



Government response to the Housing, Communities and Local Government Select Committee Report Pre-legislative scrutiny of the draft Tenant Fees Bill

Presented to Parliament
by the Secretary of State for
Housing, Communities and Local Government
by Command of Her Majesty

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Introduction

1. The Government is committed to rebalancing the relationship between tenants and landlords to deliver a fairer, good quality and more affordable private rented sector, including:
 - Insisting that all landlords are members of a redress scheme so that tenants have quick and easy resolution to disputes;
 - Ensuring that all letting agents are registered and are members of a client money protection scheme to provide assurance to tenants and landlords that their agent is meeting minimum standards;
 - Introducing banning orders and a database of rogue landlords and agents to make it easier for local authorities to act against them to protect tenants; and
 - Consulting on the benefits and barriers of longer tenancies in the private rented sector and what action could be taken to overcome these barriers.
2. An integral part of this work is our commitment to ban letting fees to tenants and cap tenancy deposits. We published the draft Tenant Fees Bill on 1 November, which set out our detailed approach and will help millions of renters by bringing an end to costly upfront and renewal payments. The draft Bill's provisions were informed through consultation with agents, landlords and tenants.
3. The Housing, Communities and Local Government Select Committee conducted pre-legislative scrutiny of the draft Bill. The Committee made a call for evidence in December 2017 and held five public evidence sessions during January and February of 2018.
4. Government supported the Select Committee's scrutiny throughout, providing written evidence and participating in oral evidence sessions. Heather Wheeler, Minister for Housing and Homelessness and Bill Minister for the Tenant Fees Bill appeared before the Committee alongside Government officials on 26 February.
5. The Committee published their final report on 29 March. Government has carefully considered the recommendations made by the Committee. This document outlines our response to each point. The majority have been accepted and have informed the final Bill.
6. We would like to thank the Committee for the work they have undertaken during the pre-legislative scrutiny and the stakeholders that participated constructively in the call for evidence and oral evidence sessions. This process has been invaluable in ensuring that the Tenant Fees Bill achieves its aims of delivering a fairer, more affordable lettings market.

Response to recommendations

Aim of the Bill

7. We welcome the Committee's acknowledgement that Government is right to intervene in order to address the imbalance between tenants, landlords and letting agents when it comes to letting fees. It is clear that there is consensus that the lettings market is not functioning according to healthy market principles.
8. Government is pleased to note that the Committee agree that the proposed legislation has the potential to save tenants in the private rented sector hundreds of pounds as well as increasing competition, improving fee transparency and reducing unfair practices in the sector.

Permitted Payments

9. Government's intention with regards to the ban is to prohibit all fees except those explicitly permitted. These fees are referred to "permitted payments". We believe that this approach, as opposed to listing all fees that are banned, will prevent letting agents from creating new types of fees in order to circumvent the legislation.
10. The approach Government has taken when deciding which fees should be permitted has been informed by responses to the public consultation which ran for 8 weeks in 2017. Government has engaged with the stakeholders in the sector since the ban on letting fees was announced at Autumn Statement 2016. We have also considered the evidence and feedback given during the Select Committee's pre-legislative scrutiny of the Bill on which fees should and should not be permitted. The principle Government has adhered to is to ask the party that contracts the service to pay for it, which is reflective of fair and effective markets
11. **Recommendation:** amend Schedule 1, paragraph 1(6), to make it clear it applies only to variations in the rent which are agreed after the tenancy has been entered into.
12. **Government's response:** We accept this recommendation and have amended Schedule 1, paragraph 1(6). Landlords will only be able to charge a varied level of rent if this has been agreed with the tenant subsequent to the tenancy being entered into. Government has been clear that the intention of this paragraph is to prevent landlords and agents from inflating the first months' rent as a means of circumventing the ban.
13. **Recommendation:** Government should reduce the cap on security deposits to the equivalent of five weeks' rent in recognition that finding 6 weeks' worth of rent can cause financial difficulties for tenants.

14. **Government's response:** We are not accepting this recommendation. We share the Committee's desire to improving affordability and fairness in the private rented sector and have considered their recommendation carefully.
15. A deposit of 6 weeks' rent will be an upper limit and not a guideline. There is a balance that must be struck between providing tenants with greater affordability whilst ensuring landlords have adequate financial security for their assets. This is integral to retaining investment and supply in the sector. Scotland has capped tenancy deposits at no more than 8 weeks' rent. A cap of 6 weeks' rent offers greater affordability benefits to tenants whilst minimising the financial risk to landlords and allowing them greater flexibility to accept higher risk tenants such as those with pets. We can see the benefits of a cap at 5 weeks' rent in terms of improved tenant affordability, but a cap of 6 weeks' rent could better support both landlords and tenants by giving landlords greater financial flexibility.
16. We expect that landlords should consider on a case by case basis the appropriate level of deposit to take and will provide guidance to this effect. The deposit is also only retained by the landlord in instances where the tenant defaults on their obligations under the tenancy.
17. **Recommendation:** The Bill should provide that a landlord may retain the holding deposit if a tenant provides false or misleading information (without the need to show this is reasonable). However, unless the tenant did so knowingly, the landlord should only be able to retain the cost of any reference check, limited to an amount to be prescribed by the Secretary of State.
18. **Government's response:** We are not accepting this recommendation. We believe that the approach in the Bill with regards to the requirements on landlords to return a holding deposit is the right one. Not permitting landlords to charge a holding deposit is likely to lead to tenants speculating on a number of different properties, which could result in landlords and agents being unfairly penalised financially – this was a concern raised by a number of landlords in the public consultation. Such an approach could also result in landlords self selecting those tenants that they perceive to be 'less risky' and more able to pass a reference test.
19. The legislation provides that the landlord or letting agent does not have to refund the holding deposit if the tenant provides false or misleading information and the landlord is reasonably entitled, when deciding on whether to grant the tenancy, to take into account either the tenant's action in supplying the information or the difference between the information provided and the correct information. This provision is intended to ensure that a landlord is not able to retain the deposit simply because of a minor discrepancy. A landlord does not have grounds for retaining a holding deposit if the tenant fails a reference check but provides accurate information.
20. We considered inserting a 'knowingly' test to the provision, whereby a landlord would only be entitled to retain the deposit if the tenant 'knowingly' provided false or misleading information. However, such a test would be difficult to implement in practice as the landlord is unlikely to have sufficient evidence to be

able to confidently conclude that the tenant knowingly provided the false or misleading information. This could lead to landlords taking a risk-averse approach and self selecting those tenants that they perceive to be 'less risky.'

21. Permitting the landlord to only retain the cost of any reference check if the tenant provided false or misleading information 'unknowingly' could unfairly penalise the landlord. This is because costs incurred in referencing a potential tenant are not only the reference check itself but lost rent if the tenancy does not proceed. We therefore believe that tying the maximum holding deposit that can be retained to a variable of rent is a fairer compensation to the landlord's likely actual loss.
22. To address the concerns the Committee has raised, we will provide guidance to landlords and tenants to clarify scenarios when a holding deposit can be retained. We will also seek to encourage landlords to be flexible where a tenant fails a reference check in good faith and to only retain the costs of a reference check rather than the full amount. In addition, we have removed the criminal penalty for unlawfully withholding the holding deposit. A breach will now be punishable only by a civil penalty of up to £5,000.
23. **Recommendation:** That the Bill allow a landlord to retain the holding deposit where they have attempted to follow the prescribed requirements for checking whether a person has the right to rent, as under section 24(2)(a) of the Immigration Act, and not been provided by the tenant with the necessary information or documents to allow them to comply with the prescribed requirements before the deadline for agreement.
24. **Government's response:** We are not accepting this recommendation. The Government believes that there is already provision for this within paragraphs 10 and 11 of Schedule 2 of the Tenant Fees Bill. Paragraphs 10(c) and 11(c) of Schedule 2 have the effect that the person receiving the holding deposit does not have to repay it if the tenant does not take all reasonable steps to enter into the tenancy before the deadline for agreement. We would consider failure to provide the landlord or agent with the necessary information or documents to allow them to carry out a right to rent check as a failure to take all reasonable steps to enter into the tenancy.
25. **Recommendation:** That the Bill provide a landlord with a defence to any financial penalty or offence (but ensure the deposit remains repayable) where they have complied with the prescribed requirements but erroneously been told by the Home Office that the tenant does not have the right to rent, provided the landlord did not know the tenant had no right to rent when taking the deposit (as currently provided in paragraph 7(b) of Schedule 2 of the Tenant Fees Bill).
26. **Government's response:** We accept this recommendation. To confirm that a tenant has the right to rent a landlord or agent must check the relevant documentation. A landlord or agent may have a need to contact the Home Office if an immigration application or appeal is outstanding. The Home Office receive approximately 200 such calls per month.

27. The Home Office will be able to advise a landlord that they may let to an individual who is here lawfully having made an in time application or appeal and to provide written notice to confirm that the landlord has a statutory excuse from a civil penalty under the Right to Rent scheme. These checks are conducted within two working days (in line with the market standard for tenant referencing checks). Should the Home Office fail to respond within that timeframe, the landlord will receive an automated message explaining that they may let and will have a statutory defence against a penalty. All checks have been made within these timeframes to date (often within a few hours).
28. However, we accept the recommendation that a landlord have a defence to any financial penalty or offence where they have complied with the prescribed requirements but have been incorrectly told by the Home Office that the tenant does not have the right to rent. Although this eventuality seems an unlikely one, the Government wishes to offer reassurance to legitimate landlords and tenants that they will not suffer an inconvenience for matters outside of their own control.
29. **Recommendation:** The Government should amend Schedule 1, paragraph 3, and Schedule 2, to clarify that holding deposits can be paid to letting agents as well as landlords.
30. **Government's response:** We accept this recommendation and have re-drafted the Bill to clarify that holding deposits can be paid to letting agents as well as landlords.
31. **Recommendation:** That Government issue clear guidance to tenants, landlords and letting agents on what constitutes a reasonable default fee and, guidance to tenant about how to challenge the inclusion of such fees in tenancy contracts. The reasonableness of both the type and the amount of fee should be considered. The Government's intention to issue such guidance should be communicated during the Second Reading debate.
32. **Government's response:** We accept this recommendation and are committed to providing such guidance. Government will produce guidance and information for landlords, letting agents and tenants to explain how the legislation affects their rights and responsibilities. This guidance will also include answers to frequently asked questions and examples of what constitutes a reasonable default fee.
33. **Recommendation:** Government should consider giving trading standards the express power, and resources, to enforce the reasonableness of default fees, without reliance on the Consumer Rights Act 2015.
34. **Government's response:** We accept this recommendation in part. We agree that enforcement authorities should be able to enforce default fees without reliance on the Consumer Rights Act 2015. We have qualified the permitted payment in the event of a default in Schedule 1 (4) by reference to the landlord's loss. The amount of any payment which exceeds the landlord's loss will be a prohibited payment.

35. **Recommendation:** That Government should consider establishing an anti-retaliation provision similar to that relating to complaints about the condition of housing.

36. **Government's response:** We do not accept this recommendation. We acknowledge the concerns raised by the Committee and would certainly not support any landlord evicting tenants that have refused to pay an unfair default fee. However, Government rejects this recommendation due to the practical difficulties of implementation. We believe that such a provision is susceptible to abuse since it would simply be the landlord's word against the tenant's as to whether the landlord has requested fees. This would be time-consuming to resolve owing to the likely difficulties in providing evidence. Such a provision is different to the prescribed conditions, the How to Rent guide and the gas safety certificate, where the landlord can evidence whether or not they have provided these documents. We do not want to encourage or facilitate spurious claims to prevent or delay a landlord from recovering their property when they are entitled to do so.

Other points raised by the Committee

37. We acknowledge that the Committee has welcomed Government's intention to allow for a charge to vary a tenancy, for example, to enact a change of sharer, or to amend a tenancy agreement to allow the tenant to keep a pet. Government further proposes to cap such a charge at £50 or reasonable costs if greater.

38. We welcome the Committee's support of Government's intention to clarify that Green Deal payments are permitted under the legislation. We have further clarified the Bill to be clear that landlords and agents are permitted to charge tenants for payments in relation to utilities, communication services and council tax payments.

39. We have noted the Committee's suggestion that Government should encourage innovation in the deposit free renting sector by assessing the merits of alternatives to traditional security deposits and reporting their findings to the Committee. Government will explore the merits of deposit alternatives and reply to the Committee within six months.

Enforcement

40. In Government's approach to enforcement of the ban we have aimed to be ambitious and tough in order to provide a sufficient deterrent to the continued charging of fees. Government has also proposed the establishment of a lead enforcement authority to support local authorities in their enforcement activities and to ensure consistency.

41. The proposed approach is aimed at being fair, ensuring that an inadvertent first breach of the ban is not criminalised and to provide tenants with a means to recover any illegally charged fees.
42. A breach of the fees ban will usually be a civil offence with a financial penalty of £5,000, but if a breach is committed within 5 years of the imposition of a financial penalty or conviction for a previous breach this will be a criminal offence. The penalty for the criminal offence, which will be a banning order offence under the Housing and Planning Act 2016, is an unlimited fine.
43. **Recommendation:** That the Bill prevent landlords from recovering possession until they have repaid any prohibited fees. In doing so it would more fully mirror the approach taken in tenancy deposit legislation and would in our view be more effective.
44. **Government's response:** We accept this recommendation and the Bill has been revised to stipulate that a landlord will not be able to gain possession through the Section 21 ('no fault') process set out in the Housing Act 1988 if the landlord has unlawfully required the tenant to pay fees which have not been repaid. This is similar to measures that prevent landlords from serving a Section 21 notice if they have failed to provide the tenant with a copy of the 'How to Rent Guide' and gas safety certificate or in relation to an unlicensed House in Multiple Occupation (HMO).
45. **Recommendation:** That Government allows tenants to recover prohibited fees in the First-Tier Tribunal.
46. **Government's response:** We accept this recommendation. We acknowledge the Committee's point that the First-tier Tribunal is generally more accessible for tenants. A tribunal is not able to enforce its own judgments. This can only be done by a Court. If a landlord or letting agent refused to abide by the order of a First-tier Tribunal, a tenant would still be required to go to the County Court to have this decision enforced and recover their fees.
47. **Recommendation:** The Government should clarify in the drafting that prohibited loans are repayable on demand.
48. **Government's response:** We accept this recommendation. The legislation proposes that landlords and lettings agents cannot require a tenant to grant a loan to any person in connection with a tenancy. We have revised the Bill to make provision that any sum lent in contravention of the legislation will be repayable on demand to the tenant.
49. **Recommendation:** That the Government reconsider its intention for the legislation to be solely self-funded through the retention of civil penalties. The Committee recommend that Government either provide sufficient additional funding directly to all local authorities to enforce the legislation or increase the maximum amount of civil penalty.

50. **Government's response:** We accept this recommendation in part. We do not propose to increase the maximum amount of civil penalty under the Bill. The maximum amount of £30,000 has been subject to consultation and is in line with the penalty for banning order offences under the Housing and Planning Act 2016. We do intend to provide some additional funding to local authorities in year one of the policy to support implementation and education to enforce the legislation.
51. **Recommendation:** that the Bill provide that the only costs to be taken into account in fixing the level of a financial penalty are those costs directly associated with the breach for which the penalty is being imposed. Alternatively, Government must explain in detail its reasons for departing from usual principle.
52. **Government's response:** We accept this recommendation in part. We agree that it would be inappropriate to take the need to generally fund enforcement into account when determining the appropriate level of financial penalty for a breach but it would be unusual to prescribe this in a Bill. We intend to clarify in guidance.
53. **Recommendation:** that the Government clearly specifies in the final Bill a broader right of appeal against financial penalties, allowing the First-tier Tribunal to decide appeals as complete re-hearings, and to take into account all matters, whether or not known to the local authority at the time of its decision.
54. **Government's response:** We accept this recommendation and have redrafted Schedule 3 of the Bill accordingly. The Bill provides a right to appeal to the First-tier Tribunal against financial penalties. An appeal must be brought within 28 days from the day after the final notice was served. A landlord or agent may appeal against the decision to impose the penalty or the amount of the penalty. An appeal is to be a re-hearing of the enforcement authority's decision and may take into account additional evidence of which the enforcement authority was unaware.
55. **Recommendation:** that the Government reconsider carefully whether the need for local authorities to be able to recover financial penalties might not adequately be met by providing in Schedule 3, paragraph 7, that a certificate of non-payment is prima facie, rather than conclusive, evidence of that fact.
56. **Government's response:** We accept this recommendation and have re-drafted the Bill accordingly.
57. **Recommendation:** That the guidance developed by the lead enforcement authority for local trading standards should strongly encourage collaborative relationships with a range of stakeholders, particularly with all local authority tiers in order to draw on local expertise. That the guidance should also highlight existing powers of delegation under the Local Government Act 1972 and the Deregulation and Contracting Out Act 1994 which permit weights and measures authorities to delegate their powers under the Bill to other tiers of local government where appropriate.

58. **Government's response:** We accept this recommendation and encourage collaborative and productive enforcement relationships between the different tiers of local authority. To facilitate this, we have included provision in the Bill to provide a power for district councils that are not trading standards authorities to enforce to the Bill provisions if they choose to do so. The requirement to enforce will remain with local weights and measures authorities (Trading Standards).
59. **Recommendation:** That the lead enforcement authority should be tasked, and given the funding, to launch a nationwide awareness raising campaign to promote the legislation to tenants.
60. **Government's response:** We accept this recommendation in part. The lead enforcement authority will be tasked with awareness-raising for agents, landlords and tenants. Government will produce guidance and information for landlords, letting agents and tenants to explain how the legislation affects their rights and responsibilities. This guidance will also include answers to frequently asked questions and examples of what constitutes a reasonable default fee. More broadly, we will shortly be launching new and updated 'How to' guides with the aim of improving landlord and tenant awareness of their rights and responsibilities across the private rented sector.
61. **Recommendation:** That the lead enforcement agency be under a duty to issue the guidance referred to in clause 17(5), and that it be subject to Parliamentary scrutiny. In particular, they advocate the use of the draft negative procedure as endorsed by the House of Lords Delegated Powers and Regulatory Reform Committee.
62. **Government's response:** We accept this recommendation in part. The Bill now places a duty on lead enforcement authority to issue guidance but we do not propose to accept the use of draft negative procedure. It is proposed that the guidance should not be subject to any Parliamentary procedure since Parliament will have approved the overarching enforcement principles by enacting the legislation. The function of the guidance will be to support enforcement authorities in applying that legislation consistently, whilst allowing them a measure of discretion. It will include detail inappropriate for parliamentary scrutiny such as reporting processes. It is also important to have the ability to easily update the guidance following review of the practical operation of the fees ban in the marketplace. There is a precedent for this approach in the Housing and Planning Act 2016.
63. In recognition of the concerns raised by the Committee and the House of Lords Delegated Powers and Regulatory Reform Committee, Government will provide draft guidance ahead of introduction of the Bill to the House of Lords to provide greater clarity on the proposed contents.

Other points raised by the Committee

64. The Committee suggested that Government review whether to provide the First-tier Tribunal with enforcement powers and that, in the longer term, Government should review the routes (e.g. housing court, housing ombudsman) by which

tenants can seek redress, with a view to unifying the process across the private rented sector.

65. At present enforcement is undertaken by the County Court. MHCLG are working with the Ministry of Justice to understand the experience of users of the courts and the tribunal service, including disposal timelines. We will consult with the judiciary at every stage of our considerations before making any changes. Work is also already underway to explore the case for strengthening redress in housing. Our consultation exploring the case for a single housing ombudsman closed on 16 April and we are analysing responses.

66. We have noted the Committee's suggestion that the Government review whether the law about recovery of a prosecutor's costs of investigation is sufficiently clear, adequately understood by local authorities, and comprehensive enough to ensure that there is no disincentive to authorities pursuing wrongdoing landlords and letting agents. We will discuss this further with colleagues from the Ministry of Justice.

Impact Assessment

67. **Recommendation:** That Government should follow its existing guidance and publish an Impact Assessment at the same time as releasing a draft Bill.

68. **Government's reply:** the Committee's recommendation is noted. An Assessment of Impact was published as part of the Department's written evidence submitted to the Committee on 14 December. It contains detailed analysis about the likely impacts of the Bill in its draft form. Presenting in this form enables us to better demonstrate transfers within a sector and the significant non-monetised benefits to society. Our approach was in line with the interim Better Regulation Framework Guidance published by the Better Regulation Executive on 22 February (available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683119/better-regulation-framework-interim-guidance-2018.pdf) which covers arrangements for impact assessments.

69. We have now submitted an Impact Assessment to the Regulatory Policy Committee for verification.

Conclusion

70. We thank the Committee for their scrutiny and the stakeholders who engaged with the pre-legislative scrutiny. We believe this process has added immense value to the drafting process. The Tenant Fees Bill will be introduced to the House of Commons and we hope that all stakeholders and parliamentarians will continue to engage with the Bill as it progresses.

71. Implementation is subject to Parliamentary timetables but we are keen to bring the Bill provisions into force as soon as possible.

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