Ymateb gan: Cymdeithas Landlordiaid Preswyl
Response from: Residential Landlords Association

## Consultation on the Renting Homes (Wales) Bill

I am writing on behalf of the Residential Landlords Association (RLA), to make representations in response to the consultation on the Renting Homes (Wales) Bill. The RLA represents over 18,000 small and medium-sized landlords in the private rented sector (PRS) who manage over 250,000 across the UK. We seek to promote and maintain standards in the sector, provide training for members, promote the implementation of local landlord accreditation schemes and help drive out those landlords who bring the sector into disrepute. Members also include letting and managing agents.
The RLA aims to ensure that private rented housing can be seen as a first option as opposed to being second best to the owner occupied sector or social renting.

The Renting Homes (Wales) Bill introduces radical changes to the way we rent homes in Wales. Some of these changes the RLA supports, such as increased tenant education and awareness. Although the RLA has some reservations in other areas, many of the principles behind the Bill are well intentioned and with merit. In our response to the questions raised we look at the various concepts and principles underpinning the Bill. We consider what we believe to be the key issues; and we also comment on various provisions within the Bill, some of which are of a technical nature.

## 1.The general principles of the Renting Homes (Wales) Bill and the need for legislation to improve the arrangements for renting homes in Wales.

### 1.1 Introduction

We agree that the process of renting a home in Wales has for too long been complicated by variances in contract types and process, with both landlords and tenants often not being fully aware of the key details and rights as well as their responsibilities. The RLA supports the calls to make renting a home simpler and creating what should become a “default contract” for establishing the majority of tenancies in the PRS. Assimilating contracts into two types with as many common characteristics as possible is welcome. We do however have concerns about the upheaval involved, as well as costs associated with implementation. We had originally called for an across the board adoption of the assured tenancy regime, with the addition of various provisions recommended by the Law Commission, which we believe would have mitigated the impact of change. Achieving simplicity is not a straight forward process. Whilst we agree with many of the principles behind the Bill we do have reservations about the particular matters within the Bill.

## 1.2 The Agreement

Written contracts for particular transactions are a Holy Grail, but repeatedly, history has demonstrated that it is not achievable in practice. We therefore agree with the underlying purpose of the Bill to introduce what is in effect a "default contract". The hallmark of the private rented sector (PRS), unlike the social sector, is flexibility. Whilst we strongly encourage the use of written tenancy agreements, nevertheless, things are often dealt with orally or with minimum formality. The concepts of fundamental terms and supplemental terms, along with the key particulars, operate as a default contract regime both prescribing minimum requirements and setting out certain basic terms, but, in our view, this replaces informality with a complex approach which is not readily understandable to the non lawyer. We accept that the model contract will in reality set these provisions out, but a model contract is of limited use if it does not replicate tenancy terms which are in common currency. There is also an accompanying need to address all the varied types of property in the private rented sector, both singly and multiply occupied. One size does not fit all.

## 1.3 A Default Contract

Although the RLA would strongly recommend that landlords create a full written contract, a small minority of landlords may attempt to continue to issue contracts informally, orally or missing out fundamental terms. Where this happens we recommend that the landlord must still issue the Key Terms, of no more than 2 sides of A4 (or face penalty), but otherwise the contract should automatically revert to a 'Default Contract' set forth by the Welsh Government. This 'Default Contract' would include any provisions that the Welsh Government see fit to include within a tenancy agreement (which should be subject to consultation).

By establishing such a mechanism, the Welsh Government would essentially force landlords to issue contracts correctly inline with the new guidance, or face having the contract written for them by the Welsh Government

## 1.4 The relationships between various terms

We support the notion to make it clear, by the way of "Fundamental Terms", exactly what clauses must be included within the contract. This being said the relationship between fundamental terms, fundamental terms which can be changed, supplementary terms and additional terms must be clear. At present it is possible in certain instances to change a "Fundamental Term" if the landlord and tenant agree, and if that change offers greater protection to the contract holder. Many of these "Fundamental Terms" already offer the greatest form of protection to the contract holder, that is likely to be offered in reality and including the conditional ability to alter the term could lead to unnecessary confusion. Instead "Fundamental Terms" should be 'fixed' (without the ability to be altered) where appropriate, and where not they could be reclassified as supplementary.

## 1.5 The need for additional terms

At present the relationship between "Fundamental Terms" and "Supplementary Terms" on the one hand and "Additional Terms" on the other is also something that will need to be the subject of training and education when it comes to landlords putting contracts together. As we identified in the last paragraph, based on what we had seen in the Model Contract, this is somewhat limited. The usual comprehensive tenancy agreement contains many more terms. We perceive this to be a considerable disadvantage in the proposed regime. A Model Contract could not have maximum utility unless it is comprehensive. There is an additional danger here that if terms which are normal in the market place are not incorporated then you end up with the many variations of the tenancy agreements which you encounter today, which undermines any simplification. There is also the danger of terms introduced as additional terms which conflict with Supplemental Terms and the difficulties which can then ensue. We acknowledge the need in any Model Contract for the basic requirement for fairness, having regard to the special status that the Model Contract will enjoy under the Unfair Contract Terms Legislation. We believe that a balance can still be maintained if a rather more comprehensive approach were adopted as to what will be supplementary terms. By reasonably increasing the number of supplementary terms included, landlords and agents are likely to have a few additional terms which they wish to see included. This also means that it reduces the opportunity for terms which "clash" with the prescribed supplemental terms or worst still fundamental terms.

At present it is unclear as to exactly how landlords and tennats will use the power to vary terms in practice. Section 32(3) contains a requirement to 'identify' non incorporated terms. Does this mean that for example there could be a list of excluded terms, e.g. "Terms 7, 8 and 9 shall not apply". Alternatively, would it be acceptable that the supplementary term which would otherwise apply should be crossed out and the crossings out initialled? Clarity is needed. Presumably, however, if another term is incorporated into the contract which by implication would exclude a prescribed supplementary term this is not sufficient?

Much of the additional documentation (such as key matters document) is aimed at explaining the contract to tenants. Because we see the use of these terms as a potential source for confusion, it would be beneficial to see a "how to" guide for landlords putting a contract together. This would also address the issue which we phrased in the previous paragraph around the addition of "additional terms" in the tenancy agreements.

In order to ease the introduction of Additional Terms, the Bill should, in secondary legislation, set out as many Additional Terms as feasibly possible. This will help to increase the clarity of Additional Terms for later use; however this process should also be subject to further consultation due to the inherent nature of Additional Terms as they currently stand.

### 1.6 The extent of documentation to be handed over

The RLA supports the emphasis placed on improving tenant awareness of their rights and responsibilities. The RLA has long campaigned for more informed tenants to better hold landlords to account and vice versa, because the majority of disputes arise

due to a lack of information and understanding on all sides. Keeping this in mind, the RLA feels that the amount of additional documentation that the landlord is required to give the tenant is somewhat excessive. Specifically we are referring to the Key Matters, Easy Read Guide, Model Contract and Model Contract Summary as well as the additional documentation such as deposit protection already required. While we support the need for information to be clear to tenants, this amount of documentation is excessive.

Furthermore increasing the number of documents required to fully establish a tenancy will likely result in more unnecessary errors, as landlords simply forget about one of the less important documents, or where documents get lost and tenants do not sign receipts for documents. The amount of paperwork that a landlord is now expected to complete or hand over during the establishment of a tenancy is becoming an onerous task, especially when considering the amount of 'accidental landlords' in the PRS. Overwhelming tenants at the outset with such a volume of paperwork is likely to prove counter productive. It also undermines the concept of simplicity.

If the Welsh Government insisted on having a large volume of documentation to be handed to the tenant, we could expect the Government to meet its commitment to sustainability. This would mean allowing information to be given electronically to minimise the physical impact of reams of paperwork that would otherwise be created. See section 2.1 for further details of 'Digital by Default'.

**1.7 Problems with new concepts and terms yet to be scrutinised by the Courts**

The RLA is cautious that with any new Bill, especially one which rewrites tenancy agreements, new terms and concepts can often cause difficulty when it comes to legal interpretation. Many of the new terms and concepts are yet to be tested by legal scrutiny, thus increasing the potential for problems once the Bill is implemented. One of the core principles of the Bill is simplicity. This should mean simplicity for the tenant and landlord so that their respective legal positions are clear.

It is important, in our view, that the Bill itself avoids uncertainties and that issues raised as it passes through the Assembly are clearly addressed. It has taken many years and various cases to interpret the assured and secured tenancy regimes. Case law now provides a considerable element of certainty but the reality is that there will be a significant number of test cases because of the novel concepts introduced in the Bill. Indeed, these will take up much of the cost involved in implementation. We hope that as the Bill is scrutinised and questions are raised that answers will be incorporated in the Bill as necessary by appropriate amendments to deal with these. These terms (or for this matter, the Bill) should not be defined by a number of legal battles, which are ultimately costly, and may undermine the Bill.

**1.8 Inter relationship with common law and existing legislation**

The Bill cannot and should not operate in isolation from the common law. It is an impossible task for any Bill such as this to incorporate all common law or existing legislation. It has to be recognised, that the foundations on which the Bill sit are common law concepts such as tenancy and licence, which in turn are underpinned by

the law of contract. There is nothing wrong in our view in relying on common law where this is appropriate.

This relationship with the common law can be viewed in two stages up to the formation of the contract and then thereafter during the course of the tenancy. In reality, the involvement of the common law in particular cannot be excluded from either. After all it is a precondition of the existence of an occupational contract that there should be a licence or tenancy, both of which involve contractual common law concepts (see Section 7 of the Bill). It is perhaps legitimate to criticise the assured tenancy regime because, when it comes to termination, it is heavily dependent on common law provisions, but we feel that the provisions of this Bill, as it currently stands, fails to take account of the realities of the PRS, especially in relation to tenancy termination. Section 147 purports to provide an all embracing code, subject to limited exceptions in relation to rescission and frustration. This, coupled with the absence of a provision requiring occupation under occupation contract as being in respect of an only or main home, gives rise to potential difficulties, as it overlooks both implied surrenders and mergers (when the tenant acquires the freehold for example). In particular this fails to address the important issue of implied surrenders – see below.

It is disappointing that, contrary to usual practice, the Bill does not contain a list of relevant repeals or amendments to existing legislation. For example, the inter relationship with the provisions of the Bill and the Protection from Eviction Act 1977 are important.

Likewise, the inter relationship between the Bill and the Law of Property Act 1925, especially when it comes to formalities is significant. We question the need for there to be a deed where a tenancy exceeds three years or is not granted in possession. This could be amended to 7 years so as to tie in with the requirement of HML and Registry as to registration. Most tenancies are not actually granted in possession because there is often a delay before a tenant moves in. This strips the tenant of certain protections, e.g. if the property is sold by the landlord in the meantime. It can also mean that the provisions of Section 62 of the 1925 Act, implying certain easements do not apply. The opportunity should be taken to address technicalities of this nature.

**1.9 Basic Concepts**

1.9. Dwelling"

This is barely defined; for example the traditional reference to "building or part of a building" is not even included. The issue of tenants sharing with others (beside the landlord) is not addressed. Therefore protections which work well in relation to shared accommodation as contained in the assured tenancy regime are omitted. In case law the Ultratemps case settles the issue that if the key amenity is omitted where the tenant does not have the use of other accommodation, it is still a dwelling. However, case law has not determined whether a property is still a dwelling even though the tenant has shared use of the amenities such as a kitchen. Do the premises actually let still comprise a dwelling as a key facility is outside them? Whilst dealing with a different concept of "separate dwelling" the assured tenancy regime addresses

this issue. This is an example where clarity at the outset would be helpful to avoid subsequent litigation.

The Bill provides an opportunity to address the issue of "home working". Whilst business tenancies within the scope of the Landlord & Tenant Act 1954 are excluded from the definition of "dwellings" this key issue is not addressed. The volume of business tenancies and those "home working" is increasing, we would expect to see this recognised within the Bill. The UK Government have raised the issue of the necessity to amend the 1954 Act legislation so that unintentionally what started out as a residential letting cannot be brought into the scope of the 1954 Act. Another issue which the Bill does not address is whether the list of exceptions for Section 7 set out in Schedule 2 is intended to be exhaustive or whether the residential lettings fall outside the scope of a "dwelling" even though that particular type of occupation does not fall within the exceptions listed in Schedule 2 (see R (CZ) v London Borough of Newham where the Supreme Court held that the provision in the Housing Act 1988 was not exhaustive).

1.9.2"The Tenancy"

Again, the definition of "tenancy" is skimpy. One assumes that it includes a tenancy be estoppel. Again why cannot this be spelt out to avoid uncertainty? In practice, properties are often let out by a letting agent or a father may manage and let family properties in his own name when in fact they belong to other family members. It is important to address these casual relationships; avoiding uncertainty.

1.9.3 The "Principal Home"

The requirement of "principal home" is no longer a key element for the existence of an occupational contract. Nevertheless, the requirement for a property to be a person's only or main home is important when it comes to certain aspects of the Bill, e.g. possession of abandoned dwellings (See Section 216) and exclusion of joint contract holders (Section 221). We have already commented adversely on the problems around drafting contracts from a landlord's perspective and omitting such a requirement is therefore yet another trap for the unwary, especially if no provision is incorporated in the Model Contract (as is presently the case with the Law Commission's version). This brings us back to the point we have made about what is in termination because under the assured tenancy regime if the tenant moves out for good (e.g. into long term care) the landlord can take action at common law to terminate the contract, e.g. by serving notice to quit.

**1.10 The upheaval and cost to landlords**

As mentioned previously, the Renting Homes (Wales) Bill creates wide scale changes to the way we rent homes in Wales, which inevitably will incur a significant cost. The cost of this Bill falls in three main areas, landlords, markets and government expenditure. Inevitably, some of the costs payable by landlords will be passed onto tenants through increases in rents.

This Bill is expected to increase costs for landlords when renting out a property under the new system. This includes the obvious such as further training, extra printing costs

and re-issuing tenancies. It also includes some less obvious costs, for example with such big changes being introduced, inevitably more landlords are likely to make mistakes, especially early on. This could mean increased court visits, reissuing of documents and changes of business practice. Some of these costs can be mitigated against, for example by distribution of a 'how to' guide for landlords, greater training and the inclusion of 'Digital by Default'. There is the likelihood of significant litigation costs as the provisions for the Bill are tested in the Courts. The ever present ingenuity of lawyers should never be underestimated.

The Renting Homes (Wales) Bill also poses a threat to further investment in the market, due to increased levels of financial risk. Where the Bill has made it more difficult for landlords to recover assets, or where the Bill increases the length for a potential return of investment (see retaliatory eviction below), the Bill also impacts the market viability of further investment in the PRS. This is potentially dangerous considering the increasing demand on the PRS and the new discharge of homeless duties, landlords should not be discouraged from investing further in their property (which benefits the tenant) or expanding their portfolio (which helps increase supply for tenants and social tenants).

**1.11 Implementation/training**

The huge upheaval to which we referred above makes it essential that there is both sufficient awareness and training, particularly for landlords and agents. We are concerned that as yet no thought has been given for how the new regime under the Housing (Wales) Act regarding mandatory training as part of licensing process will be used or tailored so as to meet the requirements of this Bill. We estimate that there are at least 70,000 private landlords in Wales. The Welsh Government have a figure of 80,000. A significant number of these will be accidental landlords or landlords with one or two properties. We need to get a message across to them regarding the terms of this Bill, once it is implemented, and this will be a huge endeavour. It is important, that the Welsh Government explores ways of using the registration and licensing scheme to put across a message regarding the requirements of the Bill. Likewise, it is important that tenants are alerted to the provisions of the legislation.
To achieve this need, we would expect to see a full communications plan, including costing, as to how the minister expects to inform and educate all effected by this Bill.

Turning now to the key issues in the Bill

**1.12 Removal of the 6 month moratorium**

The removal of the 'six-month moratorium' has a number of benefits for both landlords and tenants, adding a degree of flexibility to the system. Contrary to some views, landlords do not (nor does it make good business sense) consistently look for ways and means to evict good tenants. Landlords do however risk assess tenants in order to establish whether that tenant would be a 'good tenant'. This includes processes such as referencing. At present a lack of availability of accommodation for high risk tenants such as those previously homelessness, are exacerbated by the fact that the tenancy is at minimum six months. By removing the 'six-month moratorium' landlords can effectively reduce the risk profile, as should the tenant not prove to be a

‘good tenant’ action can be taken to either address the situation or recover possession. This could mean more landlords introducing probationary tenancies, which could be used to house those who have a poor renting history, setting them up in the future for much longer term tenancies (See 1.13).

There is demand for genuine short term tenancies. At the properties may be empty for say a month or two, e.g. if the landlord is proposing to sell the property or if tenants are between properties. Some one might come along and want a short term tenancy but at the moment with the moratorium the landlord has no guarantee of gaining possession at the end. The tenant can choose to stay there longer and there is nothing the landlord can then do about it. Instead the landlord has to wait until the initial six months has run out. We believe, based on our experience, that this is a real disincentive to the supply of a required market for short term lets.

Many landlords already let for an initial fixed term of at least six months, as this guarantees a rental income for at least the first six months. Where a landlord considers the tenant to be a low risk tenancy, i.e. not previously homeless or poor renting history, landlords will want to guarantee the tenancy for a fixed period. This means that in practice, good tenants and landlords are likely to include some type of mutually acceptable fixed term, such as six months or one year. There is therefore very little evidence to suggest that the removal of the ‘six-month moratorium’ would alter the vast majority of tenancies. It would however greatly increase the flexibility of short term housing, such as those moving between homes or for study, and greatly increase the chances of landlords letting to tenants they may not have otherwise been willing to consider.

**1.13 Long Term Tenancies**

To somewhat alleviate the concerns expressed by those who oppose the removal of the six month moratorium, the RLA is currently consulting on a Long Term Tenancy Agreement, which will be submitted shortly, upon completion. Although the details are still being finalised and consulted with stakeholders, this agreement would allow tenants an option to extend their tenancy for 6/12 month periods for up to a total tenancy term of 5 years.

We kindly request that the Committee allow for this submission as evidence when completed, as we feel it may add extra security to tenancies and mitigate the concerns of others.

**1.14 Rent controls**

The RLA is pleased to see that the Welsh Government has resisted calls from some to include rent controls in the Renting Homes (Wales) Bill. The RLA is strongly opposed to rent controls, as any such policy would have a catastrophic impact on investment in the PRS, ultimately resulting in poor standard accommodation for tenants.

Such a policy would also see an immediate spike in rents in anticipation , as currently tenants in Wales have seen some of the smallest increases in rent. Office for National Statistics shows that in Wales rent increased by 0.2% in the 12 months to December

2014. During this time, inflation measured by the RPI was 1.6% and 0.5% as measured by the CPI. So not only is the call for rent controls bad policy, it is also unjustified given the relative decline in rent prices.

Rent controls would have a catastrophic impact on investment in Wales as many landlords would begin to withdraw assets in Wales for re-investment elsewhere in the UK or perhaps out of the PRS altogether. Those who call for Rent Controls and improved standards should think very carefully as to how the two policies can realistically work together.

**1.15 Retaliatory Eviction**

The RLA entirely supports the principle behind addressing the issues of retaliatory evictions in this Bill, as no tenant should fear eviction for simply holding a landlord to account. We very much endorse the targeted approach of dealing with this situation on a case by case basis allowing the Courts to consider on the facts of the case whether the eviction is retaliatory; rather than the general moratorium on use of the no fault notice as introduced in England which adversely impacts on responsible landlords, as well as non compliant landlords. We do however have concerns as to how this principle has been executed and what the potential impact may be going forwards.

Firstly it is not unreasonable to ask that any additional clause effecting eviction procedure should not adversely affect the time it takes for a landlord to recover possession. Our concern is that as the clause currently stands, it could potentially unduly delay possession orders. This is because tenants could be deliberately damaging property, making routine complaints to avoid eviction or withholding months worth of rent. This increases the scope for tenants to run into large arrears, and by placing number of well timed complaints, can avoid eviction proceedings.

Secondly we are concerned by section 213(3) (B) “the court is satisfied that the landlord has made the possession claim to avoid complying with those obligations”. Our concern is that we have little guidance as to what would satisfy the court in this context.

To help avoid such issues we would like to see the introduction of a standard complaints procedure around repairs that can generally be followed to ensure that both landlord and tenant know what is expected of them. This would clarify the complaint process for landlord and tenant, but also help the courts to determine retaliatory eviction cases. It should also not be possible to claim RE in cases of proven ASB, rent arrears or, notably in repair cases, damage caused by tenants.  The RLA would like to work with the Committee to produce an acceptable procedure that could be introduced into the Bill.

**1.16 Property Condition**

Tenants and Landlords should be equally aware of their rights and obligations when entering a tenancy agreement. The condition of the dwelling can often be a source for disagreement between tenants and landlords when situations such as questionable

repair, services and deposits arise. These issues often arise due to a lack of awareness of the rights and obligations of the tenant or landlord.

Attempts to increase awareness and clarity of the rights and obligations of landlords and tenants in relation to property condition are welcomed.
We endorse the approach of retaining and repeating the provisions of the current Section 11 of the Landlord & Tenant Act 1985. Any change in approach would lead to uncertainties in an important area especially as the landlord is under existing comprehensive obligations in relation to ongoing repair.

The RLA has welcomed the decision of the Welsh Government to abandon its original proposal to incorporate a fundamental term to prevent dwellings being rented with Category 1 hazards. The Housing Health and Safety Rating System (HHSRS) is a local authority enforcement tool with subjective elements giving discretion to the assessor so that it simply did not provide the necessary certainty for landlords and tenants to determine whether the contractual standard was met. Undoubtedly there were also resource issues if local authorities were to become involved in "overseeing" the operation of this term. In principle, we support the alternative approach, but with considerable reservations around key issues. We support the Welsh Government's intent to improve the standard of residential accommodation in Wales; but this gives rise to considerable challenges; not least the costs involved, which will ultimately either fall on tenants through increased rents or will lead to an increase in empty properties, particularly in areas of deprivation, because they are not worth letting out due to the work required.

Regrettably, there are no up to date Welsh Government statistics to assist in assessing the impact of what is proposed. The last Welsh Housing Conditions Survey was published in 1998. At that time there were some 80,900 dwellings in the PRS and disrepair was the major problem for the sector, which today that figure is around 210,000 PRS properties. The estimated cost per dwelling of effecting repairs at that time was £1,883 on average per PRS property, but, importantly, this included the cost of bringing the properties up to fitness standard where necessary.
The contractual requirement for a property to be reasonably fit for human habitation was all but abandoned from 1957 onwards (see the history set out in the Law Commission Report – Landlord and Tenant: Responsibility for state and condition of property published in 1996). In other words it applied in the days before double glazing, when outside toilets were still quite common and the main source of heating was coal fires. As does the Welsh Government we want to see the general standard of housing in the PRS improved over time but there is a very real danger if the bar is set too high from the outset. Furthermore, when the Law Commission considered matters, recommending this term, mandatory repair grants for landlords were still available but this public financial assistance has, to all intents and purposes, disappeared completely, except for the disabled.

We are deeply concerned that not only is there an attempt to resurrect this concept of unfitness for human habitation which has fallen into disuse, without careful consideration of the implications, but that this has been done without any proper research or even available reliable up to date statistics for Wales on current housing stock conditions, especially in the PRS. It will, of course, have implications for community landlords but it is well recognised for example that housing association

stock is significantly more modern. The social sector has had the benefit of a major upgrade of its stock via the Decent Homes Programme at a cost approaching £40 billion spent in England and Wales.

The age of the stock in the PRS is a major challenge. It should go without saying that it is much harder to keep older stock in repair, improve its energy efficiency when it lacks cavity walls, and retro fit to bring properties up to modern 21st Century standards. This should not become a blame game. The reality is that as owner/occupiers move on significant elements of this older stock have fallen into the PRS. EHS statistics confirm that in terms of tenure proportionately the PRS has the highest proportion of pre-1919 stock.

You also have to set against this the likely rental income for many of these older properties in the PRS, as the rental yield is typically very low. No financial assistance such as the Decent Homes Programme has been provided for the PRS. We regret to say that we have seen no evidence so far of careful consideration of the likely consequences of incorporating what, as it stands according to Section 90 of the Bill, as being an absolute requirement, subject to the caveat of only requiring reasonable expenditure. Nevertheless, as currently set out in the Bill this is such a vague qualification and indeed could actually prove counter productive, as the Law Commission identified in its report.

Turning to Section 90 as currently drafted we consider that the following amendments are needed –

- The provision should only apply to completely new lettings once the Bill is implemented. A "big bang" conversion of existing tenancies would mean an across the board requirement at the outset which is simply impracticable. The requirement needs to be phased over time.
- The requirement should be drafted purely in terms of health and safety; not personal comfort or enjoyment of the property. This would be in line with HHSRS concepts, especially if the deficiencies which could give rise to liability are framed in terms of HHSRS hazards. This was generally considered to be the interpretation of the current moribund provisions in the 1985 Act.
- The scope of the requirement should not extend across all 29 hazards. This provides a far too expansive list.
- Age, character and locality needs to be taken into account.
- Energy efficiency improvements should be excluded from the scope of this obligation. They will be addressed from 2018 by minimum energy performance standards and can also be the subject of HHSRS powers

It is vital in our view that the costs of carrying out work be capped at what is reasonable, although this needs clarification. This has always been an accepted proviso for provision of this kind. However, it is worth noting, as the Law Commission pointed out in their report that this can be counter intuitive, because it can lead to a situation where a landlord allows a property to deteriorate to such an extent that he/she can then hide behind the reasonable expenditure defence. Ironically, this could exacerbate the problem. To deal with this, there needs to be an obligation to expend up to a reasonable sum where this is required even if some only

of the issues in the property can be property addressed and not all of them. This is on the supposition that the yardstick of reasonable expense is defined with greater exactitude and set at an affordable level. Again this was where the issue of whether expenditure on different hazards is judge cumulatively becomes important. After all, under HHSRS, the cumulative approach is not adopted.

We acknowledge that there are gaps in the statutory repairing covenant which is modelled on Section 11 of the 1985 Act. We agree that it makes sense to impose requirements over and above this repairing obligation but, as drafted, Section 90 sets the bar too high and, as yet, the implications have not been consulted upon or debated. Section 90 as drafted imposes a stringent and too all embracing standard which is not realistically achievable. It is a step in the right direction but the economics of what is proposed need more careful consideration.

1.16.2 Electrical Safety

The RLA recognises the various calls for improved electrical safety standards to be introduces within this Bill. At present, it is a legal requirement for electrical safety checks to be carried out in Houses of Multiple Occupation (HMO) every five years. The RLA supports this as HMOs tend to have higher turnover of tenants. We believe however, for owner-occupied properties, non-HMO properties should have checks of the installed wiring within them every five to ten years, on the recommendation of a registered electrician. We would also support the introduction of Residual Current Devices in domestic properties. The RLA does not feel that it is necessary to make annual Portable Appliance Testing (PAT) mandatory as this goes beyond what is required of even the largest employers. We feel that considering even the largest employers are not required to uphold this measure, it would not be necessary for landlord to do so.

## 1.17 Joint contracts

The current law regarding joint contracts is such that the landlord is effectively entitled to treat the tenants as one; rather than as individuals with separate rights. Broadly on a day to day basis, there are two scenarios from the landlord's perspective so far as joint tenants are concerned. Firstly, there are couples where some relationship is involved, whether or not they are married and, secondly, there are groups of tenants such as groups of students or young professionals. Often these groups can be quite large in number.

Under a joint tenancy the landlord expects to receive a single sum by way of rent, although in many cases (especially where one is concerned with a group of tenants) individuals will contribute towards this. Significantly, from a landlord's perspective if one of the joint contracts holders is allowed to leave that his/her source of income is put at risk. In the case of an ordinary couple if one works and the other does not or if one has a significantly higher income that the other then should the higher earner depart, this clearly puts the contract in jeopardy and the landlord faces the prospect of arrears. If one of the contract holders leaves, the result can negatively impact the others.

In its desire to "individualise" joint contracts the Welsh Government is clearly motivated by a wish to protect those who are vulnerable when a relationship breaks down. This does not really arise however in the case of groups. In promoting this laudable aim, it is, however, important that the interests of the landlord are recognised and protected. In particular, regrettably, as a result of the one contract holder leaving the others cannot pay the full rent and they would have to leave. At the same time, it is important to ensure that, subject to landlord's approval new contract holders can be introduced and that this can be accommodated. For example, in the case of lettings of student groups, this is a not unknown problem. Normally, the landlord is happy to allow a new party to be introduced but this, of course, requires not only the landlord's consent but the consent of the continuing occupants. We do have some issues of detail around these proposals and also around the introduction of the concept of only or principal home as a relevant criterion in certain related situations – as already explained.

At present the current law regarding what happens to a joint contract if one of the tenants leave can negatively impact the other tenants and in some cases lead to a re-drawing of the tenancy agreement. In principle, where a tenancy breaks down by one person leaving the other tenants should have the opportunity to continue the tenancy, provided this does not adversely affect the landlord.

This Bill allows for one tenant to be removed from the tenancy without it ending the whole contract. This provides security for tenants as it means that if one tenant is acting irresponsibly or is arrested, it will not result in the other tenants becoming automatically homeless. This would effectively allow for the responsibilities of the tenancy agreement to be simply transferred should one tenant leave.

Our concern however is that while this acts well in principle it does not do so in practice. What were to happen if for example 3 out of 4 tenants moved out, leaving the remaining tenant to cover the whole tenancy agreement? This has the potential to leave tenants stranded, building up arrears, while the landlord must only look towards eviction proceedings to resolve the issue.

To avoid this we would suggest extending the length of time an individual has to give notice is set at two months. This would give time for the landlord to receive notice, write to the other tenants as the landlord is required and a conversation beginning between the remaining tenants and landlord. Possibly then by the one month mark, the remaining tenants and landlord must decide whether either side wishes to continue. No notice from either side means the tenancy continues but without the original tenant that gave notice. If the other tenants decide to leave, then this procedure effectively backdates their notice, should the tenants wish. Ultimately this encourages dialogue and responsibility from both sides as to the affordability and practicality.

1.17.2 Practicalities, Deposits and Cost

Although we agree with the increased flexibility in the area proposed by the Bill, it does raise a technical issue surrounding deposits and inventories. If one tenant were to move out, leaving other tenants in the property, a check-out would need to be carried out, a partial deposit released and a new inventory prepared and signed by all

remaining tenants. The problem here is that the tenants will continue to live in the property and for an inventory to be done correctly, the tenants would have to move out of the property and back in after the inventory. Obviously impractical. The solution to this is that any new tenants coming into the property must accept the original inventory and highlight any damage that they find within a property to the landlord and get it recorded by the landlord. Whilst not ideal, alternatives will mean that such changes in tenancy will be very expensive.

The costs associated with inventories and deposits can be surprising, with the average 1 bedroom flat inventory costing £110 for its preparation and around a further £50 for an end of tenancy check-out. Professor Ball of Reading University, in the report on the impact of regulation in the PRS, concluded that deposit protection has a cost to tenant of approximately £2 per week on the rent. Without careful consideration into the practicality and implementation of this policy, costs to tenants could rise further.
We would also express concern with the Deposit Protection Schemes technical capacity to adapt to such a change and deliver a practical system to deal with the joint contract scenario.

### 1.18 Implied surrenders

The Law Commission are seeking to provide a comprehensive code for occupation contracts, at least once the contract has been formed. However, there are already exceptions in respect of repudiation and frustration. As we have already pointed out above, there is significant omission in terms of the doctrine of implied surrender. We believe that its omission from the Bill is a serious practical defect in the scope of the termination provisions contained in the Bill, as it presently stands. The Bill (Section 152) refers to an agreement for surrender but it does not include deemed surrenders which are implied by operation of law, for example where the tenant returns the keys to the landlord and the landlord accepts these. We have already pointed out that a hallmark of the PRS is informality. The keys for example may not be returned direct but instead left with a neighbour for the landlord to collect. Provided that there is an unequivocal intention on the part of the tenant to give up the tenancy which is accepted by the landlord then this puts an end to the tenancy. Many tenancies are currently brought to an end in this way. Indeed, in many instances, this overcomes any issues around abandonment because where there is a clear intention to end a tenancy that puts an end to the tenancy anyway. Rather than have any arguments about whether the scope of section 152 extends to a deemed agreement, it would be far better in our view to set out this principle within the Bill itself to put the matter beyond any doubt.

### 1.19 Abandonment

We very much welcome the intent to provide for cases where tenancies are abandoned and try to put and end to the uncertainty that surrounds this. From the landlord's perspective this is a very difficult situation because if the landlord gets it wrong he/she is at risk of a claim by the tenant or even prosecution. Regrettably, however, we do not feel that the current provisions of the Bill go far enough because they still leave a lingering uncertainty. Chapter 13 (Section 216 onwards) for a start only applies if there is a requirement for the contract holder to occupy the dwelling as his/her only or principal home. We have already raised this issue elsewhere. The

problems lie with Section 218(2)(b) in particular in that the contract holder can claim that he/she has not abandoned the dwelling and there has been good reason for his/her failure to respond or respond adequately. This is beyond the control of the landlord and these circumstances will be unknown to the landlord at the time.

Further whilst the requirements of paragraph (c) are in a sense within the control of the landlord, with hindsight, the Court may well take a different view to the landlord as to what constituted "reasonable grounds". It is always difficult to judge these issues. We are also concerned that even though it is discretionary it is open to the Court to order the landlord to provide suitable alternative accommodation which makes it impractical for a small landlord who has no alternative property available to do this. There is also the risk of a reinstatement order and the question then arises as to what happens if the landlord has re-let the property to someone else. Again this is perhaps a section that would warrant further guidance and discussion as to how this section might be implemented pratically.

We consider that at the very least paragraph (b) ought to be removed and that the question as to the reasonable grounds on the part of the landlord should explicitly be judged at the time and in the light of the information reasonably available to the landlord. The power to reinstate should be subject to availability of accommodation.

## 2. Any potential barriers to the implementation of these provisions whether the Bill takes account of them.

### 2.1 Volume of paperwork and 'Digital by Default'

As mentioned throughout this consultation, one of the biggest areas for concern is the amount of paperwork involved in establishing a tenancy. Often this requirement may mean large printing costs, misplacement of documents or corners being cut because the process is 'too difficult'. Although the Bill takes account of issues such as cutting corners, it does not fully account for the extra work and cost this may cause the landlord. This is where 'Digital by Default' comes in.

At present notices and documents under the Renting Homes (Wales) Bill may be issued electronically if the tenant has given express consent to receiving them by this method. Rather than gaining express consent from a tenant, tenancy agreements and included documentation should be issued electronically where the tenant has given an appropriate email address. This would remove a large part of the burden for landlords and cut down significantly on the amount of physical paperwork. Issuing a tenancy agreement could be as simple as a few electronic signatures and the emailing of a folder containing all the relevant and required information. It would also mean that tenants are more likely to read and file the information for future use.
We acknowledge however, that some people are not IT literate, especially those of the older generation, and the answer may be as a compromise to allow an express opt out

of electronic communications; rather than an opt in. Landlords could be required to, upon request, issue one written version of the contract, per tenant, at no charge.

### 2.2 The need for training and publicity

The key barrier in our view for the uptake in the PRS is the need to communicate these changes. Importantly, as the Welsh Government has adopted a scheme for registration and licensing, there must be a tie in with this system for it to be used to disseminate information. We would however, express caution that training and licensing can achieve this. The take up in Scotland for example has been slow and no one suggests that there there is comprehensive coverage. After all, a change always takes much longer to implement than anyone expects.

### 2.3 The need for education and publication of literature

The Law Society Gazette recently reported on the reluctance of publishers to publish books explaining separate laws as they emerge in Wales. This is due to the relatively small number of lawyers in Wales and the small size of the jurisdiction. This Bill will be one of the first major pieces of legislation which introduces wholly novel concepts of wide application. Clearly, a reluctance to publish literature will inhibit the dissemination of information which will adversely impact on lawyers as well as other advisers. Economies of scale will be lost to the relatively small market. Likewise, for those trained and educated in England there will be problems in learning including mastering a new set of laws.

## 3. Whether there are any unintended consequences arising from the Bill

The Renting Homes (Wales) Bill proposes wide ranging changes to the rental market. It is not reasonable to expect the bill to foresee every eventuality and consequence; however a through assessment of any potential consequences should be undertaken. The Welsh Government should consider costing for financial support and/or secondary legislation to avoid slow response and solution to unintended consequences created by this Bill. We would not want the nightmare scenario of a repeat of a case such as Superstrike, which could take the government far too long to respond to.

### 3.1 Increased pressure on legal services

With new legislation and regulation coming into force there will inevitably be some mistakes made and new legal process to be implemented. This ‘teething’ period may result in increased pressure on legal services, which could result in an increase of legal costs.

What the Renting Homes (Wales) Bill must avoid is adding further complication to any aspect of the renting process. This would undermine the basic principle behind the Bill; to make renting a home in Wales simpler. The Bill must avoid increasing pressure on legal services, as it could result in lengthening processes and costs for both the tenant and landlord. This is why, where appropriate, any legal change such as retaliatory eviction should not lengthen the legal process by any more than absolutely

necessary. To reiterate, the RLA supports the principle behind the retaliatory eviction clause, however we feel it is in the Bill's own interest to minimise any added delay this may add to legal proceedings.

### 3.2 The risk of increasing paperwork resulting in corners being cut

If a landlord is faced with a plethora of paperwork, key documents and certificates, they may be more likely to find an alternative solution, rather than working through the process. This means that a landlord may informally arrange additional terms with the tenant, rather than exploring how to write them into the contract. It could also mean that landlords do not talk the tenant through the contract, as they lean on the additional documentation to do the explaining for them. More emphasis needs to be placed on tenant acknowledgment of having understood their rental contracts rather than devising duplicate methods of telling them the same thing over and over. It is the current practice of many landlords and letting agents to walk a prospective tenant through the various sections and pages of their rental agreements and to answer any questions that may arise.

Again one possible solution to this issue, as mentioned above is 'Digital by Default'.

### 3.3 Unwillingness to rent

It has to be recognised that this Bill in conjunction with the Housing (Wales) Act destroys the traditional informalities surrounding the PRS, especially ease of access to renting. Unlike the conveyancing process surrounding owner/occupation or even formalities applicable in the case of social housing, private renting has been a relatively informal process. The market is heavily dependent on small landlords. Institutional investment has not taken off and is unlikely to do so to any large extent. If you make things too complicated for the small landlord then properties will start to disappear from the rental market to the detriment of tenants. Landlords will get fed up with the complex processes surrounding letting and managing properties and will disinvest. Perversely, this could well lead to something of an influx of unsavoury characters that cut corners anyway. Private landlords are facing huge upheaval in terms of introduction of Universal Credit, requirements for immigration checks and increasing regulatory requirements. This ever increasing complexity and plethora of regulation could in the medium term impact adversely on capital values. For a sector where, like it or not, returns are heavily dependent on capital growth, not just rental income, this could again adversely impact on much needed investment.

### 3.4 Increase in rents

Another likely unintended consequence will be increased rents. As more and more formalities apply this involves extra cost which will then be priced into rental levels, again coupled with the extra requirements imposed by Housing (Wales) Act. Consumer protection always comes at a cost and it is always the consumer who bears this cost.

### 3.5 External investment

Another significant danger for the Welsh PRS is an increasing reluctance on the part of external investors, especially from nearby parts of England to invest in the sector because of increased regulation and formality, not least the extra requirements which will be introduced by this Bill, especially when taken in conjunction with Housing (Wales) Act requirements. Having to learn a new set of laws and practices is an immediate "put off" for external investment. It could even prove deterrent for institutional investors considering investment in Wales. We also have concerns about the willingness of buy to let lenders to invest in this market; again because it involves learning a new set of rules and training staff etc.

### 3.6 Joint tenancies

We would expect that because of the complexity surrounding joint tenancies some landlords would insist on having a single tenant. The "lead tenant" concept has proved popular in terms of dealing with tenancy deposits as it simplifies administration of the deposit. The landlord can just deal with one tenant. The next logical step following the introduction of complex provisions around joint tenancies is that landlords may simply refuse to let to joint tenants and rely on a contract with the head tenant who then informally will bring in other occupiers. This has been done in the past for example to avoid tenancies being treated as multiple lets so we would imagine that this practice would assert itself, going forward.

## 4. The financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum)

As is already known, we have published our own impact assessment on the effects of this Bill, some time ago, and estimated the total likely cost in the region of £45 million; this excludes any cost involved with the upgrading of properties in the PRS . Our approach has been different from the standard impact assessment approach and brought into its scope a greater range of costs, especially costs resulting in litigation surrounding the legislation as test cases are brought out to clarify the new concepts. Having now seen a text of the Bill we see nothing to lead us to depart from our original view. Our assessment of the cost appears as an Appendix to this evidence. We stand by our original calculations. We believe that the Welsh Government's own impact assessment greatly underestimates the financial impacts because it underestimates the total cost to the PRS and the wide range of stakeholders involved in the Sector who will be affected by these provisions.

We have addressed separately above the question of costs which would be involved in implementing the fitness for habitation provisions, coupled with the cost of bringing the condition of the properties in the sector up to standard. As a broad brush approach we would estimate the total cost to be of the order of £0.5billion to £0.75billion much of which will fall on tenants.

## 5. The appropriateness of the powers in the Bill for Welsh Ministers

**to make subordinate legislation (as set out in Chapter 5 of Part 2 of the Explanatory Memorandum)**

The amount of subordinate legislation that this Bill would allow Welsh Ministers to make is both excessive and without any real check or balance. It is concerning that Welsh Ministers would have the ability to change many of the fundamental terms and supplementary provisions, by only using the negative procedure. This means at least theoretically, once the Bill has passed, the nature of the model contract could easily change before the Act's implementation. The powers also allow ministers to radically alter the amount of additional explanatory information that must be given (specifically powers relating to sections 29(1), 32(4) and 45(3)). Given previous comments made regarding the volume of additional information required to be given upon the start of the tenancy, and any additional issues surrounding this, it is concerning to see how easily the Welsh Ministers could escalate this burden resting upon the landlord.

The RLA does however support the power enabling Welsh Ministers to amend section 55. This would allow for the definition of prohibited conduct to be updated rapidly, so that any form of anti-social behaviour or domestic abuse is quickly dealt with. This power is however considered 'Affirmative' citing the reason that this power enables the amendment of primary legislation. This is surprising when many other powers which have a direct impact on the primary legislation are given negative procedure citing that they 'prescribe technical matters of detail which may change from time to time'.

As we have already pointed out above, we do have concerns around the omission of lending/repealing legislation to deal with the impact of the Bill on the existing legislation. Whilst we accept that things are overlooked and the use of regulation making powers may be helpful it is important to deal with this. The main body of repeals should, in our view, be included in the Bill.

We are also concerned at the absence of a draft model contract because it is very difficult to understand the terms of the Bill without this. Currently, we only have the Law Commission proposal to rely upon.

**Conclusion**

We will be publishing our own technical memorandum which we will submit to the Welsh Government to put forward suggestions for detailed amendments to improve the Bill to benefit both landlords and tenants.

We are grateful for the opportunity to make representations in relation to this Bill. We do have a number of significant concerns around various provisions mainly that the Bill can be improved upon to the benefit of the PRS. The recommendations made by the Law Commission incorporated in the Bill are in many respects helpful improvement. However, the introduction of a radically different code for renting in both the PRS and the social sector will lead to major upheaval and cost. We believe that the Welsh Government has under estimated the total costs involved.

**Summary of key issues**

The RLA is in broad agreement with most aspects of the Bill, including many of the principles. Where we have expressed concern, it is typically not for the principle itself, but rather how this particular principle has been executed. Although we have made some comments with regards to definitions, amounts of paperwork and the confusion surrounding key terms, we believe these are largely technical issues that can be resolved as the Bill progresses. Our main areas of interest are:

The Removal of the 6 month moratorium:
We believe that this will add increased flexibility to the PRS and greatly enhance the practicality for Local Authorities to discharge homelessness duty into the PRS. Those who oppose the removal of the 6 month moratorium, we would say that many landlords will issue contracts with a fixed term of at least 6 months. The RLA is also going to propose a Long Term Tenancy Agreement, which would allow tenants to extend security for 6/12 months up to a total of 5 years. With these two factors combined, plus the added flexibility regarding vulnerable households in the PRS, the removal of the 6 month moratorium could be said to increase security for thousands, not diminish it.

Retaliatory Evictions (1.15):
The RLA entirely supports the principle behind the retaliatory eviction clause, as no tenant should fear eviction for holding a landlord to account. However our concerns are not regarding the principle, but how the courts may interpret the clause and any additional length this may add to proceedings. Retaliatory Evictions clause should be written as to not warrant abuse of the system, or add any undue delay to proceedings.

Property conditions (see 1.16):
The RLA endorses the approach of retaining and repeating the provisions of the current Section 11 of the Landlord & Tenant Act 1985. Any change in approach would lead to uncertainties in an important area especially as the landlord is under existing comprehensive obligations in relation to ongoing repair. We would however express deep concern against any attempt to resurrect Fitness for Human Habitation standards. We believe this would be setting the bar “too high, too quickly” without the benefit of any reliable statistical data to support such a movement (see paragraph 4, 1.16). The RLA would however support movements on increased electrical safety standards (section 1.16.2).

Joint Tenancies (1.17 and 1.17.2):
White the RLA understands the reasoning and principle behind this idea, our concerns are focused on implementation and practicality. We would reiterate our notion of the 2 month tenant notice period and its potential to improve dialogue between tenants and landlord, when one tenant decides to end a tenancy. It is important however to recognise the practical issues surrounding inventories, check-out procedure and individualising (see 1.17.2) as well as the technical issue with regard to mirroring this with Deposit Protection Services.

## Appendix 1

We have carried out our own calculation of cost and we estimate that across the board the proposals could cost as much as £45million. These calculations are based on a number of factors, including the costs associated with establishing the new models, legal disputes which may arise, extra legal letting agent's fees, the cost of training and other associated factors. These are calculated based on our suggested methodology for the impact assessment. We have arrived at this figure of £45million using the following calculation –

- The RLA has reached the £45 million cost using the following calculations:

  - The total number of tenancies in Wales is **414,000** (Local Authority – 88,500, Housing Associations 135,000 and Private Rented tenancies 190,500)

  - Initial publicity start-up costs - **£250,000**

  - Cost of preparing new tenancies agreements, and the new documentation needed costed in the region of £100 per tenancies which comes to **£41,400,000**.

  - Based on experience, it is likely that possibly ten court cases will be involved in the transition at £60,000 each; this comes to **£600,000**.

  - Extra legal costs and other advice needed for landlords and tenants - **£1,000,000**.

  - One Off Costs for training local authorities - 22 authorities x ten members of staff = 220 x £100 - **£22,000**

  - Training courses for Housing Association staff and, private landlords, - **£275,000**

    Housing professionals, agents etc, training courses - **£1,250,000.00**

  - Mortgage lenders costs for adapting to new systems **£100,000**

**TOTAL: £44,897,000.00 - rounded up to £45 million pounds**