from increasingly diverse demographics, rent their homes within an ever more complex legislative framework. However, after successive governments have effectively focused on increasing property standards for those living in the private rented sector, policies such as this ban could well see the good work of the last two decades undermined as landlords struggle, with some failing, to make ends meet. The result will be a reduction in property conditions and an increase in poor management practices with the use of the professional services provided by letting agents reserved for only those who can afford it; leaving the most vulnerable tenants in the hands of inexperienced and/or unscrupulous landlords and agents.

32. The cost of running a letting agency – an office, staff, travel expenses, advertising properties and administration costs all mount up. Official statistics show that real estate activities (both sales and lettings) in England and Wales provided employment for 241,000 people in 2015 (6,500 in Wales, 19,000 in the South West and 19,000 in the North West).¹¹ Some letting agents may not be able to absorb the loss of income created by the ban and will close. Others may have to cut staff and costs. Capital Economics' analysis suggests that in the worst-case scenario (where agents do not pass on any additional costs to landlords), 16,000 jobs will be lost in the sector and a further 8,000 in the supply chain and even in the most plausible scenario, whereby letting agents pass on 75% of the loss from the fees ban to landlords, this will result in 4,000 jobs in the sector being lost.¹² In either situation, unemployment will increase as a direct result of the ban on letting fees; adding additional costs to the public purse in terms of direct unemployment benefits from those losing their jobs. It will also result in the reduction of new roles being created in the industry as it will reduce the ability for small businesses to grow, train their existing staff and take on properly-trained apprentices who will become the next generation of professional, qualified

¹⁰ <http://www.arla.co.uk/news/january-2018/arla-propertymark-provide-evidence-for-universal-credit-debate-in-parliament/>

¹¹ <http://www.arla.co.uk/media/1045728/letting-the-market-down-assessing-the-economic-impacts-of-the-proposed-ban-on-letting-agents-fees.pdf>

¹² <http://www.arla.co.uk/media/1045728/letting-the-market-down-assessing-the-economic-impacts-of-the-proposed-ban-on-letting-agents-fees.pdf>

letting agents. Therefore, this policy again runs contrary to the Welsh Government's efforts to support small businesses; which represent the majority (60%) of the industry.

33. Private landlords are an important source of investment in housing stock and a worsening of their financial position will likely result in less investment. Some would-be landlords are likely to be put off by the increased costs that may be demanded by letting agents, and together with the withdrawal of Mortgage Interest Rate Relief¹³ and additional stamp duty¹⁴, this will likely reduce the number of new entrants. This will put upward pressure on rents and stifle the market.

34. Finally, it is also important to note that residential lettings activity provides 58,000 jobs across England and Wales, which generate employee taxes in the order of £400 million for the Exchequer each year. Furthermore, Value Added Tax (VAT) is currently charged on letting fees. Capital Economics estimate that the sector provides the Exchequer with annual tax revenues of around £1 billion, from VAT, business rates and employee taxes. Therefore, banning letting fees outright will result in a significant loss of income to the Exchequer.

¹³ <https://www.gov.uk/government/publications/restricting-finance-cost-relief-for-individual-landlords/restricting-finance-cost-relief-for-individual-landlords>

¹⁴ <https://gov.wales/newsroom/finance1/2017/171003-progressive-tax-plans-for-wales-published/?lang=en>