

**Julie James AS/MS**  
**Y Gweinidog Tai a Llywodraeth Leol**  
**Minister for Housing and Local Government**



**Llywodraeth Cymru**  
**Welsh Government**

Mick Antoniw MS  
Chair  
Legislation, Justice & Constitution Committee  
Senedd Cymru  
Cardiff Bay  
Cardiff CF99 1SN

11 August 2020

Dear Mick,

I am writing in response to your letter of 09 March requesting responses to a series of questions regarding the Renting Homes (Amendment) (Wales) Bill.

Please find enclosed my responses to those questions.

I understand that the Committee does not have capacity to reschedule my evidence session which had originally been due to take place on 20 April. However, if there is any further information the Committee requires in order to complete its scrutiny of the Bill please do let me know

I hope this information is helpful to the committee.

Yours sincerely,

**Julie James AS/MS**  
**Y Gweinidog Tai a Llywodraeth Leol**  
**Minister for Housing and Local Government**

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:  
0300 0604400

Bae Caerdydd • Cardiff Bay  
Caerdydd • Cardiff  
CF99 1SN

[Gohebiaeth.Julie.James@llyw.cymru](mailto:Gohebiaeth.Julie.James@llyw.cymru)  
[Correspondence.Julie.James@gov.Wales](mailto:Correspondence.Julie.James@gov.Wales)

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

**Responses from the Minister for Housing and Local Government to questions from the Legislation, Justice and Constitution Committee in relation to the Renting Homes (Amendment) (Wales) Bill**

***1. Why is this legislation necessary? The responses to the Welsh Government's consultation have not all been positive, with a number of responses highlighting some difficulties that this legislation could create in the rented sector in Wales. Further, in your evidence session with the Equality, Local Government and Communities Committee on 27 February 2020, you indicated that you are relying on an anecdotal evidence base.***

We have made a policy commitment to improve security of tenure in the private rented sector and this Bill is necessary to achieve that.

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"). It will ensure that a section 173 possession notice (the appropriate notice to be served where there has been no 'fault' on the part of the contract-holder), cannot be served for the first six months of occupation and, where possession is sought, will give the contract holder six months' notice. The notice period for a section 173 notice currently is two months.

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.

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. 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.

**2. Many Welsh citizens will need to be able to access and understand the provisions contained in this Bill within the context of the existing Renting Homes (Wales) Act 2016. Without access to commercial subscription services, such as Westlaw and LexisNexis, this may prove difficult. Did you consider bringing forward a single Bill that would restate the provisions of the Renting Homes (Wales) Act 2016 with the necessary modifications and additions that you wish to see made to that legislation? Will your decision not to do so affect the accessibility of this important legislation? Why have you chosen to amend an Act of the Assembly which is not yet in force?**

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.

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.

**3. The Bill contains a number of Henry VIII powers to amend primary legislation. What is the justification for the inclusion of these powers? 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 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.

***4. 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”. In relation to Schedule 2, which sets out new Schedule 9A to the 2016 Act listing restrictions on a landlord giving notice, there is an additional reason included for including a regulation making power; to reflect “legislative changes”. Can you explain what is meant by this and why a different approach has been taken?***

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

***5. What will the impact of the Bill be on the Human Rights of both tenants and landlords, and how have you assessed these impacts?***

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.

***6. Sections 5 and 11 of the Bill introduce a restriction on the use of break clauses in fixed term contracts so they cannot be used in contracts of less than 24 months and cannot be activated by the landlord until 18 months into the contract. How do you justify, in terms of human rights, and specifically the landlord’s A1P1 rights, restricting a break clause to 18 months when the contract holder has, at that point, had more than the minimum 12 months’ security of tenure envisaged by the Bill?***

The aim of these provisions is to ensure that the policy of increasing security of tenure in respect of periodic standard contracts is not undermined.

Given the Bill provisions which increase the moratorium and notice period in respect of notices served under section 173 of the 2016 Act, some landlords may choose to offer only long term fixed term contracts from the outset. Making break clauses available only in contracts made for 24 months or more is intended to discourage landlords from offering only longer term fixed term contracts. Some landlords may accept having to wait an extra 6 months to regain possession of their property in the shorter term (as compared with a periodic standard contract), in order to buy certainty of income and to lock contract-holders in for the long term. These provisions are an appropriate and proportionate means of addressing these issues.

Restricting the use of break clauses in this way is likely to be sufficient to prevent landlords from viewing the long term fixed term option as the preferred option. We do not wish to create a regime where long term fixed term contracts would become a landlord's preferred option because contract-holders are unable to release themselves from that contract were, for example, an offer of social housing to be made to them.

While these provisions will mean that a landlord will have to wait longer to regain possession of their property under a fixed term standard contract than under a periodic standard contract, the length of that period will place both regimes on an equal footing in terms of how they are viewed by landlords. This will encourage an environment where an 'inequality of arms' as between the landlord and the contract-holder, at the outset of the contract, has less impact on the contract-holder in terms of the renting regime they end up accepting.

Extending the period before which a landlord may exercise a break clause, to 18 months, is therefore a proportionate means of ensuring that the competing interests of the landlord and contract-holder are fairly and properly balanced. Other, potentially more intrusive means of achieving this aim were considered but this approach strikes a fair balance between the A1P1 rights of the landlord and the contract-holder's Article 8 rights. A landlord may choose to offer a fixed term standard contract to ensure certainty of income but will not be incentivised to do so in order to circumvent amendments which the Bill makes in respect of periodic standard contracts, including the increased moratorium and notice period in respect of section 173 notices and the restrictions against repeat service of those notices.

***7. Section 7 of the Bill allows a landlord to issue a second section 173 notice without having to wait for six months to pass after the expiry of the first one, provided the second notice is given within 14 days of the first. Outside this 14 day window, landlords who make a mistake in a section 173 notice have to***

***wait another six months before they can issue another notice. How is this 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? Is a 14 day 'cooling off period' long enough to justify restricting a landlord's access to their property for an additional six months in such circumstances?***

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.

***8. As drafted, the Bill requires the landlord to give six months' notice at the end of a fixed term contract. Does this place a landlord at a distinct disadvantage when trying to make future plans for the property, and how do you justify this provision on human rights grounds? 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 that you say is the policy aim of the Bill?***

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 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' which would encourage the practice of landlords issuing six month fixed term contracts at the outset of the contract and, at the same time, issue a notice to end the contract at the end of the fixed term, following which, either a landlord would take possession or the contract-holder would leave the property. Alternatively, where the contract-holder wishes to remain in occupation, a landlord could offer another fixed term of six months with a notice to end the contract at the end of the fixed term because this would avoid a landlord having to offer the 12 months' security of tenure provided by a periodic standard contract. Provision was clearly required to prevent landlords from circumventing the Bill provisions which increase security of tenure in respect of periodic standard contracts.

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.

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

In relation to a landlord's ability to make future plans for the property, 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.

***9. How do you justify, on human rights grounds, the 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?***

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. There is nothing in the Bill to prevent this. 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.

***10. Are there any provisions in the Bill that you envisage acting retrospectively? Paragraph 10.3 of the Explanatory Memorandum to the Bill states that the restrictions on serving certain notices in respect of some pre-existing contracts will not be "truly retrospective"; what does this mean?***

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 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'.

***11. What impact will the commencement of the 2016 Act, and the amendments to it made by this Bill, have on tenancies made before the date the 2016 Act, as amended, comes into force?***

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 effect of the 2016 Act on those tenancies was considered, at the time the 2016 Act was passed. The response to question 10 above, sets out the provisions of this Bill which will impact on converted contracts.

**12. What transitional provisions will need to be in place to ensure that the Bill does not apply retrospectively to tenants and landlords who enter into contracts based on the current legal framework?**

Provision is made within the Bill itself to guard against Bill provisions having retrospective effect. 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.

**13. Can you explain the effect of paragraph 24 of Schedule 6 and the interaction between this Bill and the Renting Homes (Fees etc.) (Wales) Act 2019?**

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.

**14. When do you intend that this Bill, if it is approved by the Assembly, and the 2016 Act would come into force?**

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 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.

**15. When will the secondary legislation that is necessary to implement the 2016 Act be made, particularly the regulations containing supplementary terms and model contracts?**

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.

***16. The order making power in section 17(2) enables the Welsh Ministers to provide for commencement of section 6(5) and paragraph 24 of Schedule 6 of the Bill. The commencement order will not be subject to an Assembly scrutiny procedure. This Committee's previous recommendations on this matter on other Bills have been that commencement orders that include 'transitory, transitional or saving provision' should be subject to the negative procedure. What assessment was undertaken before it was decided that an order made under section 17(2) would not follow a formal Assembly scrutiny procedure?***

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.

***17. Have you explored whether the courts will have the necessary capacity to deal with the potential for an 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?***

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

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 contracts<sup>1</sup>.

***18. The First Minister, in his letter dated 10 January 2020 to the Llywydd, indicated 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. Has the Minister sought and received the necessary consent?***

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

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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