TENANT FEES BILL

Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Tenant Fees Bill (“the Bill”). The Bill was introduced to the House of Commons on 2 May 2018 and received its Third Reading on 5th September. The Bill was introduced to the House of Lords on 6th September. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. SUMMARY OF THE BILL

2. The Bill makes provision for the banning of certain letting fees to tenants and licensees of privately rented housing in England. In this memorandum the term tenants also includes licensees.

3. The Bill bans private sector landlords and their agents from requiring tenants to make any payment in connection with a tenancy to the landlord, agent or a third party, with the exception of:
   - the rent;
   - a refundable tenancy deposit (reserved for any damages or defaults on the part of the tenant) capped at no more than 6 weeks’ rent;
   - a refundable holding deposit (for securing a property for let, as an expression of interest or a commitment to rent a property) capped at no more than one week’s rent;
   - certain payments on assignment, novation, variation or termination of a tenancy
   - payments in respect of utilities, communications services and council tax; and
   - any fees incurred through default of the tenant (for example, replacing a lost key or a late rent payment fine).

4. The Bill also bans landlords and letting agents from requiring such tenants to secure and pay for services from any third party, to enter into a contract of insurance or to make a loan in connection with a tenancy with the exception of contracts in respect of utilities and communications services.

5. In the Bill “in connection with a tenancy” includes when the above are required:
   - in consideration of the grant, renewal, continuance, variation, assignment, novation or termination of a tenancy;
   - as a condition of arranging the grant, renewal, continuance, variation, assignment, novation or termination of such a tenancy,
   - on entry into a tenancy agreement containing relevant provisions;
pursuant to a provision of a tenancy agreement which requires or purports to require the person to do any of those things in the event of an act or default by the tenant or if the tenancy is varied assigned, novated or terminated
pursuant to an agreement related to the tenancy which requires or purports to require the person to do any of those things in the event of an act or default of the person or if the tenancy is varied assigned, novated or terminated; and
in consideration of providing a reference for a former tenant.

6. The prohibitions referred to above are referred to in this memorandum as “the fees ban”.

7. The Bill requires holding deposits to be returned to tenants when the tenancy agreement is entered into or if the landlord decides not to proceed with the letting (subject to certain exceptions).

8. The Bill provides that enforcement of the fees ban will be carried out by local authorities Trading Standards. The Bill also makes provision for tenants to be able to recover unlawfully charged fees.

9. An initial breach of the fees ban will be a civil offence with a fine of up to £5,000. A subsequent breach within 5 years of the imposition of a financial penalty or previous conviction will be a criminal offence but with a civil penalty of up to £30,000 as an alternative to prosecution. The criminal offence will be a banning order offence under the Housing and Planning Act 2016. Failure to return a holding deposit will be subject to a fine of up to £5,000.

10. The Bill amends the Consumer Rights Act 2015 to specify that the requirements on letting agents to be transparent about their fees, redress and client money protection scheme should apply to property portals. The Bill also proposes a new provision regarding fines in the event of a continuing breach of the requirements in England and will also require letting agents in England to display the name of the client money protection scheme to which they belong (if they are required to belong to such a scheme).

11. The Bill amends the Housing and Planning Act 2016 to specify that enforcement of the requirement on property agents in the private rented sector to belong to a client money protection scheme will be undertaken by local weights and measures authorities.

12. Finally, the Bill places duties on a lead enforcement authority to provide oversight, guidance and support with the enforcement of relevant letting agent legislation. The Lead Enforcement Authority is the Secretary of State or a person whom the Secretary of State has arranged to be the Lead Enforcement Authority.

13. The Bill proposals were subject to a public consultation, which ran for 8 weeks from 7 April until 2 June 2017. The consultation received 4,724 responses from stakeholders across the private rented sector. These responses and
additional stakeholder engagement have informed the implementation approach.

14. The Bill was published in draft on 1 November 2017 and was subject to pre-legislative scrutiny by the Housing, Communities and Local Government Committee (the Committee). The Committee published their report and recommendations on 29 March 2018 further to receiving over 60 written submissions and holding five oral evidence sessions with a range of stakeholders across the private rented sector, including the Ministry of Housing, Communities and Local Government. The Committee’s recommendations have been fully considered and have informed the final Bill.

15. We are grateful to the Committee on Delegated Powers and Regulatory Reform for their consideration of the Government’s draft delegated powers memorandum and their comments to the Committee of 23 February. These comments have been reflected in this memorandum.

16. The Delegated Powers in the Bill are:

- Clause 3(2): Power to add, modify or remove a reference to a permitted payment
- Clause 9: Power to amend maximum financial penalties
- Clause 22(2): Power to make arrangements for a lead enforcement authority
- Clause 22(4): Power to make transitional or saving provision when there is a change in the lead enforcement authority
- Clause 23(2)/(3): Duty / power of the Lead Enforcement Authority to issue guidance to which relevant enforcement authorities must have regard
- Clause 23(6): Power to direct the Lead Enforcement Authority (if not the Secretary of State) to issue guidance
- Clause 28(12): Power to make transitional, transitory or saving provision in connection with the coming into force of any provision of this Bill.
- Clause 32(1): Commencement power

C. ANALYSIS OF DELEGATED POWERS BY CLAUSE

Clause 3(2): Power to add, modify or remove a reference to a permitted payment

Power conferred on: Secretary of State
Power exercised by: Regulations (Statutory Instrument)
Parliamentary procedure: Affirmative procedure / Negative procedure

Purpose and context

17. Clause 3(2) contains a power to amend Schedule 1 of the Bill which specifies which payments are permitted payments under the Bill. Any payment that a landlord or letting agent requires a tenant make to themselves or a 3rd party and which is not a permitted payment is a prohibited payment under the Bill.
18. Permitted payments are payments of rent under a tenancy, payment of a tenancy deposit of no more than six weeks’ rent, payment of a holding deposit of no more than one week’s rent, payments that a tenant is required to make in the event of a default by the tenant, certain payments on assignment, novation, variation or early termination of a tenancy, and payments in respect of council tax, communication services and utilities.

19. Although no changes to the categories of permitted and prohibited payments are currently intended, the private rented sector is expanding and has a changing demographic as well as growing technological innovation. Similarly, rental levels have been subject to great change in the last few years and buy-to-let landlords have been affected by a number of new pieces of legislation, notably the imposition of higher rates of Stamp Duty Land Tax (implemented from 1 April 2016) and the restriction of cost relief for individual landlords (implemented from 1 April 2017). These recent legislative changes demonstrate that circumstances may arise whereby it becomes necessary to add, modify or remove a description of permitted payment.

20. The proposed power allows the Secretary of State to amend the categories of permitted and prohibited payments should it become necessary to do so to address any issues that are presently unanticipated. The power is qualified by subsection (3) which states that the power does not extend to removing rent from the categories of payment which are permitted payments under this Bill.

Justification for delegation

21. The Government has listed all the permitted payments that are currently intended and any qualifying factors, such as a capped level of deposits, on the face of the Bill. The list of permitted payments was informed by an eight week public consultation, which received 4,724 responses. The Government has also consulted extensively with stakeholders, including letting agent professional bodies, landlord and tenant representative groups as well as other interested parties since the announcement of the intention to ban letting agent fees paid by tenants at the Autumn Statement in November 2016.

22. Through extensive stakeholder engagement, consultation and pre-legislative scrutiny the Government has explored in detail the payments that should be permitted and prohibited under this Bill as well as any unintended consequences. As such the Government firmly believes that the list of permitted payments proposed in the legislation is the correct one.

23. However, following review of the practical operation of the fees ban in the marketplace, it could become apparent that the permitted payments require amendment. This could occur if agents or landlords amend their business practices or employ an avoidance tactic not currently anticipated to undermine the legislation. Similarly, technological innovation, economic or market changes may necessitate amendment to the permitted payments to ensure that there are not any unintended consequences of the legislation.
24. For example, the Government may wish to amend the level of capped tenancy deposit if the proposed cap has adverse impacts on the market or, due to economic and market changes, a new cap becomes more appropriate.

25. In reaching a decision on the appropriate level of a cap for the security and holding deposits, the Government had to reach an appropriate balance between increasing affordability for tenants at the outset of a tenancy and ensuring a reasonable level of security for landlords. Following consultation and pre-legislative scrutiny, the Government believes that the proposed cap levels strike the right balance in the present circumstances.

26. Tying the caps to a rental amount means that the caps should remain more reflective of market costs and therefore less likely to require amendment in the future. Nevertheless, there remains a chance that rental levels could deviate significantly from changes to income levels, which may lead to either affordability worries for tenants or concerns from landlords around a lack of financial security. The power set out in clause 3(2) will ensure that the Government is able to retain the right balance in the lettings market with regards to the financial concerns of both tenants and landlords.

27. During the Government's consultation and the Committee's pre-legislative scrutiny a number of agent and landlord groups requested that fees for reference checks should be exempt under the fees ban. The Government does not agree since it is the landlord, either directly or through an agent, who contracts the services of a referencing agency to provide assurance that the tenant is capable of meeting the terms of the tenancy.

28. However, there is a risk that not permitting a charge to be levied for referencing may lead to some tenants being discriminated against should an agent or landlord perceive them to be less likely to pass a reference check.

29. The Government believes this risk is low and is mitigated by permitting holding deposits to ensure that landlords and agents are not unfairly penalised owing to a failed reference check. Nevertheless the Government needs to be able to address any such unintended consequences caused by the implementation of the fees ban and this is the rationale for the power set out in clause 3(2).

**Justification for procedure selected**

30. The Government does not intend for the power to be used to significantly alter the objective of the legislation, which is to ban letting fees paid by tenants to increase competition and fairness in the lettings sector whilst giving tenants greater clarity and control over what they will pay.

31. However, given the importance of achieving the right balance between tenants’ interests and those of landlords and letting agents and the potentially significant impact of any changes on the private rented sector the Government considers it appropriate that the power in clause 3 will generally be subject to the affirmative procedure to allow adequate parliamentary
debate and scrutiny of any changes to permitted payments under the Bill and consideration of those competing interests.

32. Parliamentary scrutiny will also ensure that the power in clause 3 is not used for purposes contrary to the objectives of the legislation or to make changes that may have negative consequences on the lettings market. The government is of the view that this will provide sufficient safeguard in the exercise of this power.

33. However, the Government considers the negative procedure to be appropriate in the case of regulations made solely to amend the amount set out in paragraph 5(2)(a) of Schedule 1 to reflect changes in the value of money. This is the amount which is set as the maximum amount that may be charged for an assignment, variation or novation of a tenancy at the tenant’s request – currently £50 (unless the landlord’s costs are greater). The use of the negative procedure to amend Schedule 1 is tightly limited and could not be used to undermine the intention of the legislation, the sum that may be amended is a small one and negative procedure may only be used for amendments which reflect changes in the value of money, therefore we consider the negative procedure to be appropriate for this aspect.

34. In the submission of 23 February to the Select Committee on Housing, Local Government and Communities, the Committee on Delegated Powers and Regulatory Reform indicated that the broad scope of the power is justified to deal with changes in circumstances which cannot at the moment be anticipated or predicted. Further, it was noted that the width of the power is balanced by the fact that the affirmative resolution procedure will apply to any regulations made under clause 3(2).

35. We note that the qualification in relation to regulations amending the amount for the time being set out in paragraph 5(2)(a) was not considered by the Committee on Delegated Powers and Regulatory Reform in pre-legislative scrutiny. The Government does however believe that the use of the negative procedure solely to reflect the change in the value of money is justified for the reasons given above.

Clause 9: Power to amend maximum financial penalties

*Power conferred on:* Secretary of State  
*Power exercised by:* Regulations (Statutory Instrument)  
*Parliamentary procedure:* Negative procedure

**Purpose and context**

36. The Bill provides that a local authority may impose a financial penalty of up to £5,000 for an initial breach of the fees ban or for failure to return a holding deposit. A subsequent breach of the fees ban within 5 years of the imposition of a financial penalty or previous conviction will be a criminal offence but enforcement authorities may impose a financial penalty as an alternative to
prosecution. The local authority can determine the amount of the penalty, which may be up to £30,000. This high penalty reflects feedback from the Government consultation and pre-legislative scrutiny that indicated that there needed to be a significant deterrent for agents and landlords breaching the ban.

37. Clause 9 contains a power for the Secretary of State to make regulations amending the amount of financial penalty that a local authority may charge, to reflect changes in the value of money. Clause 9(3) enables the Government to make transitional, transitory or saving provision in relation to the uprating in order to ensure that there is a smooth transition from one upper limit to another.

38. We note that this power was not considered by the Committee on Delegated Powers and Regulatory Reform in pre-legislative scrutiny.

_Justification for delegation_

39. The Government considers that regulations are appropriate to amend the amount of financial penalty that a local authority may charge. These are changes that are intended only to reflect the value of money and not to alter the intent or effect of the legislation. Permitting local authorities to levy financial penalties of up to £30,000 for breaches of the fees ban is intended to serve as a significant deterrent to agents and landlords. Including a power to amend the amount of penalty ensures that the Government can address any issue where the deterrent effect is no longer realised owing to changes in the value of money without the need for primary legislation.

40. There is a precedent for delegation in these circumstances in section 23(9) of the Housing and Planning Act 2016. Including a regulation making power enables the legislation to remain relevant over time, to reflect changes in the value of money.

_Justification for procedure selected_

41. The Government considers that the affirmative procedure is not proportionate in the case of a power that enables the financial penalties to be amended solely to reflect changes in the value of money to ensure that the legislation remains relevant over time. Given the very limited scope of the power the Government considers that the negative procedure is proportionate. As referred to above, there is also a precedent in the Housing and Planning Act 2016.

Clause 22(2): Power to make arrangements for a local weights and measures authority in England to be the lead enforcement authority for the purposes of this Bill.

*Power conferred on:* Secretary of State  
*Power exercised by:* arrangements made by the Secretary of State
Parliamentary procedure: none

Purpose and context

42. Under clause 22(2) the Secretary of State may by arrangement delegate the lead enforcement authority functions to a trading standards authority who will then act as the lead enforcement authority for the whole of England instead of the Secretary of State.

Justification for delegation and procedure selected

43. In making arrangements for the delivery of the functions of the lead enforcement authority the Secretary of State is bound to follow a fair and open procurement process. The award of the contract will be liable to legal challenge on the usual public law principles. The Government is of the view that this will provide sufficient safeguard in the exercise of this power.

44. This power is broadly in line with:
   a) Section 24A(2) and (3) of the Estate Agents Act 1979 which enables the Secretary of State to make arrangements for the carrying out of his functions of the lead enforcement authority under that Act;
   b) Section 13(1)(b) National Minimum Wage Act 1998 and section 15(2) Gangmasters (Licensing) Act 2004 which each enable the Secretary of State to make arrangements for the delivery of functions under the relevant Act to be carried out by officers of a Minister, Department or body performing functions on behalf of the Crown.

Clause 22(4): Power to make transitional provision for a change in the lead enforcement authority

Power conferred on: Secretary of State
Power exercised by: Regulations (Statutory Instrument)
Parliamentary procedure: None

Purpose and context

45. The purpose of the power in clause 22(4) is to enable the Secretary of State to smooth the transition between trading standards departments should the lead enforcement authority change at any time. It may be necessary, for example, to make transitional provisions and provide for savings relating to notices issued by and other enforcement action taken by a trading standards department before its appointment as lead enforcement authority comes to an end.

Justification for delegation and procedure selected
46. No parliamentary procedure is proposed for regulations made under new clause 22(4) as any use of these powers would only be for transitional purposes on the transfer of functions from one lead enforcement authority to another.

47. The power is very similar to that in section 24A(4) of the Estate Agents Act 1979 and section 7(5) Mesothelioma Act 2014.

Clause 23(2) & (3): Duty / power to issue guidance

*Power conferred on: Secretary of State or the Lead Enforcement Authority (if not the Secretary of State)*  
*Power exercised by: Guidance*  
*Parliamentary procedure: None*

**Purpose and context**

48. Clause 23 establishes a Lead Enforcement Authority with oversight, guidance and enforcement functions in relation to relevant letting agency legislation. The Lead Enforcement Authority may be the Secretary of State or a local weights and measures authority with which the Secretary of State has made arrangements.

49. Clause 23(2) places the Lead Enforcement Authority under a duty to issue guidance to enforcement authorities about the exercise of their functions under the Bill. Pursuant to clauses 6(4) and 7(2) enforcement authorities must have regard to such guidance when exercising their enforcement functions under the Bill.

50. Clause 23(3) places the Lead Enforcement Authority under a duty to provide information and advice to relevant enforcement authorities about the operation of the relevant letting agency legislation in the form and manner it considers appropriate.

51. Relevant letting agency legislation is the Tenant Fees Bill and the requirements under the Consumer Rights Act 2015, the Enterprise and Regulatory Reform Act 2013, and the Housing and Planning Act 2016 related to fees transparency, membership of a redress scheme and membership of a client monies protection scheme respectively.

52. Should the Secretary of State or Lead Enforcement Authority consider it appropriate to issue guidance on the operation of any other relevant letting agency legislation then relevant enforcement authorities will be required to have regard to it when exercising their enforcement functions under the legislation in question. This is effected by way of amendments made by clauses 27(1)(b), 27(2)(a) and 27(5)(a) to the Consumer Rights Act 2015, the Enterprise and Regulatory Reform Act 2013 and the Housing and Planning Act 2016.
53. The guidance on the Tenant Fees Bill and any other relevant letting agency legislation will support local authorities in understanding and undertaking their responsibilities under the relevant Acts. In particular, the Government would expect that it will provide detail regarding practical aspects of enforcement such as interactions between the Lead Enforcement Authority and local enforcement authorities, including the setting out of reporting requirements and/or procedures (see clause 24(7)). The Government would also expect that guidance will be used to promote and provide examples of best practice and to promote consistency in application of the legislation, for example in relation to the circumstances in which it would be more appropriate to issue a financial penalty rather than prosecute in respect of an offence under the Tenant Fees Bill, and the appropriate levels of financial penalty in particular circumstances.

54. The Government would expect that the guidance issued would be similar in style to that published to support local authorities in issuing Civil Penalties under the Housing and Planning Act 2016 but with additional scenarios and case studies as appropriate: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606653/Civil_Penalties_guidance.pdf

55. The Department is working with local authorities to draft the guidance and will share a version with Parliament in due course.

Justification for delegation

56. Setting out principles in guidance to which relevant enforcement authorities must have regard will help to ensure that the approach of different authorities is consistent whilst allowing relevant enforcement authorities an appropriate measure of discretion as to how those principles are applied. It is appropriate to allow such discretion by setting out these principles in guidance rather than setting out a prescriptive approach in legislation because the factual matrix of an offence may vary considerably.

57. In particular, it will be a matter for local enforcement authorities to decide whether on the facts of any particular case it should prosecute or impose a financial penalty for an offence under this Bill.

58. The guidance will give a level of technical detail about procedures relating to the enforcement function as well as scenarios and case studies that would not be suitable for inclusion in the primary legislation. It is appropriate that there is the ability to easily update the guidance, procedures and examples given to reflect the experience on the ground following implementation of the legislation as well as any changing circumstances in the lettings market. For these reasons, it is necessary to take the power to issue guidance rather than prescribe an approach on the face of the Bill.

59. Under clause 22(2) the Secretary of State may make arrangements for a local weights and measures authority in England to be the lead enforcement authority instead of the Secretary of State. It is therefore necessary to provide
for the lead enforcement authority to issue guidance as well as the Secretary of State.

Justification for procedure selected

60. It is proposed that this power should not be subject to any Parliamentary procedure since Parliament has 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 also include detail inappropriate for parliamentary scrutiny such as reporting processes. As set out above, 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 also a precedent in the Housing and Planning Act 2016.

61. In the submission of 23 February, the Committee on Delegated Powers and Regulatory Reform noted that 'since the guidance is likely to be highly influential as to how enforcement functions are exercised [...] it should be made subject to parliamentary scrutiny, with the draft negative procedure offering an appropriate level of scrutiny.'

62. In recognition of these concerns, Government will share draft guidance with the House of Lords in due course to provide greater clarity on the proposed contents.

Clause 23(6): Power to direct the Lead Enforcement Authority (if not the Secretary of State)

Power conferred on: Secretary of State
Power exercised by: Direction
Parliamentary procedure: None

Purpose and context

63. Where the lead enforcement authority is not the Secretary of State, the Government intends that it will be primarily responsible for issuing guidance to relevant enforcement authorities if it considers it appropriate. However, clause 23(6) provides a power for the Secretary of State to direct the lead enforcement authority to issue guidance about the working and enforcement of the relevant letting agency legislation and about the contents of such guidance. It is intended that the Secretary of State will retain a light touch oversight role in ensuring that the guidance to relevant enforcement authorities is appropriate (where it has made arrangements for a trading standards authority to fulfil the Lead Enforcement Authority role), and this power will enable him if necessary to direct the lead enforcement authority how to respond in guidance to a development in the market or in response to practice on the ground to which the Secretary of State considers relevant enforcement authorities should have regard.
**Justification for delegation and procedure selected**

64. This power supplements the duties to issue guidance and provide information and advice referred to above if the Lead Enforcement Authority is not the Secretary of State.

65. The justification for delegation and procedure selected is, accordingly, as set out above at paragraphs 55 to 62 in relation to the power to issue guidance.

**Clause 28(12): Power to make transitional, transitory or saving provision in connection with the coming into force of any provision of this Bill.**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: None*

**Purpose and context**

66. This clause contains a standard power for the Secretary of State to make transitional, transitory or saving provision in connection with the bringing into force of provisions of the Bill.

**Justification for delegation and procedure selected**

67. This power is necessary to make transitional provision in connection with the commencement of the Bill which may be too detailed to appear on the face of the Bill. It will be needed, in particular, in connection with the bringing into force of the fees ban. The power enables the Secretary of State to deal with transitional issues that arise from the circumstances that exist when the Bill is brought into force.

68. As usual with such powers, it is not subject to any parliamentary procedure. Parliament has approved the principle of the provisions in the Bill by enacting them. This power will enable them to be implemented in an orderly manner.

**Clause 32: Commencement power**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations (Statutory Instrument)*

*Parliamentary procedure: None*

**Purpose and context**

69. This clause contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations.
70. As usual with commencement powers, regulations made under this clause are not subject to any Parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

Ministry of Housing, Communities and Local Government
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