House of Commons

Housing, Communities and Local Government Committee

Pre-legislative scrutiny of the draft Tenant Fees Bill

Third Report of Session 2017–19

Report, together with formal minutes relating to the report

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Housing, Communities and Local Government Committee

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Contacts

All correspondence should be addressed to the Clerk of the Communities and Local Government Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 4972; the Committee's email address is hclgcom@parliament.uk.

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Summary

The Government's draft Tenant Fees Bill, as published on 1 November 2017, is intended to make renting in the private rented sector fairer and easier for tenants by introducing a ban on "tenant fees", fees chargeable to tenants by landlords and letting agents. With increasing numbers of people living in the private rented sector, we support the aims of the draft Bill and broadly support the proposed legislation. We believe it has the potential to save tenants in the private rented sector hundreds of pounds as well as making the market more transparent.

However, it is clear that some improvements could be made in order to better deliver the Bill's aims. Our key recommendations are as follows:

- **Security deposits should be capped at the equivalent of five weeks' rent in recognition that finding six weeks' worth of rent can cause financial difficulties for tenants.**

Tenants are required to find large sums of money at the start of a tenancy which can pose a significant financial challenge. By reducing the cap on security deposits, the private rented sector will become more affordable while also protecting landlords from rogue tenants.

- **Landlords should only be permitted to retain the full holding deposit if the tenant knowingly provides false or misleading information. If the tenant provides information in good faith and subsequently fails a reference check, the landlord should only be permitted to retain the cost of a reference check.**

If a tenant fails a reference check despite providing accurate information, it is unfair for the tenant to lose their entire holding deposit. Simply encouraging landlords to do the right thing and return all but the cost of a reference check is unsatisfactory. But there should be some disincentive for tenants knowingly to lie. We think "reasonableness" an unsatisfactory threshold for dividing the cases.

- **Clear guidance needs to be provided on what type of fee, and how much, constitutes a reasonable default fee, and a role for trading standards in enforcing the reasonableness of such fees should be considered.**

While default fees can represent actual costs for landlords and letting agents, they are open to abuse. The definition of a reasonable default fee must be clarified and the limiting of fees to what is reasonable more easily enforced.

- **Tenants should be allowed to recover any prohibited fees through the First-tier Tribunal and landlords should be prevented from recovering possession of their property until they have repaid any prohibited fees.**

It is unrealistic to expect tenants to recover any prohibited fees through the County Court process. The First-tier Tribunal is more user-friendly. By preventing landlords from recovering possession of their property, it would encourage swift repayment in the event of a breach of the ban on tenant fees.

- **Additional funding should be made available to local authorities to enforce the legislation if the Bill is to fulfil its potential.**

Funding enforcement of the legislation solely through civil penalties will not sufficiently resource local authorities and may even encourage less effective enforcement practices.

- **All draft Bills should be published alongside an Impact Assessment in line with existing Government guidance.**

It is highly concerning that the Ministry did not publish an Impact Assessment at the same time as publishing the draft Bill despite guidance from the Cabinet Office and the Department for Business, Energy and Industrial Strategy that they should do so. Effective Parliamentary scrutiny can benefit from ensuring key stakeholders and others are able to fully assess the Government's anticipated impact of a draft Bill.

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1 Introduction

Background

1. The Government believes that the lettings market is not functioning fairly for tenants and requires intervention.[1] As a result, it announced its intentions in the 2016 Autumn Statement to ban fees chargeable to tenants ("tenant fees"). The commitment was later referenced in the Conservative Party's 2017 General Election manifesto and in the 2017 Queen's Speech. Following a public consultation between April and June 2017, the Government published the draft Tenant Fees Bill on 1 November 2017. A ban on tenant fees is not a new idea to Parliament. It was a 2015 and 2017 manifesto pledge of both the Labour and Liberal Democrat parties and was the subject of a 2016 private Members' Bill in the House of Lords.

Our inquiry

2. On publication of the draft Bill, the Secretary of State wrote to the Committee inviting Parliamentary scrutiny with a view to ensuring that the draft Bill would achieve the Government's objectives. Our inquiry focused on the aims of the draft Bill and considered whether there were any loopholes or potential unintended consequences, whether it could be effectively enforced and how it would impact tenants, landlords and letting agents. This Report sets out our key conclusions and recommendations ahead of the formal introduction of the Bill to Parliament. An assimilation of the various ways in which we recommend, in the body of the Report, that the Government should amend the text before introducing the final Bill to Parliament can be found in the Annex.

3. In scrutinising the draft Bill, we found some minor legal drafting errors and anomalies which have been resolved informally with officials from the Ministry of Housing, Communities and Local Government. Details can be found in the Annex. More significant technical issues are raised in the chapters below.

4. We thank all those who have contributed to our inquiry. We received over 60 written submissions and held five evidence sessions, hearing from a range of stakeholders including tenants, landlords, letting agents and local authorities. We are also grateful to the House of Lords Select Committee on Delegated Powers and Regulatory Reform for agreeing to consider the Government's draft delegated powers memorandum at short notice. We also held two private meetings with officials from the Ministry which we found particularly useful. We hope that our Report, and the oral and written evidence we have collected, which we will seek to tag to the debates on the Bill, will assist the House in considering the Bill when it is introduced.

1 Secretary of State Sajid Javid, Written Statement (HCWS212), 1 November 2017

2 Aim of the draft Bill

Introduction

5. According to the Secretary of State, the intended objective of the draft Bill is to deliver "a fairer, more competitive, and more affordable lettings market where tenants have greater clarity and control over what they will pay and where the landlord is the primary customer of the letting agent".[2] The Government stated that:

> Tenants have little control over letting fees because the agent is appointed by the landlord and as a result those fees can run into hundreds of pounds. This is not fair… a ban is necessary to recognise the stronger market position of landlords and to reflect that agent services are primarily provided on their behalf.[3]

6. With increasing numbers of people living in the private rented sector, it is important that where the lettings market is found to be unfair to tenants, the Government intervenes.

7. This chapter considers the broad policy aims of the draft Bill. Later chapters raise specific instances where we consider that these objectives could be better achieved in a different way.

Fairness

8. The Government identified the power imbalance between tenants, landlords and letting agents as a key justification for the legislation.[4] We have heard the current relationship described as "dysfunctional" and "artificial and rather unhelpful".[5] The Government stated that "tenants have little control over letting fees because the agent is appointed by the landlord".[6] The Northern Housing Consortium (NHC) agreed: "tenants, as the consumers of the service, have no choice in using a particular agent and are therefore being subjected to whatever charges the agent uses".[7] Kate Webb, Head of Policy at Shelter, told us that if tenants do not accept the fees, they are likely to lose the property.[8] She went on to say that "at the moment agents are strongly incentivised to make the most attractive offer to the landlord, who is the active consumer, knowing full well that they can pass it on to the tenant, who is far more passive in this situation".[9]

9. The dysfunctional nature of the relationship was also recognised by some industry bodies. The National Landlords Association (NLA) told us:

> Traditionally, property agents treat landlords as 'clients' and as such the law of agency applies. However, increasingly as chargeable services are provided to applicants and tenants these individuals are taking on a status

2 Secretary of State Sajid Javid, Written Statement (HCWS212), 1 November 2017
3 Secretary of State Sajid Javid, Written Statement (HCWS212), 1 November 2017
4 Secretary of State Sajid Javid, Written Statement (HCWS212), 1 November 2017
5 Q99; Q172
6 MHCLG, DTF0044
7 Northern Housing Consortium, DTF0039
8 Q48
9 Q48

> as secondary clients. The NLA has long been concerned that this represents a potential conflict of interest should the agent need to negotiate concessions on the part of the tenant.[10]

In clarifying that the transactional relationship is between the landlord and the letting agent by prohibiting fees chargeable to tenants, the draft Bill ensures that tenants are no longer financially impacted by the landlords' choice of letting agent. Mette Isaken, Senior Policy Researcher at Citizens Advice, welcomed this relationship shift. She told us that "the landlord is paying for a service from the letting agent in order to get their income from the rent, so that is where the service should be provided and the payment should be made".[11] Shelter also welcomed the principle, saying that "landlords will be clearly established as the primary consumer of agents, removing concerns about double-charging".[12]

10. However, some concerns were raised that the shift in power would negatively affect tenants.[13] Chris John & Partners said:

> Tenants will no longer be clients of ours at any point in the process. We will continue to try to represent their interests as far as we can and to act as a buffer between landlord and tenant when things get difficult, but many agents will no longer bother. There will be a power shift towards landlords.[14]

11. The National Approved Letting Scheme (NALS) contended that "the 'customer/provider' relationship between the tenant and the agent will be broken. This will call in to question the current arrangements whereby tenants can seek redress for poor service via the agent's complaints procedure and a redress scheme".[15] However, The Property Ombudsman contested this. It told us:

> We have had concerns raised with us from within the industry, that the enacted Bill will mean that tenants or prospective tenants will have a non-fiduciary relationship with the agent and that this will result in a weaker claim for consumer redress. For the Committee's reference, we do not agree with this view having regard to the Ombudsman's Terms of Reference which makes provision for complaints to be received from all consumers and allows compensatory awards to be made on the basis of actual proven financial loss and/or distress, aggravation and inconvenience.

12. **The relationship between tenants, landlords and letting agents is unusual in that letting agents see themselves as providing services to both tenants and landlords. Landlords choose letting agents and tenants choose properties. In doing so, tenants have little choice but to accept letting agents' fees. We agree that it is right that the Government has sought to rebalance the relationship.**

10 Q105
11 Q105
12 Shelter, DTF0047
13 See also ARLA Propertymark, DTF0036; National Landlords Association, DTF0030; UK Association of Letting Agents, DTF0037; and Lifestyle Property, DTF0012
14 Chris John &Partners, DTF0003
15 The National Approved Letting Scheme, DTF0050

Competition

13. In rebalancing the relationship between tenants, landlords and letting agents, the Government hopes that the draft Bill will increase competition in the lettings market as:

> It will sharpen and increase letting agents' incentives to compete for landlords' business resulting in a more transparent market with lower overall fee levels and a higher quality of service. A ban will also reduce the risk of unfair practices in the form of double charging … thus making the sector more competitive, more affordable and of a higher standard.[16]

This view is shared by tenant groups. Shelter told us:

> The Bill will lead to a more competitive lettings market because to remain financially viable, agents will need to offer fair prices and high-quality services to attract and keep a landlord's business …
>
> Shelter anticipates the Bill will result in landlords receiving a better and more transparent service from agents. Landlords will be clearly established as the primary consumer of agents, removing concerns about double-charging, and agents will need to offer landlords services at a price which fairly reflects the quality of services provided.[17]

14. However, we heard widespread concerns from letting agents that the loss of revenue would lead to job losses and business closures, thereby reducing competitiveness in the sector.[18] According to the Government's assessment of impact, the draft Bill, if enacted in its current form, is likely to deprive letting agents of £80 million per annum in revenue.[19] ARLA Propertymark (ARLA) believed that job losses are inevitable as a result of the draft Bill and that in the worst-case scenario 16,000 jobs will be lost in the sector and a further 8,000 in the supply chain.[20] Chris John & Partners shared this view, telling us: "it is unlikely that landlords will accept much in the way of fee increases. There will be job losses. In an already difficult post-Brexit sales market some mixed service agents will go to the wall".[21]

15. To survive in the market, Dr Julie Rugg, Senior Research Fellow at the Centre for Housing Policy at the University of York, told us that service levels of some letting agents may decline:

> Markets are such that a rental level will be maintained, but the quality of the property might decline. The landlord's willingness to attend to repairs might go down if the letting agent fees go up … It might be things such as people [letting agents] not doing as many inspections of a property as they

16 MHCLG, DTF0044
17 Shelter, DTF0047. See also Q99 [Mette Isaken]
18 See The National Approved Letting Scheme, DTF0050; ARLA Propertymark, DTF0036; Q137; LSL Property Services, DTF0040; National Landlords Association, DTF0030; Brittons Estate Agents Ltd, DTF0038; Leaders Romans, DTF0027; Regal Lettings, DTF0002
19 MHCLG, DTF0044
20 ARLA Propertymark, DTF0036
21 Chris John &Partners, DTF0003

> might have done in the past so that there is a cut in service rather than a cut in rent … They [letting agents] might not be training their staff in a way that you would want them to.[22]

ARLA agreed:

> Letting agents deliver a hugely valuable service in ensuring that properties are safe, compliant and professionally managed… An outright ban on letting fees will likely mean that agents become unable to continue offering a full service to tenants.[23]

16. While the Government stated that "agents will need to consider their business models" in light of the draft Bill, it contended that the legislation is only "likely to have a negative impact on agents that are unable to adapt to a market where letting fees to tenants are banned".[24] Shelter concurred:

> There is no reason why agents who offer a good quality service will not be able to adapt. Shelter's most recent private landlord's survey showed service quality was far more important to landlords than price, with 74% of landlords saying they choose their agent "because they have the best reputation for service overall", compared to only 18% who choose based on price … agents have shown their adaptability on previous occasions.[25]

The NHC agreed that there is no reason why letting agents cannot adjust to a new operating environment.[26]

17. Indeed, some letting agents already operate without charging fees to tenants. OpenRent told us that:

> OpenRent's combination of (i) being the largest letting agent and (ii) not charging agency fees to tenants, constitutes proof that a ban on letting fees is not 'bad for business' as so many in the industry insist. Our existence is an argument that cannot be ignored.
>
> We have grown, from founding in 2012 to today's market-leading position, without charging the huge fees our competitors have. Tenant fees are simply not a necessary part of a letting agent's business model in the age of online property search, digital signatures and ecommerce technology.[27]

18. If the prohibition of fees does lead to letting agent closures, Shelter believed that the "loss of some agents will not necessarily be negative for the market. The ban may additionally help to drive the worst performing agents from the market, as they are least likely to be able to offer a good quality service to landlords".[28]

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22 Q47; Q55
23 ARLA Propertymark, DTF0036
24 MHCLG, DTF0044
25 Shelter, DTF0047
26 Northern Housing Consortium, DTF0039
27 OpenRent, DTF0057. We note that OpenRent do charge a set fee of £20 if a landlord requires a reference from a tenant.
28 Shelter, DTF0047

19. **While we acknowledge that the draft Bill would deprive letting agents of an income source, we agree that the draft Bill will increase competition in the sector by improving fee transparency, which will reduce unfair practices, and is to be welcomed given existing irregularities in the market.**

Affordability

20. The obvious improvement in affordability for tenants is that they would no longer be required to pay fees to landlords and letting agents as the draft Bill would prohibit all payments with the exception of rent, security deposits of up to six weeks' rent, holding deposits of up to one week's rent, and default fees. The Government estimate that the average household in the private rented sector will benefit by between £18 and £50 annually as a result.[29] However, we heard that tenants could benefit by much more given that the Government found that renters pay an average of £200–£300 per tenancy in letting agents' fees, with some respondents to the Government's public consultation saying they had paid over £1,000.[30] Mette Isaken from Citizens Advice told us she "anticipates that tenants would save hundreds of pounds every time they move".[31] Shelter stated that "with average fees of more than £200 and many renters being forced to pay more than this, the Bill will significantly ease the financial pressure on tenants".[32]

21. However, despite repeatedly hearing from landlords and letting agents that the draft Bill would result in job losses, business closures and decreased service levels, we heard—mainly from the industry—that it would not improve long-term affordability as rents would rise to recover lost income.[33] The Royal Institute of Chartered Surveyors (RICS) stated that "a ban on fees for tenants could lead to additional charges for landlords who will then pass on the cost in the form of higher rents".[34] A survey conducted by ARLA supported the RICS's claim by finding that 90% of letting agents thought that rents would increase.[35] Cheshire West and Chester Council also identified this risk.[36] The Residential Landlords Association (RLA) stated that "the market would become less transparent. Rather than a clear fee at the start, the costs would be included in the rent which tenants would be paying almost permanently on a monthly basis".[37] ARLA believed that this would disproportionately disadvantage "lower income families who will probably move less often than younger, wealthier millennials … the proposed ban will financially disadvantage tenants unless they move on a regular basis".[38] RICS went on to state that "clearly such an outcome is at odds with the stated objective of creating a more affordable PRS [private rented sector]".[39]

29 MHCLG, DTF0044
30 MHCLG, DTF0044
31 Q99
32 Shelter, DTF0047
33 See The National Approved Letting Scheme, DTF0050; MakeUrMove, DTF0048; ARLA Propertymark, DTF0036; Royal Institute of Chartered Surveyors, DTF0041; National Landlords Association, DTF0030; My Place in Cornwall, DTF0032; GD Estates Ltd, DTF0017; Keystone IEA Ltd, DTF0008
34 Royal Institute of Chartered Surveyors, DTF0041
35 ARLA Propertymark, DTF0036
36 Cheshire West and Chester Council, DTF0022
37 Residential Landlords Association, DTF0023
38 ARLA Propertymark, DTF0036
39 Royal Institute of Chartered Surveyors, DTF0041

22. Shelter do not believe that rents will rise.[40] Research, which they commissioned, found that landlords in Scotland, where that has been a comparable tenant fees ban fully in place since 2012, were no more likely to have increased rents since 2012 than landlords elsewhere in the UK.[41] Kate Webb from Shelter told us that the risk of rent increases as a result of the draft Bill was an issue that Shelter considered thoroughly.[42] She told us that:

> It is very difficult to make predictions about what will happen to rents… When you look at the range and size of fees being charged across the sector, it is very difficult to argue that a landlord, who has the choice of whether to go with that particular agent and has the consumer power to question the fees, will accept some of the costs that are being charged to tenants. Our assumption is that they just will not.[43]

Mette Isaken from Citizens Advice agreed. She told us that "judged on the fact that there are inflated fees at the moment and there is double-charging of landlords and tenants, we would at least anticipate that tenants would definitely save money and that letting agents will absorb at least the vast majority of the cost of it".[44] Brittons Estate Agents supported this argument by stating that fees are unlikely to be transferred to landlords and will be absorbed by agencies.[45]

23. While Shelter disputed that rents will rise, it argued that even if some landlords do increase rents, this is preferable for tenants as it is more transparent and costs are spread over time.[46] The results of the Government's public consultation supported this argument; 24% of tenant responses explicitly stated that a rise in rent was preferable to upfront fees.[47] Dan Wilson Craw, Interim Director of Generation Rent, also supported this assertion. He told us that "a lot of tenants will prefer to avoid costs at the start of the tenancy, even if it means that they are paying slightly more".[48]

24. **Given the comprehensive ban on letting fees, we conclude that the legislation will improve affordability for tenants in the private rented sector at the start of a tenancy. The draft Bill has the potential to save tenants hundreds of pounds. We acknowledge concerns that rents may increase, but believe the risk to be low as demonstrated by the recent experience in Scotland and the expected effect of improving the competitiveness of letting agents. If rents do increase to recover lost letting agent or landlord income, we believe that would be preferable for tenants as it spreads costs over a tenancy and still reduces the up-front cost of renting in the private rented sector.**

40 Shelter, DTF0047
41 Shelter, *End Letting Fees: Lessons from the Scottish lettings market*
42 Q58
43 Q58
44 Q100
45 Brittons Estate Agents Ltd, DTF0038
46 Shelter, DTF0047
47 MHCLG, DTF0044
48 Q101

3 Permitted payments

Introduction

25. Clauses 1 and 2 of the draft Bill prohibit all payments to a landlord or a letting agent which are "a condition of the grant, renewal or continuance" of a residential tenancy.[49] But clause 3 and Schedule 1 allow certain "permitted payments",[50] namely:

- rent,
- tenancy (security) deposit,
- holding deposit, and
- "default" payments.

26. In this chapter, we consider:

- the four categories of permitted payment in turn,
- whether any others should be permitted, and the Government's power to amend the categories, and
- whether the general prohibition is wide enough to encompass fees charged at the end of a tenancy.

Rent

27. Paragraph 1 of Schedule 1 permits rent payments, but the prohibition on fees would be ineffective if landlords could disguise them in this permitted rent. We heard that a slight increase in rent, spread over time, would be preferable to up-front fees.[51] But if landlords could simply add the fees to the first month's rent, the prohibition would be worthless. To prevent this "front-loading", paragraph 1 provides that there is a prohibited payment if a landlord charges, for one period of the tenancy, a higher rent than is charged for a later period in the first year of the tenancy.[52]

28. However, there is an exception. The Government told us that it wants to allow "the landlord and tenant to agree a rent decrease later in the tenancy",[53] or under a review clause in the tenancy.[54] Accordingly, paragraph 1(6) provides that downward variations in rent do not create a prohibited payment where the variation of rent is "by agreement between the landlord and the tenant", or "pursuant to a term in the tenancy which provides for variation of the rent … ". Several witnesses thought this would allow the front-loading the Government is at pains to avoid.[55] Dr David Smith, Policy Director at the RLA described it as:

49 Cll 1(1) and 2(1)
50 Defined in Schedule 1
51 Shelter, DTF0047
52 Schedule 1, para 1, subparas (2) to (8)
53 Q355
54 MHCLG, DTF0059
55 See Q354–356

> Clearly a mistake—where it says that you cannot charge a higher rental in the first month, and then it goes on to say that you can if it is in the tenancy agreement. Obviously, if I am going to charge a higher rental in the first month, it is going to be in my tenancy agreement. Why would it not be?[56]

29. The Government recognised that the provision "could, in theory, enable a landlord to set an initially high-rent … and then reduce the rent in order to disguise a fee as higher rent in the first month", but said it didn't want the provision "obstructing rent decreases for other reasons" and believed "most tenants [would] object to inflated up-front rent".[57]

30. ***As Schedule 1 is currently drafted there is little to prevent a tenancy agreement providing that the rent is very high initially, with a downward variation to take effect from, for example, a month later. We therefore believe that the Government should amend Schedule 1, paragraph 1(6), to make it clear it applies only to variations in the rent which are agreed after the tenancy agreement has been entered into, or take effect under a review clause which permits upward as well as downward review. Alternatively, the Government could simply remove subparagraph (6) altogether given downward rent variations would still be permissible after 12 months.***

Security deposit

31. Schedule 1, paragraph 2 provides that tenants can be required to pay up to six weeks' worth of rent as a security deposit. The money is intended to be held as security for (a) the performance of any obligations of a tenant, or (b) the discharge of any liability of a tenant, arising under or in connection with a tenancy.[58] The Government stated that capping security deposits would "ease the financial burden that tenants can face at the start of a tenancy" and may lead to reduced instances of financial difficulty.[59] 68% of respondents to the Government's public consultation supported the introduction of such a cap.[60]

32. The level of the cap has, however, proved more contentious. The Government's public consultation broadly found that landlords supported a cap of two months' rent, while letting agents preferred six weeks and two thirds of tenants called for a cap of one month's rent or less.[61] Our inquiry has received a similarly mixed response to this matter.

33. Landlords and letting agents have generally welcomed the six-week cap though some industry bodies wished to see the cap raised to eight weeks. The RLA stated that while it welcomed the proposals in the draft Bill to cap the security deposit at more than four weeks, it "feel[s] that two months would be a better limit".[62] This opinion was shared by LSL Property Services plc (LSL) who argued that a security deposit capped at eight weeks' rent "would provide flexibility to accommodate tenants that request extra services, tenants with pets or those considered to be a credit risk".[63]

56 Q137 [Dr Smith]. See also Private Rented Sector Professionals Ltd, DTF0009; Generation Rent, DTF0055 and Q108
57 MHCLG, DTF0059
58 Schedule 1, Paragraph 2
59 MHCLG, DTF0044
60 MHCLG, DTF0044
61 MHCLG, DTF0044
62 Residential Landlords Association, DTF0023
63 LSL Property Services plc, DTF0040

34. The belief that some tenants warrant the charging of a higher security deposit is widespread among landlords and letting agents, and was often used by witnesses to justify the importance of capping security deposits at no lower than six weeks' worth of rent. David Smith-Milne, Managing Director of PlaceFirst, told us:

> We, as a landlord, have a wide variety of tenants. You might think that this is a small thing, but it is actually quite an important point: tenants who tend to have pets often struggle to get properties in the private rented sector, because their landlords have a zero pet policy. We as a landlord are happy to take tenants with pets, but often pets cause quite a lot of damage in a property, and capping a deposit at six weeks' rent in an area where the rent is not particularly high—say, £400 to £500 a month—may not necessarily cover the cost of, say, re-carpeting a house after a tenant has moved out.[64]

Some industry submissions suggested that reducing the cap may result in some tenants finding the private rented sector less accessible as landlords seek to minimise their risk.[65]

35. However, both Shelter and Citizens Advice disputed the importance of a six-week cap and called for the cap to be reduced to four weeks. They contended that decreasing security deposits to four weeks' rent would not negatively affect landlords. Shelter found that 55% of landlords already ask for a deposit equivalent to one month's rent, with only 6% asking for more than six weeks.[66] Similarly, research by Citizens Advice found that only 8% of renters had paid a deposit of more than six weeks' rent.[67] This—the only empirical evidence we received—suggests that the need for a deposit of more than six week's rent is not prevalent. The research conducted by Citizens Advice also found that the average deposit returned to tenants at the end of the tenancy was over 75% of the deposit amount, thereby suggesting that security deposits are unnecessarily high and "disproportionate to the risk they insure against".[68]

36. Shelter also countered claims made by Dr Smith from the RLA that a cap of at least six weeks' rent was necessitated because "if you make it a month, if the tenant does not pay the last month's rent—which does happen too often—then there is no money available to fix any damage to the property".[69] Shelter said that in practice this does not often occur. Their research found that "only 18% of landlords had experienced this in the last five years and less than half of them had experienced a tenant doing this without asking".[70]

37. From tenants' perspective, we heard considerable evidence that capping the security deposit at six weeks' rent does little to improve affordability in the sector. Kate Webb from Shelter told us that "the Minister has missed an opportunity to maximise affordability by allowing the deposit to be six weeks rather than four".[71] This view was shared by other tenant groups. Mette Isaken from Citizens Advice told us:

> Our findings are that two out of three renters faced financial problems as a result of the upfront costs of renting: things like having to take out a loan,

64 Q42
65 National Landlords Association, DTF0030; Jeremy Clarke, DTF0005; Residential Landlords Association, DTF0023
66 Shelter, DTF0047
67 Citizens Advice, DTF0042
68 Citizens Advice, DTF0042
69 Q143
70 Shelter, DTF0047
71 Q72

> borrowing money from your family and friends, or cutting back on food or heating, and so on. This is a really big opportunity for the Government to reduce that significant upfront cost of a deposit, but at the moment they are really missing that opportunity.[72]

38. Mette Isaken suggested few renters would benefit from a cap of six weeks as polling commissioned by Citizens Advice found that only 8% of renters had paid a deposit of more than six weeks' rent.[73] The evidence of Adrian Jeakings, Chairman at the NLA, was consistent stating: "deposit figures, as far as we can see, have barely changed since 2011; they are 4.9 weeks, so capping the deposit may be solving a problem that does not exist".[74]

39. It was also noted that the affordability of the six-week cap was a particular concern in high-cost rental areas such as London. The Chartered Trading Standards Institute (CTSI) stated that "in some high rental areas, such as London … a total of seven weeks' rent for a deposit [six weeks' rent for the security deposit plus one week's rent for the holding deposit] will remain a prohibitive amount".[75] The London Borough of Hackney explained further:

> Hackney's 34,000 private renters will rightly question whether capping deposits at six weeks' rent will really create a housing market that works for everyone …
>
> Rising rent levels in Hackney have meant the average two-bedroom property now costs around £1,820 a month on the private market–over £300 a month more than it did in 2011. A tenancy deposit equivalent to six weeks' rent would therefore be £2,500—a significant barrier to many Hackney residents on low incomes, and a sum that does not reflect the potential risks to landlords.[76]

40. We also heard concerns that, by setting a ceiling for security deposits, there was a risk that landlords and letting agents, who currently set their security deposit at less than six weeks' rent, would see the provision as an invitation to increase tenancy deposits.[77] Mette Isaken told us that "there is a risk that when you cap something, you will see a clustering of costs around the upper end of that cap, so you could even be increasing the average deposit as a result of capping it".[78]

41. **We acknowledge that setting a cap on security deposits equivalent to six weeks' rent can pose a significant financial challenge to tenants, particularly in high-rent areas such as London. However, we recognise that there are instances when a security deposit equivalent to more than four weeks' rent may be warranted in order to protect landlords and encourage flexibility in the market. *Given that the National Landlords Association told us that the average deposit is equivalent to 4.9 weeks' rent, the Government should reduce the cap on security deposits to the equivalent of five weeks' rent. Capping the security deposit at five weeks' rent will reflect landlords' existing risk in the market, while also reducing the financial burden on tenants at the start of a tenancy and the risk of a race to the top.***

72 Q112
73 Citizens Advice, DTF0042
74 Q143
75 Chartered Trading Standards Institute, DTF0056
76 London Borough of Hackney, DTF0031
77 Dlighted, DTF0053
78 Q112

Holding deposit

Retention after provision of false or misleading information

42. Paragraph 3 of Schedule 1 permits the payment of a holding deposit. It was not suggested to us that holding deposits should be prohibited, but there was considerable unease about the clarity of the circumstances in which a holding deposit must be returned. In particular, there were concerns about what would happen if a prospective tenant supplied accurate information but failed a reference check or unknowingly supplied misleading information.

43. The draft Bill would allow a landlord to keep the holding deposit if (among other things) the tenant provided "false or misleading information to the landlord" and, when deciding whether to grant the tenancy, the landlord was *reasonably entitled* to take into account:

a) the difference between the information provided by the tenant and the correct information, or

b) the tenant's action in providing incorrect or misleading information.[79]

44. Witnesses had concerns about the vagueness of "reasonably entitled" and whether provision of false or misleading information equated to failing a reference check.

45. Shelter were concerned at suggestions[80] that the provision of false or misleading information was equivalent to failing a reference check, but thought it was clearly not the meaning of the draft Bill, and that agents might, following reference checks, regard information provided in good faith as being misleading information.[81] ARLA did appear to equate the provision of false or misleading information with a failed reference check, refusing to accept that their description of failed reference checks as grounds for not returning deposits was inaccurate.[82] The Property Ombudsman queried whether a tenant could lose their deposit because they failed a reference check despite providing accurate information.[83] Citizens Advice told us they believed the draft Bill "should not enable landlords or letting agents to retain holding deposits following a failed credit check or reference check" as it could cause severe financial hardship for tenants, and recommended "that the government clarify that failed tenant checks will not enable letting agents or landlords to retain holding deposits".[84]

46. The scope for confusion was apparent when the Minister for Housing and Homelessness, Mrs Heather Wheeler MP, referred to the test as being whether the tenant had "lied" (which suggested to us some degree of intent) and told us that the only fee the landlord would be able to retain was the cost of the reference check.[85] The Ministry told us they had considered a test of "knowingly" but felt it "difficult to implement in practice as the landlord is unlikely to have sufficient evidence to confidently conclude that the tenant

79 Schedule 2, para 8.

80 By ARLA: we presume Shelter were referring to "Tenant Fees Bill at a glance" (accessed 8 March 2018)

81 Shelter, DTF0047

82 Q196

83 The Property Ombudsman, DTF0026

84 Citizens Advice, DTF0042. See also National Approved Letting Scheme, DTF0 050; Q198; Q199; OpenRent, DTF0 057.

85 Q337 [Minister]

knowingly provided the false or misleading information".[86] The Ministry said it would provide guidance about when a deposit might be retained and would "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".[87]

47. **We are not satisfied it is enough for the Government to "encourage" landlords to retain only the cost of a reference check. We believe allowing landlords to retain a prescribed amount in respect of reference checks where a tenant has provided false or misleading information would be clearer and enforceable.**

48. **A test of what is "reasonable" is hard to apply in practice, and is not a satisfactory basis for a possible criminal offence, if it can be avoided. Landlords are sometimes justified in retaining a holding deposit. As the draft Bill stands, well-advised landlords would likely be told to return the deposit in case of doubt, not least given the sums involved (from a landlord's perspective). Although it will be rare for a landlord to have evidence that a tenant has knowingly lied, we think "knowingly provides false or misleading information" would be an easier test to understand. If there is evidence for this we see no reason why a tenant should not lose their entire holding deposit.**

49. ***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.***

Landlord who complies with Immigration Act 2014 requirements

50. Schedule 2 of the draft Bill permits a landlord to retain a holding deposit if the landlord is prohibited from renting to that tenant by the Immigration Act 2014 (and the landlord did not know it when taking the deposit).[88] In this case a landlord would be liable to a penalty of up to £3,000 for breach.[89] But the landlord is excused under that Act if they followed prescribed requirements,[90] which currently include obtaining from the tenant certain documents or (in some cases) obtaining a "Positive Right to Rent Notice" from the Government's "Landlord Checking Service".[91]

51. **We are concerned about the lack of any defence in the draft Bill for a landlord who retains a holding deposit as a result of the Home Office wrongly notifying that a tenant had no "right to rent". There is no reason to expose a landlord to criminal penalty for retaining a holding deposit in reliance of an erroneously negative response from the Home Office. Equally, we see no reason why a landlord should return a holding deposit if the prospective tenant fails to supply the prescribed documents.**

86 MHCLG, DTF0059. See also Q339
87 MHCLG, DTF0059
88 Schedule 2, para 7
89 Immigration Act 2014, ss 22–23
90 Immigration Act 2014, s 24(2)(a)
91 Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order (SI 2014 No 2874), article 4(b)

52. ***We recommend that the Bill—***

a) ***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, and***

b) ***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).

Payment of holding deposit to letting agent

53. The draft Bill's definition, in Schedule 1, paragraph 3, of a holding deposit is money paid "by or on behalf of a tenant *to a landlord* … with the intention that it should be dealt with *by the landlord* in accordance with Schedule 2".[92] This contrasts with the definition of a tenancy deposit which is "money intended to be held (*by a landlord or otherwise*) as security …".[93]

54. ***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.***

Default fees

55. The draft Bill does not provide a comprehensive definition of "default fee". Schedule 1, paragraph 4(1) provides that a payment that a tenant is required to make in the event of a default by them is a permitted payment if the tenant is required by the tenancy agreement to make it in the event of such a default. Sub-paragraph (2) defines default as (a) a failure by a tenant to make a payment by the due date or (b) a breach by the tenant of a covenant or condition of the tenancy.

Abuse

56. Many witnesses predicted the exception for default fees might be used by letting agents and/or landlords to recoup costs which might otherwise amount to prohibited payments. The breadth of the definition, and range of covenants or conditions, usual or contrived, in respect of which a landlord might insert a pre-determined penalty for breach, gives rise to concerns that default fees would be open to abuse. For example, Citizens Advice stated that these provisions:

> Leave the legislation open to exploitation … unfair or disproportionate fees could easily and legitimately be written into contracts … a wide-range

92 Schedule 1, para 3(2); emphasis added.

93 Schedule 1, para 2(2); emphasis added.

> of tenancy terms could be reworded or added to satisfy the definition of "default" fees… this would not only affect fees for replacement keys or late rent payments, but could open the door for what are effectively renewal fees, inventory charges and exit fees.[94]

Melanie Rees, Head of Policy at the Chartered Institute of Housing, and Councillor Robert Lawton, Portfolio Holder for Housing at Bournemouth Borough Council, raised similar concerns.[95] NALS, an industry licensing scheme, acknowledged that the provisions seem "to open up the scope for charging for a wide range of services provided in the event of a 'default'".[96]

57. Mette Isaksen from Citizens Advice told us that she "would strongly suggest scrapping [default fees] altogether … there is no positive benefit from having the clause in there".[97] Kate Webb from Shelter agreed and argued that, as the draft Bill allows landlords to ask for a security deposit, equivalent to up to six weeks' rent, landlords had a "substantial sum of money" which could "cover some of the costs that it seems default fees are proposed to address".[98]

58. Nevertheless, we heard that default fees can represent a legitimate cost to landlords and letting agents. David Cox, Chief Executive of ARLA told us:

> If you lock yourself out at two o'clock in the morning we will charge you a fee to come and let you in. That is a reasonable charge if somebody has to get out of bed at two o'clock in the morning, drive to the office, pick up the keys, drive to the property, let the tenant in, drive back to the office, drop the keys off, drive back home and go to bed. I would suggest that that is a reasonable fee that should be allowed. Think about the tenant; if those sorts of fees do get banned, will the agent do all of that or will they just say, "My office hours are 9.00 to 5.00; please come in during office hours"? Where does the person sleep overnight if they are locked out of their property?[99]

Definition

59. Some witnesses called for the Bill to provide an exhaustive list of permitted default fees. According to LSL, "without a definitive list, there is a risk of opacity and misunderstanding. This may also become an area of speculative litigation".[100]

60. The Minister told us that a "comprehensive list of the different types of permitted default fees is very problematic and may lead to difficulties in the future, owing to the list being incomplete or insufficient".[101] She went on to say that the Government intends to issue non-statutory guidance detailing what would qualify as a default fee and what level would be appropriate for that type of fee.[102] Becky Perks, Ministry of Housing, Communities and Local Government (MHCLG) official, added that "the agent or landlord

94 Citizens Advice, DTF0042
95 Q262; Q225
96 The National Approved Letting Scheme, DTF0050
97 Q110
98 Q72
99 Q194
100 LSL Property Services plc, DTF0040
101 Q330
102 Q330

would need to be clear with the tenant at the time the tenancy agreement is agreed as to whether or not the tenant would be liable for paying that fee and what the amount is that would be charged".[103]

Reasonableness of amount

61. Witnesses questioned whether the draft Bill protected tenants from unreasonably high default fees.[104] The Government's assumption that tenants will be able to challenge the type and level of default fees at the time of signing the tenancy agreement was disputed by Citizens Advice who contended that "tenants often have weak bargaining power … this makes it difficult to challenge or refuse unreasonable conditions and fees within tenancy contracts".[105]

62. This is of particular concern given some evidence we received from the lettings industry suggesting that letting agents may seek to charge disproportionate default fees in order to recoup revenue lost as a result of the legislation. Northwood considered that "fees for any breach of the tenancy agreement, such as late payment, will increase and be applied more rigorously".[106] Regal Lettings supported this view by stating that "the fees that agencies would be allowed to charge tenants, i.e. default fees, would be increased severely as the loss is attempted to be made up elsewhere".[107]

63. The Government stated that the approach in the draft Bill "achieves the best balance between protecting the tenant from unfair charges whilst enabling the landlords to recover their costs from tenants when the tenant is at fault".

Existing law on reasonableness

64. Witnesses told us how the existing law might be relevant to the reasonableness of default fees. For example, Shelter considered default fees to be penalty clauses, unenforceable as a matter of common law if they "exceed a party's actual loss or reasonable administrative expenses and there is no equality of bargaining power between the parties".[108]

65. David Cox of ARLA told us that clauses in tenancy agreements "are already covered by not one but five different sets of law".[109] The Consumer Rights Act 2015 has reduced the volume of legislation, and the guidance produced by the Competition and Markets Authority in 2014 is not a source of "law",[110] but Mr Cox's evidence does illustrate the

103 Q331
104 Q111; Q262. See also: Citizens Advice, DTF0058; Shelter, DTF0047; Citizens Advice, DTF0042; and joint letter from Citizens Advice, Shelter and Generation Rent.
105 Citizens Advice, DTF0058
106 Northwood, DTF0011
107 Regal Lettings, DTF0002
108 Shelter, DTF0047. Applying the Supreme Court's decision of Cavendish Square Holding BV v Makdessi ([2015] UKSC 67) we understand the questions would be whether the landlord has a legitimate interest in enforcing the charge, and whether the fee was proportionate to that legitimate interest.
109 Q194
110 Competition and Markets Authority, Guidance for letting professionals on consumer protection law (June 2014); see especially paragraph 2.7

wealth of relevant legislation there has been.[111] He concluded, "there is not a lack of law in this area. Do we really need to create a sixth piece of legislation governing the same issue?".

66. The Consumer Rights Act 2015 is particularly significant, providing that an unfair term of a consumer contact is not binding on the consumer.[112] A term is unfair if, "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer".[113] The court takes into account the nature of the contract's subject matter and the circumstances existing when the term was agreed and all other terms of the contract on which it depends. Consumers can complain to (among others) trading standards[114] or the Consumers' Association, who may then apply to court for an injunction in relation to the term.[115] But Citizens Advice cautioned that:

> It is untested whether amateur landlords fall within the definition of a 'trader', meaning tenants not renting from institutional landlords cannot rely on these protections … Once in a contract, tenants may avoid challenging fees if they think it will result in a retaliatory eviction. Tenants have no defence against a Section 21 'no fault' eviction notice if the landlord follows the correct procedure.[116]

67. On the latter point, the Deregulation Act 2015 provides tenants with some protection from retaliatory eviction after they complain about the condition of housing.[117]

68. What is clear is that resolving whether a term is fair and reasonable may be a complicated task, even for lawyers. Expecting tenants to take court proceedings may be unrealistic.[118] Help is available from, for example, trading standards departments or the Consumer Association,[119] but it is not obvious that this is well-known to tenants, and we have heard that trading standards departments are financially stretched.[120]

69. **Default fees can constitute a legitimate cost to businesses and should remain a permitted payment. However, we acknowledge concerns that the provisions as drafted are open to abuse. Existing legislation should guard against unfair fees. But we believe it might not be sufficiently publicised to protect tenants against the likely increase in prevalence and level of default fees when other fees are prohibited.**

111 A few limited provisions of the Unfair Contract Terms Act 1977 remain (section 3, for example). The Consumer Protection from Unfair Trading Regulations 2008, which remain substantially in force, prohibit certain unfair commercial practices, where they contravene requirements of professional diligence and materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to the product. Breach is a criminal offence and may lead to a fine or imprisonment. Further protections were then added under the Consumer Rights Act 2015.

112 Section 62 of the 2015 Act

113 Section 62(4)

114 I.e., the local weights and measures authority

115 Section 70 and Schedule 3 of the 2015 Act

116 Citizens Advice, DTF0058

117 Deregulation Act 2015, s 33

118 See para 91, below.

119 See para 66

120 See paras 106ff, below.

70. ***We recommend that the Government issue clear guidance to tenants, landlords and letting agents on what constitutes a reasonable default fee and, guidance to tenants 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.***

71. ***Furthermore, the Government should consider:***

a) ***giving trading standards the express power, and resources, to enforce the reasonableness of default fees, without reliance on the Consumer Rights Act 2015, and***

b) ***establishing an anti-retaliation provision similar to that relating to complaints about the condition of housing.***

Whether other fees should be permitted

Change of "sharer"

72. A lack of clarity regarding whether landlords and letting agents would be able to charge a fee for a change of "sharer" in a joint tenancy emerged in the evidence. While some letting agents were sure that the draft Bill would prohibit such charges,[121] ARLA suggested that the industry was at risk of a "PPI moment", presumably meaning there was a risk agents would believe the Bill did not prohibit such charges, and could face large-scale claims in the future.[122]

73. We heard from the industry that a fee should be permitted for a change of sharer. ARLA expressed concern that if a fee was not permitted, this "service" may not be provided, thereby restricting the ability of tenants to move and reducing choice.[123] NALS added that:

> It should be borne in mind that changes of sharers are a tenant instigated change to the existing tenancy agreement … The bill should allow for a payment to be made to the agent by the tenant in respect of the costs associated with this change. If the landlord has to bear the full costs, they may be much less likely to agree to a tenant instigated change in the tenancy agreement.[124]

74. The Minister told us that the Government acknowledge that "this is an area where further clarity is needed".[125] She continued that the Government "intend to permit a charge for a variance on the tenancy and charges related to a change of sharer, where these are requested by the tenant".[126]

75. Permitting a change of sharer could (provided that the provision in the Bill is clearly drafted) avoid the need for landlords to rely on other legal rights. Sharers in a property will

121 LSL Property Services plc, DTF0040; The Property Redress Scheme, DTF0024
122 ARLA Propertymark, DTF0036
123 ARLA Propertymark, DTF0036
124 The National Approved Letting Scheme, DTF0050
125 Q333
126 Q333

often be joint tenants, therefore jointly responsible[127] for the obligations in the tenancy, including paying the rent. If the landlord refuses permission for a change of sharer, the remaining sharers will remain liable for the whole of the rent (it is not apportioned). If they do not meet that payment the landlord could take action against them, or indeed the departed sharer who also remains liable for the whole rent, to recover the payment. On the other hand, the remaining tenants might decide to give notice themselves (if they can), leaving the landlord with an empty property. Permitting a change of sharer avoids these issues arising. A change of sharer will involve the landlord in carrying out fresh reference and immigration checks for which a landlord may wish to charge.

76. **We welcome the Government's intention to clarify the legislation and to permit charges related to a change of sharer where these are requested by the tenant.**

"Green deal" loans

77. Although the Government stopped funding the Green Deal[128] in 2015, loans secured before it was closed are still being repaid as per the original agreements. Some letting agents raised concerns that the draft Bill may not permit the repayment of Green Deal loans as tenants must contractually agree to repay such loans to an approved Green Deal provider if they are the bill payer. David Cox from ARLA told us that an exemption for Green Deal charges "is particularly important when we factor in that the energy efficiency minimum standards come into force in April this year and landlords will have taken Green Deal finance out on properties".

78. The draft Bill makes no reference to Green Deal plans as "permitted payments", so might be thought to prohibit them. Under the Green Deal legislation, landlords must ensure that a tenancy[129] agreement includes an acknowledgement by the tenant[130] that the bill payer at the property is liable to make payments under the Green Deal plan.[131] It might be argued that this acknowledgment in the agreement is a requirement that a tenant pay, which would breach the Bill as drafted. However, it is the Green Deal legislation, not the acknowledgment, that imposes liability on the current bill payer at the property.[132] We therefore do not believe the draft Bill would be inconsistent with the Green Deal legislation or its requirement that the incoming tenant acknowledge liability.

79. Nevertheless, during the course of our inquiry, the Government stated its intentions to permit the repayment of Green Deal loans:

> We now propose to exempt Green Deal payments from the ban. This mirrors the approach that Scotland has taken. This would permit the requirement on tenants to pay back Green Deal loans. Landlords must make prospective new tenants aware of any obligation to pay back a Green Deal loan. Thus,

127 In legal terms, "jointly and severally".

128 The Green Deal was an energy saving scheme launched by the coalition Government to incentivise and help fund energy efficiency and renewable energy technologies for homes. Loans were offered for home efficiency improvements that were paid back over time. The Government stopped funding the Green Deal in 2015 citing low uptake.

129 Or licence

130 Or licensee

131 Energy Act 2011, s 14(2). The required form is currently set out in the Green Deal (Acknowledgment) Regulations 2012 (SI 2012 No 1661).

132 Energy Act 2011, s 1(6)

new tenants would be able to make an informed decision before entering into the tenancy. We believe that this is the fairest and most pragmatic option for both landlords and tenants.

80. **While we conclude that the draft Bill does not disrupt existing Green Deal loan repayments, we support the Government's intentions to clarify that such loans—contractually agreed as part of the former Government-sponsored Green Deal—are exempt, given concerns raised by the industry.**

Alternatives to security deposits

81. Shelter hoped the introduction of a cap on security deposits would "lead to a wider conversation on deposit reform".[133] While our inquiry has not considered security deposit reform in detail, we heard about innovation in the private rented sector throughout our inquiry and from a range of stakeholders.[134] Alternatives to traditional security deposits were mooted, from paying deposits in instalments and deposit passporting to investing deposits in Help to Buy ISAs and insurance-style products.[135]

82. It was often suggested that it would be a missed opportunity if the legislation proved unable to accommodate such developments. Dlighted, a deposit replacement insurance scheme, said that "the most obvious and powerful reform the Government could make … is to facilitate and encourage the industry to move towards deposit free renting".[136] LSL stated that such schemes "increase consumer choice and assist those who might otherwise struggle to finance a security deposit … the schemes remove the largest financial barrier left to renting a property".[137]

83. Nonetheless, the affordability of some of the schemes has been questioned. Northwood stated that some letting agents are planning to charge a monthly fee as an optional alternative to a security deposit but as the fee is charged for the duration of a tenancy, this may result in the tenant paying more than a security deposit over a tenancy, and unlike a traditional deposit, the money will not be refunded at the end of a tenancy.[138]

84. Notwithstanding the potential risks and benefits of alternatives to traditional security deposits, the RLA raised concerns that such innovation may not be permitted as such products might contravene the legislation.[139] Their concern may be justified. Payments and loans for such deposit replacement schemes, if a condition of the grant, renewal or continuance of a tenancy, are prohibited in the draft Bill. But they would probably not be prohibited were a landlord to offer to accept (at the tenant's option) a deposit replacement in lieu of a (permitted) deposit.

85. In any event, the draft Bill provides the Secretary of State with a "Henry VIII" power to amend, by regulations subject to the affirmative resolution procedure, the list of permitted payments in Schedule 1. As noted by the House of Lords Delegated Powers and Regulatory Reform Committee, "this is a significant power because the list of permitted

133 Shelter, DTF0047

134 We note that Generation Rent published a report, *Rethinking tenancy deposits*, on this topic on 26 March 2018.

135 London Borough of Hackney, DTF0031; Shelter, DTF0047; Dlighted, DTF0053; Residential Landlords Association, DTF0023

136 Dlighted, DTF0053

137 LSL Property Services plc, DTF0040

138 Northwood, DTF0011

139 Residential Landlords Association, DTF0023

payments in Schedule 1 is central to the Bill's purpose".[140] Additionally, we note that there are no limits on the type of payment which may be added to or removed from the list or the nature of modifications which may be made. Whilst the Government said that it did not intend, at the moment, to make any changes to permitted payments, it justified the power partly on the basis that it would enable the Secretary of State to respond to "technological innovation".[141]

86. **We welcome innovation in the private rented sector. However, we note that there are opportunities and risks to alternatives to a traditional security deposit which have been insufficiently subject to independent review. The draft Bill provides that the Secretary of State has a wide power to amend the list of permitted payments in Schedule 1, using regulations subject to the affirmative procedure. We believe that this power will enable the Government to respond appropriately to innovation in the private rented sector, when it has been shown to be beneficial to tenants.**

87. ***The 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. If alternative solutions are found to be affordable for all tenants, the Secretary of State should use the power provided for in the proposed legislation to amend the permitted payment list accordingly.***

Fees at the end of the tenancy ("exit fees")

88. Citizens Advice thought it unclear whether exit fees would be prohibited by clauses 1 and 2 as payments required as a condition of the grant, renewal or continuance of a tenancy.[142] Shelter raised concerns that this could permit a charge for a "wide range of services from cleaning to check-out to a generic exit fee".[143] The Government's view is that the ban covers all non-exempted payments required in a tenancy agreement, and this would include any exit fees, but is considering other drafting approaches to clarify this.[144]

89. **There is a lack of clarity in the draft Bill about whether fees can be charged at the end of a tenancy agreement. If the Bill did permit exit fees, it would undermine the Government's policy objectives. We therefore welcome the Government's stated intention to clarify that fees on exiting a contract are prohibited under the Bill as they are a condition of granting or renewing a tenancy.**

140 Correspondence, Delegated Powers and Regulatory Reform Committee, House of Lords
141 MHCLG, DTF0060
142 Citizens Advice, DTF0042
143 Q46
144 MHCLG, DTF0059

4 Enforcement

Introduction

90. We were told by a range of stakeholders that effective enforcement will be key to the Bill's success. The NHC identified it as "one of the most significant aspects of the Bill because without enforcement the provisions will be ineffectual".[145]

Recovery of unlawful fees by tenant

91. Clause 11 of the draft Bill would permit tenants to recover prohibited payments by applying to the county court. Most witnesses who addressed the issue told us it was unrealistic for tenants to navigate the county court system to recover unlawfully paid fees from landlords and letting agents. The London Borough of Hackney described it as "unnecessarily costly and complicated", and said it would "particularly disadvantage households with low incomes".[146] We were told tenants would not be entitled to legal aid, unless brought as a counterclaim in possession proceedings.[147] Indeed, as Citizens Advice pointed out, the county court would have only a discretion to order repayment of prohibited fees;[148] "the tenant would not necessarily be compensated".[149] Professor Ian Loveland thought that in practice, recovery in the county court was "likely to be a complete nonsense and will never happen".[150]

92. In contrast, David Cox of ARLA, told us:

> I … disagree with statements that have been made to this Committee that tenants do not go forward and take cases to court. We know that is simply not true by just looking at the tenancy deposit protection situation, 10 years after it came into force. There was a huge case, *Superstrike v. Rodrigues*, which involved a tenant taking a landlord to court, which went all the way to the Supreme Court … The argument that tenants do not take cases to court is simply not made out when Parliament has had to restate the law on something because of a tenant taking a landlord to court.[151]

But one case being taken to the Supreme Court on a question of principle does not seem to us evidence that tenants generally are happy to go to court.

93. Clause 12 would allow a local trading standards authority to help a tenant, for example by giving advice or conducting proceedings. And clause 8 allows a local trading standards authority to require a landlord or letting agent to repay a prohibited payment, but only when imposing a financial penalty. But these forms of assistance are both dependent on local authority means and willingness to assist.

94. We heard that it may be more appropriate to enable tenants to use the First-tier Tribunal ("FTT"), or to prevent landlords from gaining possession of their property until

145 Northern Housing Consortium, DTF0039
146 London Borough of Hackney, DTF0031
147 Q66
148 Cl 11(7): "…the court *may* order…" (emphasis added)
149 Citizens Advice, DTF0042
150 Q71
151 Q179

any unlawful fee has been paid. Professor Loveland wondered "why there is a division of jurisdiction between the First-tier Tribunal, to which a landlord or agent would appeal against a fine, and the recovery procedures being taken by a tenant".[152] Professor Loveland was not alone in suggesting it might be more beneficial to tenants to prevent landlords obtaining possession (by preventing them from serving a "section 21 notice")[153] while a prohibited payment remained outstanding (or, he suggested, for six months thereafter).[154]

95. The Minister explained they had considered using the FTT, but "tribunals are unable to enforce their decisions, which is why we go back to the county court level".[155] Becky Perks of MHCLG referred also to the time it could take to get a decision of the tribunal enforced as a judgment of the county court and said it was considered more "expedient" to go direct to the county court.[156] She told us:

> this is the same mechanism that we take with regard to the enforcement of the tenancy deposit legislation, so we are mirroring that to support tenants to understand what action they can take in instances where they are charged unfair fees …[157]

96. We are aware of examples of tribunal and even administrative decisions being enforceable in the county court. For example, awards of employment tribunals in England and Wales are, once registered, recoverable "as if … payable under an order of the county court",[158] while a penalty imposed by the Secretary of State on a landlord letting premises to a tenant disqualified by their immigration status is "recoverable as if it were payable under an order of the county court in England and Wales".[159]

97. The tenancy deposit legislation[160] which the Government is "mirroring" prevents a landlord from serving a section 21 notice while a deposit is unprotected (and not repaid).[161] Ms Perks referred to preventing possession as "something that we use in other areas of private rented sector legislation, for example, around gas safety and so forth".[162]

98. ***We recommend 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.***

99. **We see no reason why tenants should not be allowed to establish their entitlement in the less formal First-tier Tribunal. Enforcement against a recalcitrant landlord is likely to take time whatever the method, but we also think it likely that many landlords would pay once a tribunal had determined a tenant's rights. *We recommend the Government allows tenants to recover prohibited fees in the First-tier Tribunal, with a simple process of registration and enforcement as if payable under an order of the county court.***

152 Q66
153 A notice under Housing Act 1988, s 21, a preliminary step in obtaining possession of property let on an assured shorthold tenancy.
154 Professor Loveland, DTF0052. See also Dermot Mckibbin, DTF0051 and Q25.
155 Q357
156 Q366
157 Q368
158 Employment Tribunals Act 1996, s 15(1)
159 Immigration Act 2014, s 31(2)
160 Sections 212 to 215C of the Housing Act 2004
161 Housing Act 2004, s 215(1A)
162 Q360

100. ***We also recommend the Government review whether to provide the First-tier Tribunal with enforcement powers. In the longer term, it 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.***

Recovery of prohibited loans

101. There is no express provision in the draft Bill to require a landlord or letting agent to repay a prohibited loan. Prohibited payments are recoverable on application to the county court under clause 11,[163] but prohibited loans are not referred to.

102. The Government told us: "A loan is treated as any other kind of prohibited payment and the recovery mechanisms are the same".[164] But clauses 1 and 2 distinguish between the making of a prohibited payment and the granting of a prohibited loan. The Ministry might be seeking to differentiate between the making of a loan agreement and the subsequent payment of the loan pursuant to that agreement but if it is, the purpose of this subtle distinction is unclear and creates a risk that a loan advance would not be treated as a prohibited payment.

103. In Scotland, prohibited loans are expressly made repayable on demand.[165] The law in Scotland is drafted differently; aside from loans it prohibits the payment of a premium, which might not include a loan advance. Nevertheless, the Scottish approach is clearer on this point.

104. ***We do not share the Government's confidence in its interpretation of the draft Bill, as currently drafted, that prohibited loans are repayable on demand. The Government must clarify the drafting in this respect to remove any question of doubt.***

Enforcement by local authorities (trading standards)

105. Clause 6 would place the primary duty to enforce the draft Bill on local weights and measures authorities.[166] These are non-metropolitan county councils, metropolitan district councils and London borough councils.[167] In practice, it is the trading standards departments of these authorities that enforce weights and measures legislation. For brevity, we refer to them simply as "local authorities".

Local authority resources

106. Clause 7 of the draft Bill would give local authorities the power to enforce the provisions of the draft Bill[168] by imposing a (civil) financial penalty in the case of breach. The penalty could be up to £5,000.[169] If a breach were repeated within 5 years, the penalty

163 The local trading standards authority can also require a landlord or letting agent to repay a prohibited payment when imposing a financial penalty: cl 8(2).

164 MHCLG, DTF0059

165 Rent (Scotland) Act 1984, s 88(2).

166 Cl 6(1)

167 Weights and Measures Act 1985, s 69 (and also the Common Council of the City of London, and Council of the Isles of Scilly)

168 We take the view that it is the provisions of the draft Bill which are enforced, and not—as cl 7(8) currently puts it—breaches. See the Annex, below.

169 Cl 7(2)

could be up to £30,000;[170] or the authority could choose to prosecute it as a criminal offence (punishable by an unlimited fine in a magistrates' court).[171] The draft Bill is designed to be "fiscally neutral" as Schedule 3, paragraph 10, makes provisions for local authorities to retain the proceeds of the financial penalties. The proceeds are hypothecated to enforcement action in relation to the private rented sector.

107. While there was broad support for the enforcement role of local authorities, many witnesses questioned the draft Bill's approach to funding enforcement. The Government's assessment of impact does state that:

> The Government are planning to provide an additional £150k per annum to support enforcement of the ban… We anticipate that it will cost an additional £100k per annum to fund tribunals related to the enforcement of the ban. The enforcement costs are estimated to total no more than c.£700k per annum.[172]

However, it is unclear what this money is to be used for and how it could be accessed; the evidence we have received widely interprets that the provisions of the Bill, if enacted, would provide no additional funding.

108. The ability to retain money levied from the civil penalties was welcomed.[173] However, as stated to us by Sir Robin Wales, Mayor of the London Borough of Newham, while it is welcome that any money raised through fines are hypothecated to further enforcement, "it should not, by definition, be a system entirely based on that".[174]

109. We repeatedly heard concerns about the capacity of trading standards given that the draft Bill does not appear to provide any additional funding to local authorities at a time when it is widely considered that trading standards "have been under-resourced and over-stretched for some time".[175] The London Borough of Hackney stated that "the Bill fails to provide the additional funding to councils that is so essential for ensuring the ban is effectively enforced, instead placing further strain on already stretched Trading Standards service".[176] The Local Government Association (LGA) agreed, stating that "[the Government's] proposed solution for funding this work through civil penalties will not sufficiently address the funding pressure".[177] This view was also supported by ARLA which contended that "unless specific funding is set aside for the sole purpose of enforcing these new laws, then we expect the same lack of effective enforcement on the ban on lettings fees as has been demonstrated on the transparency rules under the Consumer Rights Act 2015".[178]

110. One of the reasons used to justify this stance was that money levied through fines would not cover the true costs of enforcement. Alison Farrar, representing CTSI told us that "enforcement levels come from a huge amount of prior work".[179] She clarified that

170 Cll 9 and 7(3)
171 Cl 9(3). The offence is a "banning order" offence for the purposes of the Housing and Planning Act 2016: cl 9(6)
172 MHCLG, DTF0044
173 Q205; Shelter, DTF0047
174 Q174
175 College and County, DTF0034
176 London Borough of Hackney, DTF0031
177 Local Government Association, DTF0035
178 ARLA Propertymark, DTF0036
179 Q249

"enforcement is not just about taking people to court, prosecuting them and keeping the money from the fines. It is about a huge amount of work before that to do with educating traders and tenants, and obviously creating business guidance and making sure that it is being adhered to".[180] When we asked whether the penalties in the draft Bill would be sufficient to cover the cost of resourcing of this additional work, Farrar answered "definitely not".[181] She went on to say that "when you issue a fine in court and you get the costs, you do not ever get the real costs of the investigation… therefore, obtaining and keeping the money from the fine does not really cover a proportion of the costs".[182]

111. The LGA agreed that this approach to funding "would not fund any up-front or proactive work that does not lead to any civil penalties being issued".[183] The NHC also agreed, stating that "any payments received from penalty notices will be minimal".[184] Councillor Simon Blackburn, Leader of Blackpool Council, recommended that "the fees ought to represent a full cost recovery model, so whatever it costs local government to enforce and police those regulations ought to equal what we are able to charge".[185]

112. Local authorities were also concerned that if the Bill is solely, or significantly, self-funded, the retention of fines acts as a disincentive to proactively engage with landlords and letting agents. The London Borough of Hackney stated:

> Civil penalties, while they are a helpful and welcome deterrent, are a last resort. If trading standards' enforcement activities are effective, civil penalties will rarely be charged. In Hackney Council's experience of enforcing the letting agent redress scheme and requirements relating to the transparency of letting agent fees, most of council officers' intensive activities relate to identifying and monitoring letting agents' practices, and working closely with them to comply with the law. In our experience, an approach of working with letting agents to ensure their compliance is far more effective than an overly punitive approach.[186]

CTSI agreed that "using enforcement as an income stream creates negative incentives for services to work with legitimate landlords and agents to bring them into compliance via advice"[187] Kate Webb from Shelter told us in our first evidence session that "this is a slightly curious situation" and called on the Government to reconsider whether there should be upfront funding for local authorities.[188]

113. Becky Perks of MHCLG told the Committee that "we have heard the points around proactive enforcement and it is something we will consider through the new burdens assessment".[189] The Minister reiterated that the Government are "open" to considering the new burdens assessment.[190]

180 Q252
181 Q255
182 Q259
183 Local Government Association, DTF0035
184 Northern Housing Consortium, DTF0039
185 Q175
186 London Borough of Hackney, DTF0031
187 Chartered Institute of Trading Standards, DTF0056
188 Q70
189 Q370
190 Q370

114. **We believe that funding enforcement of the Bill solely through the retention of any civil penalties is likely to be ineffective, exacerbate existing pressures and lead to further discontentment in the enforcement of legislation in the private rented sector. The funding model as it stands offers a perverse disincentive for local authorities to engage proactively and cooperatively with landlords and letting agents despite this approach being considered as more effective than a punitive system. If the funding arrangements go unchanged in the Bill, the Government will fail to achieve the aims of the legislation.**

115. ***We strongly urge the Government to reconsider its intention for the legislation to be solely self-funded through the retention of civil penalties. The Government must provide sufficient additional funding directly to all local authorities to enforce the legislation if it wants the Bill to achieve the Government's aims. Failing that, the Bill should increase the maximum amount of civil penalty.***

116. Professor Loveland raised with us the question of whether, bearing in mind that local authorities can retain and apply the proceeds of fines:

> It is to be acceptable for a council to take into account the cost of effective enforcement of the scheme in setting the level of the fine; i.e.—crudely put—"If we fine this landlord £5000 that will pay for thousands of leaflets publicising the scheme". Is that intended to be a (in the administrative law sense) relevant consideration when a council sets the size of a fine.[191]

117. The Minister told us local authorities should not be allowed to take into account their funding needs but should be able to cover their costs: "This is not meant to be topping up the general support grant. This is covering their costs".[192] The draft Bill would allow proceeds of penalties to be applied to "costs and expenses (whether administrative or legal) incurred in, or associated with, carrying out any of its enforcement functions under this Act or otherwise in relation to the private rented sector".[193] Given this potentially wide application, and that the Government intends enforcement of the provisions to be "fiscally neutral",[194] we understand the Government's intention to be that the general cost of enforcement of the Bill's provisions should be considered when setting penalties.

118. Statute prescribes that the amount of a fine must reflect "the seriousness of the offence".[195] The Sentencing Guideline Council's long-standing guideline on the principle of seriousness[196] describes seriousness as "the key factor in deciding … the amount of any fine imposed. A court is required to pass a sentence that is commensurate with the seriousness of the offence".[197]

119. In our parallel inquiry into the private rented sector, the LGA told us that powers were available to councils to allow them to recover some of their costs, but these were "rarely sufficient to meet the full cost" of enforcement activity.[198] Courts, they told us, could award costs to councils, but only from the point that a decision was made to prosecute, and any

191 Professor Loveland, DTF0052
192 Q375
193 Sched 3, para 3
194 MHCLG, DTF0044
195 Criminal Justice Act 2003, s 164(2)
196 Under Criminal Justice Act 2003, s 170(9)
197 Sentencing Guidelines Council, *Overarching Principles: Seriousness* (December 2004)
198 Local Government Association, PRS0029

preliminary investigation or time spent collecting evidence could not be included in the application for costs. Councillor Lawton's evidence that spending £5,000 on a prosecution but receiving only "£100 back" suggested that an impediment to recovering full costs could discourage some authorities from prosecuting.[199]

120. A criminal court can order an offender to pay the prosecution's costs.[200] The court decides what amount is "just and reasonable". This can include all of the prosecutor's costs of investigating, before as well as after any decision to prosecute.[201] Where those costs are disproportionate to the fine imposed, they are unlikely to be awarded in full, especially where the cost of investigating officers would have been incurred anyway because they are employed by the prosecuting authority and carrying out their normal duties.[202]

121. **The Government has told us it intends that local authorities should take into account the need to cover their costs of their enforcement functions when setting the level of a financial penalty. This is a departure from the usual principle that penalties should principally relate to the gravity of the wrongdoing.**

122. ***We recommend 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, the Government must explain in detail its reasons for departing from usual principle.***

123. **There is a conflict between local authorities' experience of recovering the costs of their investigations in the court and our interpretation of the law.** ***We recommend 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.***

Local authority enforcement powers

124. Before imposing a financial penalty, the local authority would have to notify the alleged wrongdoer, who could then make representations before the authority made a final decision.[203] There would be a right of appeal to the FTT, on various grounds.[204] The penalty could be recovered in the county court.[205] There would be similar powers for breach of banning order offences[206] and certain offences under the Housing Act 2004.[207] In relation to the former, the House of Lords' Delegate Powers and Regulatory Reform Committee (DPRRC) reported in 2016 that:

> It might be considered that this clause empowers an authority to act as if it were prosecutor, judge, jury and executioner![208]

199 Q222
200 Prosecution of Offences Act 1985, s 18
201 *Associated Octel Ltd* [1997] 1 Cr App R (S) 435
202 *BPS Advertising Ltd v London Borough of Barnet* [2006] EWHC 3335 (Admin). See, generally, *Archbold, Criminal Evidence, Pleading and Practice 2018* para 6–34.
203 Sched 3, paras 2–4
204 Sched 3, para 6
205 See further para 130 below.
206 Housing and Planning Act 2016, s 23 (not yet in force except for making certain regulations) and Sched 1 (not yet in force)
207 Housing and Planning Act 2016, s 126 and Sched 9. Financial penalties can also be imposed for breach of letting agents' duty to publicise fees, etc: Consumer Rights Act 2015, s 87 and Sched 9.
208 House of Lords, Delegated Powers and Regulatory Reform Committee, 20th Report of Session 2015–16, HL Paper 90, para 10

125. The local authority would be able to use the proceeds of financial penalties to fund the cost and expense of (or associated with) carrying out its enforcement functions under the proposed legislation or otherwise in relation to the private rented sector.[209] Councillor Lawton hinted that there may be occasions when the level of likely fine, when compared to the cost of prosecution, leads to a calculation not to prosecute,[210] though Councillor Salier, Cabinet Member for Housing at Wandsworth Council, emphasised that she "would not want to say that finance was at the bottom of [their] decision on whether to prosecute a rogue landlord", and did not think it should be. If the possibility of *profit* (even just for the purpose of private rented sector enforcement functions) were to drive enforcement, that would be unfortunate. But in any event, the DPRRC's criticism might be thought even stronger here, where the authority is the beneficiary of proceeds, albeit for defined purposes.

126. The imposition of a financial penalty would not itself equate to a criminal conviction, but would probably be seen as akin to it for the purposes of human rights law, as Professor Loveland pointed out.[211] The procedural protection of an independent decision-maker is, as he put it, "clearly lacking if the council decides if an offence has been committed and then levies a fine which is payable to the council itself".[212] This could be remedied, he thought, if the FTT had "a very expansive jurisdiction over the fines levied"; however, as currently worded, he felt the draft Bill was unclear.[213]

We queried human rights compliance with the Ministry, who responded:

> We are grateful to the Committee for raising this point and we will ensure that the Bill is fully compliant with the European Convention of Human Rights. In particular we intend to provide for a broader right of appeal, modelled on that in the Housing and Planning Act.

127. Under the Housing and Planning Act 2014, appeals to the FTT against financial penalties are dealt with as a complete re-hearing of the local housing authority's decision, and can take into account matters of which the authority was unaware.[214] This allows the FTT to consider the matter afresh, and is broader than in the draft Bill.

128. **We would be concerned if local authorities were perceived as judge and jury, if the penalties they levy were perceived by the public as a revenue stream, or if the penalty process was inconsistent with the European Convention on Human Rights. We are pleased that the Government intends to address these concerns by providing a broader right of appeal.**

129. ***We recommend 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.***

209 Sched 3, paras 10–12. See also above.

210 Q222

211 Professor Loveland, DTF0052; see also European Court of Human Rights (Research and Library Division), *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb)* (December 2013), paras 1–9

212 Professor Loveland, DTF0052

213 Professor Loveland, DTF0052

214 Housing and Planning Act 2014, Sched 1 para 10(4) (not yet in force) and Sched 3 para 10(3)

County Court enforcement of financial penalty

130. A local authority could enforce a financial penalty, if unpaid, by certifying to the county court that it is unpaid. This would be treated as conclusive evidence.[215] This provision is not unique.[216] We asked our local government witnesses whether local authorities needed the provision, which would prevent defendants from proving they had in fact paid a penalty.[217] The LGA told us "local authorities would be unwilling to sign and present a certificate to court if it had already received the payment from the defendant" and that therefore they did not believe the provision unfair.[218] They also pointed to precedents in, for example, the Consumer Rights Act 2015 and an absence of evidence of abuse.

131. **In our view, any provision which excludes the court's usual ability to test the accuracy of what it is being told ought to be included in legislation only cautiously. We do not doubt for a moment the sincerity of local government officers, but mistakes are always possible.** ***We recommend 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.***

Lead enforcement authority

132. Clause 16 establishes a lead enforcement authority (LEA). Its duties are outlined in the draft Bill's explanatory notes as follows:

- Provide guidance to relevant authorities (defined in subsection (8)) and oversee the operation of relevant letting agent legislation
- As necessary, advise the Secretary of State on the working and enforcement of the ban and related matters (i.e. market developments)
- As necessary and appropriate, disseminate information about the ban to members of the public, landlords and letting agents[219]

National Trading Standards stated that a LEA could also "provide 'back stop' enforcement, where they could take on a significant investigation and potential formal action, if a local authority felt it did not have the capacity to do so".[220] The role can either be fulfilled by the Secretary of State or outsourced to an external body. The draft Bill's assessment of impact state that "one trading standard body will be nominated as the lead enforcement body".[221]

133. The creation of such a body was broadly welcomed in evidence to our inquiry. The LGA stated that "the use of lead enforcement authorities is a helpful way of ensuring that funding is appropriately targeted at the organisations enforcing specific areas of activity".[222] Councillor Robert Lawton told us that "any help we can get is good".[223] Councillor

215 Sched 3, para 7(3)
216 See the Housing and Planning Act 2016, Scheds 1 and 9 and Consumer Rights Act 2015 Scheds 9 and 10 but also, for example, National Insurance Contributions Act 2015, Sched 2 para 17(6).
217 Q173
218 Letter from the Local Government Association
219 Explanatory Notes, Draft Tenant Fees Bill
220 National Trading Standards, DTF0054
221 MHCLG, DTF0044
222 Local Government Association, DTF0035
223 Q224

Lawton said the LEA would be particularly useful if it could develop a national database of landlords and letting agents that have been prosecuted under the legislation.[224] The LGA stated that the Government must ensure that a "national information campaign is undertaken to make tenants aware of the new rules".[225] We consider that this would be best implemented by the LEA. However, Councillor Blackburn called into question whether a LEA would be able to usefully assist local trading standards:

> We would need a very clear point of contact [at the LEA] and they would need to be super-responsive to be able to match the sort of response that our local trading standards and housing enforcement teams would be able to do. I am not quite sure how it could speed the system up.[226]

134. We heard that for the LEA to be successful, it would need to work closely with a range of stakeholders, including all local authority tiers. Councillor Clare Salier told us that it would be "reliant on relationships".[227] National Trading Standards identified their Estate Agency Team as a body that the LEA "would need with very closely with… as many of the functions have an amount of overlap".[228] The NHC stated that it would need to work with landlords and letting agents.[229]

135. Alison Farrar from CTSI suggested that the LEA created by the draft Bill could be merged with the existing estate agent LEA as there is "quite a lot of overlap".[230] However, as she also noted, this is complicated by their respective territorial application. The draft Bill applies in England while the Estate Agents Acts 1979, which established the estate agent LEA, applies throughout the UK.

136. **The success of the Lead Enforcement Authority is dependent on developing strong relationships with all local authority tiers, tenants, landlords and letting agents. Such relationships should also be cultivated at local authority level. *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. 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.***

137. ***The Lead Enforcement Authority should be tasked, and given the funding, to launch a nationwide awareness raising campaign to promote the legislation to tenants.***

138. **We note that there is crossover with the UK-wide estate agent Lead Enforcement Authority but given the territorial application of the draft Bill do not think it is appropriate to merge the two authorities.**

224 Q224
225 Local Government Association, DTF0035
226 Q175
227 Q224
228 National Trading Standards, DTF0054
229 Northern Housing Consortium, DTF0039
230 Q260

Guidance

139. Clause 6(4) would require a local authority to "have regard to any guidance issued by the Secretary of State or the LEA (if not the Secretary of State) about the exercise of its functions under this Act".[231] The Government explained the role of the guidance in its Delegated Powers Memorandum:

> The Government would expect that the guidance 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 LEA and local Trading Standards, including the setting out of reporting requirements and/or procedures (see clause 18(6)). 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, and the appropriate levels of financial penalty in particular circumstances.[232]

140. While the proposals provide (in clause 17(5)) that the Secretary of State can direct the LEA to produce guidance, they do not place a duty on either the Secretary of State or the LEA to produce such guidance. However, the need for such guidance, particularly regarding setting the level of civil penalty, was highlighted by local authorities. Cheshire West and Chester Council stated that "clear guidance should be provided to local authorities in relation to the new civil and criminal offences… it is important".[233] Professor Ian Loveland also believed that guidance had an important role:

> There does not seem to be in the Bill itself, nor in the explanatory notes—although it may feature in the subsequent guidance—any governmental attempt to structure local authorities' discretion in relation to the size of fine that they charge. I think that is a serious omission.[234]When asked further about the level of fine, Professor Loveland stated:
>
> Anything that involves unstructured discretion will necessarily lead to a large amount of satellite litigation. Eventually, the matter will have to work its way up through the courts, and the Supreme Court will tell us in five years' time exactly what the principles should be.[235]

141. Given the concerns, the Government have indicated that they intend to make the issuing of guidance under clause 17(5) a duty. Becky Perks of MHCLG, told us:

> We have listened to the Committee on this and this is very much something we intend the lead enforcement authority to do, so we are looking at making sure that that is a duty. We are looking, with lawyers, at how best we achieve that through the Bill.

231 Cl 6(4)
232 MHCLG, DTF0060
233 Cheshire West and Chester Council, DTF0022
234 Q46
235 Q67

142. **Guidance for local authorities on the exercise of their enforcement powers is key to ensuring consistent and proportionate responses to breaches of the legislation. Therefore, the production of guidance under clause 17(5) of the draft Bill should be a duty, not simply a power, on the Secretary of State or the Lead Enforcement Authority (if not the Secretary of State). We welcome the Government's stated intention to ensure that the production of guidance, issued under clause 17(5), is a duty in the final Bill.**

143. The House of Lords Delegated Powers and Regulatory Reform Committee considered that the influential role of the guidance issued under clause 17(5) warrants additional scrutiny:

> The Department acknowledges in its memorandum that the guidance will play an important role in ensuring consistency in the way in which different local weights and measures authorities exercise their enforcement functions, including deciding whether to impose a financial penalty or to prosecute. Since the guidance is likely to be highly influential as to how enforcement functions are exercised, we consider it should be made subject to parliamentary scrutiny, with the draft negative procedure offering an appropriate level of scrutiny.[236]

144. Under the draft negative procedure, a draft of the guidance would be laid before both Houses. Either may then decide to reject the guidance, and if so the guidance would not take effect.[237]

145. ***We recommend 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, we advocate the use of the draft negative procedure as endorsed by the House of Lords Delegated Powers and Regulatory Reform Committee.***

236 Correspondence, Delegated Powers and Regulatory Reform Committee, House of Lords
237 Erskine May (24th edition), p. 678

5 Impact Assessment

146. A regulatory impact assessment (IA) is a tool to "assess and present the likely costs and benefits (monetised as far as possible) and the associated risks of a proposal that might have an impact on the public, private or third sector" and a process "to help policy makers to fully think through the reasons for government intervention, to weigh up various options for achieving an objective and to understand the consequences of a proposed intervention".[238] As the Government says, "Good policy making should not start with the solution", and publication of an IA "allows those with an interest in the policy area to understand:

- Why the government is proposing to intervene;
- The main options the government is considering, and which one is preferred;
- How and to what extent new policies may impact on them;
- The estimated costs and benefits of proposed measures".[239]

147. Government guidance sets out when to produce an IA. Under the 2010 version, an IA was required if a regulatory proposal would: "Impose additional costs or reduce existing costs on businesses or the third sector".[240] Guidance published in 2015 indicated that an IA should normally be published at the consultation stage of policy development.[241] New guidance published in February 2018 for the 2017 Parliament[242] confirms (subject to irrelevant exceptions) a "full impact assessment" is needed for a measure regulating business activity where the measure has an "equivalent annual net direct cost to business" of over £5 million.[243] The Ministry's "Assessment of Impact" (see further below) suggests the average annual discounted cost to letting agents will be £85 million.

148. The Government's *Guide to Making Legislation* details how departments should go about submitting draft Bills for pre-legislative scrutiny, and states that "the final impact assessment must be made available alongside bills published in draft for pre-legislative scrutiny".[244] For the avoidance of any doubt, the *Guide* says, "The committee [conducting pre-legislative scrutiny] is likely to wish to see a note on compatibility with the ECHR [European Convention on Human Rights], an impact assessment and a delegated powers memorandum".[245]

238 Department for Business Innovation and Skills, *Impact Assessment Guidance* (April 2010) para 4
239 Department for Business Innovation and Skills, *Impact Assessment Guidance* (April 2010) para 6
240 Department for Business Innovation and Skills, *Impact Assessment Guidance* (April 2010) para 11
241 Department for Business, Energy & Industrial Strategy, *Better Regulation Framework Manual: Practical Guidance for UK Government Officials* (March 2015) para 2.5.12; in certain circumstances measures could be eligible for "fast-track", meaning a full impact assessment would not be required but only after consultation with the Better Regulation Unit (para 1.3.5) and if the gross annual costs for businesses are less than £1m (Flow chart D).
242 I.e., after this consultation launched
243 Department for Business, Energy and Industrial Strategy, *Better Regulation Framework: Interim guidance* (February 2018) para 3 and p 6
244 Cabinet Office, *Guide to Making Legislation* (July 2017) para 14.5. See also para 22.14: "The … impact assessment should be published alongside the draft bill". See also para 3.20.
245 Cabinet Office, *Guide to Making Legislation* (July 2017) para 22.29

149. The Ministry did not publish an impact assessment. Instead it produced an "Assessment of Impact" (not on the usual template),[246] as an appendix to its written evidence to us.[247] This was not previously published. We wrote to the Minister to encourage the Ministry to complete and publish, before we completed our scrutiny, a full IA with both monetised and non-monetised benefits, and list of assumptions in the various scenarios.[248]

150. If the Government had published an IA, "those with an interest in the policy area" might have been better able to understand the options considered and estimated costs and benefits.[249] Dr Rugg told us there was "concern to see the impact assessment"[250] and that "It is naïve to say, 'We are going to take some money out of this and nobody is going to feel it. Nothing is going to happen and everything is going to be fine.'"[251] David Cox, from ARLA, was able observe that he thought "certain parts of their mathematical calculations are woefully inadequate".[252]

151. The Minister insisted:

> This is a draft Bill. There is no duty on us to do what you have suggested with a draft Bill. When it gets to the point of being the Bill, we will have a duty at that point and that is exactly what we will do.[253]

152. **We are highly concerned that the Government did not publish an Impact Assessment when publishing the draft Bill. The Government's insistence that there is no statutory duty to produce an Impact Assessment at this stage misses the point. The Cabinet Office guidance is clear, as is the guidance (and recently revised guidance) from the Department for Business, Energy and Industrial Strategy. The Government should publish an Impact Assessment at the same time as releasing a draft Bill. Effective Parliamentary scrutiny can benefit from scrutiny of an Impact Assessment by others.**

153. ***The Government should follow its existing guidance and publish an Impact Assessment at the same time as releasing a draft Bill. We expect to be provided with an Impact Assessment alongside any draft Bill which we are invited to scrutinise in future, and we ask that the Cabinet Office remind all Government Departments of the importance of issuing an Impact Assessment as part of the pre-legislative scrutiny.***

Equality

154. The Government's *Guide to Making Legislation* also reminds Departments that the public sector equality duty under the Equality Act 2010[254] should be considered during the analysis of impacts.[255] Northwood suggested to us that "the majority of [letting agent] staff that will be affected will be female",[256] and also expressed concern that after fees are prohibited:

246 Available here: https://www.gov.uk/government/publications/impact-assessment-template-for-government-policies
247 MHCLG, DTF0044, Annex B
248 Letter from Chair to Dominic Raab MP, 10 January 2018
249 See para 147 above.
250 Q53
251 Q55. See also Dermot Mckibbin, DTF0051 and Q141
252 Q191
253 Q379
254 Equality Act 2010, s 149
255 Cabinet Office, *Guide to Making Legislation* (July 2017) para 14.6
256 Northwood, DTF0011

> Agents and landlords will favour tenants who are able to make a substantial advance rental payment prejudicing less 'well-off' tenants. Additionally, tenants on lower incomes or those receiving benefit will suffer further and will not be treated equally as agents will be reluctant to undertake further administration associated with referencing a guarantor.[257]

155. The "assessment of impact" does mention the danger of landlords opting not to risk tenants deemed more financially risky, and presents holding deposits as a mitigation of that danger.[258] At the Committee's request,[259] the Minister provided us with a "Draft" Equality Analysis.[260] This concludes there is no risk of different impact on men and women[261] but there is potential for discrimination by landlords against prospective tenants on grounds of age (perceived greater credit risk) and race (perception of risk tenants will fail a Right to Rent check).[262] It identifies possible retention of the holding deposit as mitigating these impacts.[263]

156. **There are concerns, and little clear evidence, about the potential for this Bill to impact on equality of opportunity between those who do and do not share a range of characteristics protected by the Equalities Act 2010, including race, gender and age. Any impact may well be proportionate to the aim of the Bill. But we expect the Ministry to carry out and publish an assessment of this, including the evidence we received, before introducing the Bill.**

257 Northwood, DTF0011
258 MHCLG, DTF0044
259 Letter from Chair to Dominic Raab MP, 10 January 2018
260 Letter from Mrs Heather Wheeler MP to our Chair, 23 January 2018
261 MCHLG, , Draft Equality Analysis
262 MHCLG Draft Equality Analysis
263 MHCLG Draft Equality Analysis

Conclusion

157. The inquiry's terms of reference asked whether the draft Tenant Fees Bill would achieve the Government's objective of delivering "a fairer, more competitive, and more affordable lettings market where tenants have greater clarity and control over what they will pay and where the landlord is the primary customer of the letting agent". Most of the evidence we received argued that the draft Bill would enable the Government's objectives to be achieved to some extent, and we support this view.

158. It is clear that the draft Bill addresses challenges in the private rented sector, and, with its focus on developing a more balanced lettings market, will be welcomed by tenants. That is not to say that improvements could not be made. We have heard suggested amendments from the majority of witnesses. This report details which suggestions we endorse.

159. Our inquiry has considered only the draft Bill. We have not considered other ways that the Government could improve the sector for all involved. The Bill is not a panacea. We refer to our ongoing inquiry into the private rented sector for our consideration of the sector more widely.

160. We now ask the Secretary of State to consider our conclusions and recommendations and accordingly revise the draft Bill before introducing it to Parliament. We hope that the Bill will begin its Parliamentary journey without delay.

Annex

Suggested amendments

Table 1 assimilates the various ways in which we recommend, in the body of the Report, that the Government should amend the drafting before introducing any Bill based on the draft Bill.

Place in draft Bill	Original text	Recommended amendment	Para in Report
Clause 7			
Cl 7(2)	The financial penalty— (a) may be such as the authority determines …	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.	122
Clause 11			
Cl 11		Provide that where this section applies (i.e., while prohibited fees have not been repaid) a landlord be prohibited from recovering possession.	98
Cl 11		Clarify that prohibited loans are repayable on demand.	104
Cl 11(3)	The relevant person may make an application to the county court for the recovery from the landlord or letting agent of …	Allow tenants to recover prohibited fees in the First-tier Tribunal, with a simple process of registration and enforcement as if payable under an order of the county court.	98
Clause 17			
Cl 17(5)	The Secretary of State may direct the lead enforcement authority to issue guidance about the operation of the relevant letting agency legislation to relevant authorities in England and may give directions as to the content of that guidance.	The lead enforcement agency to be under a duty to issue guidance. Guidance issued to be subject to the draft negative procedure.	146

Schedule 1			
Para 1(6)	There is to be left out of account … as a result of a variation of the rent payable in respect of the later period— (a) by agreement between the landlord and the tenant, or (b) pursuant to a term in the tenancy agreement which provides for variation of the rent under the tenancy.	Clarify that (a) applies only to variations in the rent which are agreed after the tenancy agreement has been entered into, and that (b) relates only to a review clause capable of increasing or decreasing rent.	30
Para 2(3) and (4)	(3) But if the amount of the tenancy deposit exceeds the amount of six weeks' rent, the amount of the excess is a prohibited payment.	Reduce the cap on security deposits to the equivalent of five weeks' rent	41
Para 3(2)	In this Act "holding deposit" means money which is paid by or on behalf of a tenant to a landlord before the grant of a tenancy with the intention that it should be dealt with by the landlord in accordance with Schedule 2 (treatment of holding deposit).	Clarify that holding deposits can be paid to letting agents as well as landlords.	54

Schedule 2			
Para 7	Paragraph 3(b) or (c) does not apply if— (a) the landlord is prohibited by section 22 of the Immigration Act 2014 (persons disqualified by immigration status) from granting a tenancy of the housing to the tenant, and (b) the landlord did not know, and could not reasonably have been expected to know, that was the case before the landlord accepted the deposit.	Add, as an alternative to (a), that the landlord has attempted to comply with the requirements prescribed under section 24(2)(a) of the Immigration Act 2014 for checking whether a person has the right to rent, and the tenant has not provided the necessary information or documents to allow the landlord to comply with those requirements before the deadline for agreement. 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. (So long as in neither case the landlord knew the tenant had no right to rent when taking the deposit (as currently provided in paragraph 7(b) of Schedule 2))	52
Para 8	Paragraph 3(b) or (c) does not apply if the tenant provides false or misleading information to the landlord and— (a) the landlord is reasonably entitled …	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) Provide that, unless the tenant knew the information was false or misleading, the landlord may retain only the cost of any reference check undertaken, limited to an amount to be prescribed by the Secretary of State.	49

Schedule 3			
Para 6(2)	The grounds for an appeal under this paragraph are that— (a) the decision to impose a financial penalty was based on an error of fact, (b) the decision was wrong in law, (c) the amount of the financial penalty is unreasonable, or (d) the decision was unreasonable for any other reason.	Specify 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.	129
Para 7	In proceedings before the county court for the recovery of a financial penalty or part of a financial penalty, a certificate … is conclusive evidence of that fact.	Reconsider carefully whether the need for local authorities to be able to recover financial penalties might not be adequately met by providing that a certificate of non-payment is *prima facie*, rather than conclusive, evidence of that fact.	131

Minor drafting issues

Table 2 summarises points that we raised with the Government which are not dealt with in the body of our Report. They are, for the most part, of a minor nature or concerned with legal or drafting technicalities. We were pleased to have the opportunity to engage with the Ministry's Bill team, and are grateful to them for the provision of detailed responses to our questions. We believe this has been a productive way to challenge the Ministry appropriately on points of detail. We acknowledge that the Government responses may not represent their final position and were provided to us in the spirit of sharing their ongoing consideration of our concerns.

Issue	Committee's observations	Government's reply[264]
Clause 7 Divergence from drafting of other legislation on financial penalties	In allowing authorities to impose financial penalties, clause 7 and Schedule 3 appear to be based on the similar provisions in the Regulatory Enforcement and Sanctions Act 2008 and the Housing and Planning Act 2016. Can you confirm the genesis of the provisions in the draft Bill, and any reasons for substantive differences between the draft Bill and the earlier 'precedent'?	Regarding Clause 7 and Schedule 3, the differences between the drafting and the Housing Planning Act were an oversight. We will instruct Parliamentary Counsel to rectify.
Cl 7(4)(c) Drafting	Clause 7(4) (on financial penalties) aims to ensure that local authorities can't impose a civil financial penalty on someone prosecuted with an offence in respect of the same breach. Subsection (4)(c) is intended to cover an acquittal in respect of the conduct (see paragraph 64 of the Explanatory Notes). It might have been better to say "criminal proceedings for such an offence in respect of the conduct have been concluded and the person has not been convicted of~~an~~ that offence ~~in respect of the conduct~~". This would make it clearer that the offence of which the person has been acquitted must be the one for which trading standards want to impose the penalty. Read in context, the draft might well be sufficiently clear, but might not greater precision have been achieved in this way?	Regarding Clause 7(4) (on financial penalties) we have noted the suggestions and will discuss the exact drafting with Parliamentary Counsel.

264 MHCLG (DTF0059), unless otherwise stated

Cll 7(8), 18(3) and 18(5) Reference to enforcing a breach	Clause 7(8) and clauses 18(3) to 18(5) refer to the "enforcement" "of a breach". Professor Loveland has criticised this as "infelicitous drafting": enforcement action is taken *against* a breach. Alternatively, one might say the *obligation not to breach* is enforced. Do you agree that the Bill should not provide for breaches to be "enforced"?	We agree with your point on Clause 7(8) and clauses 18(3) to 18(5) and will rectify in the drafting.
Cl 7(8) Potential for absence of duty to enforce	Under clause 7(8), a local authority (LA2) is relieved of its duty to "enforce the breach" if notified that another authority (LA1) proposes to impose a financial penalty. At that point—unless "proposes to impose a financial penalty" is read as "has served a 'notice of intent' under Schedule 3 para 1(2)"—it is unclear that any authority is obliged to enforce. Might it not be better for the legislation to make it clear that the duty transfers to LA1? (In a similar vein, see also clause 18(4)).	[No reply]
Clause 13	The duty, in clause 13, for letting agents to publicise fees on third party websites does not extend to advertising of licences (cf tenancies). The other provisions about agents' fees in this draft Bill relate also to licences: why doesn't the duty to publicise fees?	The Consumer Rights Act was targeted at letting agents, who are for organising tenancies and who use third party websites. We do not consider it necessary to amend the Consumer Rights Act 2015 to make provision with regards to displaying fees when advertising licences since the Tenant Fees Bill bans the charging of any such fees to tenants.
Clause 19	Clause 19(2) defines "letting agency work" as things done "by a person" in the course of business in response to instructions received from a landlord looking for a tenant for housing, or a tenant looking for housing. Would it not be clearer if the Bill explained that this encompasses only things done in relation to fulfilling the landlord's quest for a tenant, or the tenant's quest for housing? While it might be unnecessary, given the context, it would shut out argument. Is "by a person" (page 11 line 7) necessary?	In reference to your questions on Clause 19(2) regarding the definition "letting agency work". The drafting is intentionally aligned with the definition of letting agent work in other legislation such as s.54(3) Housing and Planning Act 2016, s.86(2) Consumer Rights Act 2015, and s.83(7) Enterprise and Regulatory Reform Act 2013. The reference to "by a person" hinges on the reference to "in the course of a business", which thereby excludes steps that a friend or colleague may take in assisting a person in finding a tenant or housing.

		This definition goes to the persons that the ban applies to–a letting agent is a person who engages in letting agency work. Clause 2 goes to the conduct which is banned. We do not think any amendment is needed to the definition in order to narrow the scope of the ban. We do not believe that the ban would apply to fees for letting agent services that are commissioned by tenants, such as relocation services. We do not consider such fees to be required as a condition of arranging the grant etc of a tenancy.
Explanatory Notes	In the last line of paragraph 60 of the Explanatory Notes, "how" is missing between "about" and "it". Paragraph 98 of the Explanatory Notes does not accurately enumerate the duties of the "lead enforcement authority". They are to keep under review and advise the Secretary of State about developments and the operation of the "relevant letting agency legislation" (i.e., not just "the ban" referred to in the second bullet point) (clause 17(7)). The duty to disseminate information to the public (third bullet point) also extends beyond just "the ban", and is not qualified by reference to only that which is "necessary" (clause 17(2)). It also extends to advising relevant authorities.	We agree with your points about the drafting of the explanatory notes and will make the necessary changes.
Schedule 1 Use of numerals	Schedule 1, paragraphs 2(4)(b) and 3(4) transcribe the number "fifty-two", rather using numerals, presumably to be consistent with "one" and "six" used elsewhere in paras 2(4) and 3(4). The clarity might nevertheless be improved by substituting "52"—it would make it more immediately apparent, just glancing at the paragraphs, that a week's rent is 1/52 of a year's rent.	We have noted the point made about the number 52 in Schedule 1, paragraphs 2(4)(b) and 3(4) and will discuss the merits of the alternative approach with Parliamentary Counsel.

Schedule 3 Confusing application of a defined term	Paragraph 1 of Schedule 3 defines a "financial penalty" as including a local authority requirement to repay a prohibited payment or holding deposit. Paragraph 1(3) dis-applies that extended definition from paragraphs 8 and 9, where the term "financial penalty" isn't used. On first reading, it might suggest those paragraphs don't deal at all with prohibited payments or holding deposits. The opposite is true. Though that is made clear in the italic headings, there seems no particular reason for mentioning paragraphs 8 and 9 at all in para 1(3). What was the reason for that approach?	We have noted your point on paragraph 1 of Schedule 3 and agree that the references to paragraphs 8 and 9 should be removed.

Conclusions and recommendations

Aim of the draft Bill

1. The relationship between tenants, landlords and letting agents is unusual in that letting agents see themselves as providing services to both tenants and landlords. Landlords choose letting agents and tenants choose properties. In doing so, tenants have little choice but to accept letting agents' fees. We agree that it is right that the Government has sought to rebalance the relationship. (Paragraph 12)

2. While we acknowledge that the draft Bill would deprive letting agents of an income source, we agree that the draft Bill will increase competition in the sector by improving fee transparency, which will reduce unfair practices, and is to be welcomed given existing irregularities in the market. (Paragraph 19)

3. Given the comprehensive ban on letting fees, we conclude that the legislation will improve affordability for tenants in the private rented sector at the start of a tenancy. The draft Bill has the potential to save tenants hundreds of pounds. We acknowledge concerns that rents may increase, but believe the risk to be low as demonstrated by the recent experience in Scotland and the expected effect of improving the competitiveness of letting agents. If rents do increase to recover lost letting agent or landlord income, we believe that would be preferable for tenants as it spreads costs over a tenancy and still reduces the up-front cost of renting in the private rented sector. (Paragraph 24)

Permitted payments

4. *As Schedule 1 is currently drafted there is little to prevent a tenancy agreement providing that the rent is very high initially, with a downward variation to take effect from, for example, a month later. We therefore believe that the Government should amend Schedule 1, paragraph 1(6), to make it clear it applies only to variations in the rent which are agreed after the tenancy agreement has been entered into, or take effect under a review clause which permits upward as well as downward review. Alternatively, the Government could simply remove subparagraph (6) altogether given downward rent variations would still be permissible after 12 months.* (Paragraph 30)

5. We acknowledge that setting a cap on security deposits equivalent to six weeks' rent can pose a significant financial challenge to tenants, particularly in high-rent areas such as London. However, we recognise that there are instances when a security deposit equivalent to more than four weeks' rent may be warranted in order to protect landlords and encourage flexibility in the market. *Given that the National Landlords Association told us that the average deposit is equivalent to 4.9 weeks' rent, the Government should reduce the cap on security deposits to the equivalent of five weeks' rent. Capping the security deposit at five weeks' rent will reflect landlords' existing risk in the market, while also reducing the financial burden on tenants at the start of a tenancy and the risk of a race to the top.* (Paragraph 41)

6. We are not satisfied it is enough for the Government to "encourage" landlords to retain only the cost of a reference check. We believe allowing landlords to retain a prescribed amount in respect of reference checks where a tenant has provided false or misleading information would be clearer and enforceable. (Paragraph 47)

7. A test of what is "reasonable" is hard to apply in practice, and is not a satisfactory basis for a possible criminal offence, if it can be avoided. Landlords are sometimes justified in retaining a holding deposit. As the draft Bill stands, well-advised landlords would likely be told to return the deposit in case of doubt, not least given the sums involved (from a landlord's perspective). Although it will be rare for a landlord to have evidence that a tenant has knowingly lied, we think "knowingly provides false or misleading information" would be an easier test to understand. If there is evidence for this we see no reason why a tenant should not lose their entire holding deposit. (Paragraph 48)

8. *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.* (Paragraph 49)

9. We are concerned about the lack of any defence in the draft Bill for a landlord who retains a holding deposit as a result of the Home Office wrongly notifying that a tenant had no "right to rent". There is no reason to expose a landlord to criminal penalty for retaining a holding deposit in reliance of an erroneously negative response from the Home Office. Equally, we see no reason why a landlord should return a holding deposit if the prospective tenant fails to supply the prescribed documents. (Paragraph 51)

10. *We recommend that the Bill—*

    a) *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, and*

    b) *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). (Paragraph 52)

11. *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.* (Paragraph 54)

12. Default fees can constitute a legitimate cost to businesses and should remain a permitted payment. However, we acknowledge concerns that the provisions as drafted are open to abuse. Existing legislation should guard against unfair fees.

But we believe it might not be sufficiently publicised to protect tenants against the likely increase in prevalence and level of default fees when other fees are prohibited. (Paragraph 69)

13. *We recommend that the Government issue clear guidance to tenants, landlords and letting agents on what constitutes a reasonable default fee and, guidance to tenants 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.* (Paragraph 70)

14. *Furthermore, the Government should consider:*

    a) *giving trading standards the express power, and resources, to enforce the reasonableness of default fees, without reliance on the Consumer Rights Act 2015, and*

    b) *establishing an anti-retaliation provision similar to that relating to complaints about the condition of housing.* (Paragraph 71)

15. We welcome the Government's intention to clarify the legislation and to permit charges related to a change of sharer where these are requested by the tenant. (Paragraph 76)

16. While we conclude that the draft Bill does not disrupt existing Green Deal loan repayments, we support the Government's intentions to clarify that such loans—contractually agreed as part of the former Government-sponsored Green Deal—are exempt, given concerns raised by the industry. (Paragraph 80)

17. We welcome innovation in the private rented sector. However, we note that there are opportunities and risks to alternatives to a traditional security deposit which have been insufficiently subject to independent review. The draft Bill provides that the Secretary of State has a wide power to amend the list of permitted payments in Schedule 1, using regulations subject to the affirmative procedure. We believe that this power will enable the Government to respond appropriately to innovation in the private rented sector, when it has been shown to be beneficial to tenants. (Paragraph 86)

18. *The 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. If alternative solutions are found to be affordable for all tenants, the Secretary of State should use the power provided for in the proposed legislation to amend the permitted payment list accordingly.* (Paragraph 87)

19. There is a lack of clarity in the draft Bill about whether fees can be charged at the end of a tenancy agreement. If the Bill did permit exit fees, it would undermine the Government's policy objectives. We therefore welcome the Government's stated intention to clarify that fees on exiting a contract are prohibited under the Bill as they are a condition of granting or renewing a tenancy. (Paragraph 89)

Enforcement

20. *We recommend 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.* (Paragraph 98)

21. We see no reason why tenants should not be allowed to establish their entitlement in the less formal First-tier Tribunal. Enforcement against a recalcitrant landlord is likely to take time whatever the method, but we also think it likely that many landlords would pay once a tribunal had determined a tenant's rights. *We recommend the Government allows tenants to recover prohibited fees in the First-tier Tribunal, with a simple process of registration and enforcement as if payable under an order of the county court.* (Paragraph 99)

22. *We also recommend the Government review whether to provide the First-tier Tribunal with enforcement powers. In the longer term, it 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.* (Paragraph 100)

23. *We do not share the Government's confidence in its interpretation of the draft Bill, as currently drafted, that prohibited loans are repayable on demand. The Government must clarify the drafting in this respect to remove any question of doubt.* (Paragraph 104)

24. We believe that funding enforcement of the Bill solely through the retention of any civil penalties is likely to be ineffective, exacerbate existing pressures and lead to further discontentment in the enforcement of legislation in the private rented sector. The funding model as it stands offers a perverse disincentive for local authorities to engage proactively and cooperatively with landlords and letting agents despite this approach being considered as more effective than a punitive system. If the funding arrangements go unchanged in the Bill, the Government will fail to achieve the aims of the legislation. (Paragraph 114)

25. *We strongly urge the Government to reconsider its intention for the legislation to be solely self-funded through the retention of civil penalties. The Government must provide sufficient additional funding directly to all local authorities to enforce the legislation if it wants the Bill to achieve the Government's aims. Failing that, the Bill should increase the maximum amount of civil penalty.* (Paragraph 115)

26. The Government has told us it intends that local authorities should take into account the need to cover their costs of their enforcement functions when setting the level of a financial penalty. This is a departure from the usual principle that penalties should principally relate to the gravity of the wrongdoing. (Paragraph 121)

27. *We recommend 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, the Government must explain in detail its reasons for departing from usual principle.* (Paragraph 122)

28. There is a conflict between local authorities' experience of recovering the costs of their investigations in the court and our interpretation of the law. *We recommend*

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. (Paragraph 123)

29. We would be concerned if local authorities were perceived as judge and jury, if the penalties they levy were perceived by the public as a revenue stream, or if the penalty process was inconsistent with the European Convention on Human Rights. We are pleased that the Government intends to address these concerns by providing a broader right of appeal. (Paragraph 128)

30. *We recommend 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.* (Paragraph 129)

31. In our view, any provision which excludes the court's usual ability to test the accuracy of what it is being told ought to be included in legislation only cautiously. We do not doubt for a moment the sincerity of local government officers, but mistakes are always possible. *We recommend 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.* (Paragraph 131)

32. The success of the Lead Enforcement Authority is dependent on developing strong relationships with all local authority tiers, tenants, landlords and letting agents. Such relationships should also be cultivated at local authority level. *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. 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.* (Paragraph 136)

33. *The Lead Enforcement Authority should be tasked, and given the funding, to launch a nationwide awareness raising campaign to promote the legislation to tenants.* (Paragraph 137)

34. We note that there is crossover with the UK-wide estate agent Lead Enforcement Authority but given the territorial application of the draft Bill do not think it is appropriate to merge the two authorities. (Paragraph 138)

35. Guidance for local authorities on the exercise of their enforcement powers is key to ensuring consistent and proportionate responses to breaches of the legislation. Therefore, the production of guidance under clause 17(5) of the draft Bill should be a duty, not simply a power, on the Secretary of State or the Lead Enforcement Authority (if not the Secretary of State). We welcome the Government's stated intention to ensure that the production of guidance, issued under clause 17(5), is a duty in the final Bill. (Paragraph 143)

36. *We recommend 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, we advocate the use of the draft negative procedure as endorsed by the House of Lords Delegated Powers and Regulatory Reform Committee.* (Paragraph 146)

Impact Assessment

37. We are highly concerned that the Government did not publish an Impact Assessment when publishing the draft Bill. The Government's insistence that there is no statutory duty to produce an Impact Assessment at this stage misses the point. The Cabinet Office guidance is clear, as is the guidance (and recently revised guidance) from the Department for Business, Energy and Industrial Strategy. The Government should publish an Impact Assessment at the same time as releasing a draft Bill. Effective Parliamentary scrutiny can benefit from scrutiny of an Impact Assessment by others. (Paragraph 153)

38. *The Government should follow its existing guidance and publish an Impact Assessment at the same time as releasing a draft Bill. We expect to be provided with an Impact Assessment alongside any draft Bill which we are invited to scrutinise in future, and we ask that the Cabinet Office remind all Government Departments of the importance of issuing an Impact Assessment as part of the pre-legislative scrutiny.* (Paragraph 154)

39. There are concerns, and little clear evidence, about the potential for this Bill to impact on equality of opportunity between those who do and do not share a range of characteristics protected by the Equalities Act 2010, including race, gender and age. Any impact may well be proportionate to the aim of the Bill. But we expect the Ministry to carry out and publish an assessment of this, including the evidence we received, before introducing the Bill. (Paragraph 157)

Formal minutes

Monday 26 March 2018

Members present:

Bob Blackman	Jo Platt
Helen Hayes	Mr Mark Prisk
Andrew Lewer	Matt Western

In the absence of the Chair, Bob Blackman was called to the Chair.

Draft Report (*Pre-legislative scrutiny of the draft Tenant Fees Bill*) proposed by the Chair, brought up and read.

Ordered, That the Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 161 read and agreed to.

Summary agreed to.

Annex agreed to.

Resolved, That the Report be the Third Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned until Monday 26 March at 4.00 p.m.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

	Question number
Monday 8 January 2018	
Kate Webb, Head of Policy, Shelter; **Dr Julie Rugg**, Senior Research Fellow, Centre for Housing Policy, University of York; and **Professor Ian Loveland**, the City Law School, University of London	Q1–72
Monday 22 January 2018	
Dan Wilson Craw, Director, Generation Rent; **Mette Isaksen**, Policy Researcher, Citizens Advice	Q73–112
Adrian Jeakings, Chairman, National Landlords Association; **David Smith**, Policy Director, Residential Landlords Association; **David Smith-Milne**, Managing Director, Placefirst	Q113–146
Monday 29 January 2018	
Councillor Tony Newman, Member of LGA Environment, Economy, Housing and Transport Board, Leader, London Borough of Croydon; **Sir Robin Wales**, Mayor, London Borough of Newham; **Councillor Simon Blackburn**, Blackpool Council	Q147–175
David Cox, Chief Executive, ARLA Propertymark; **Isobel Thomson**, Chief Executive, National Approved Letting Scheme	Q176–202
Wednesday 21 February 2018	
Andy Fisher, Head of Housing, Health and Communities, Boston Borough Council; **Councillor Robert Lawton**, Cabinet Member for Housing, Bournemouth Borough Council; **Councillor Clare Salier**, Cabinet Member for Housing, London Borough of Wandsworth	Q203–225
Melanie Rees, Head of Policy, Chartered Institute of Housing; **Tamara Sandoul**; Policy Manager, Chartered Institute of Environmental Health; **Alison Farrar**, Lead Officer, Chartered Trading Standards Institute	Q226–264
Monday 26 February 2018	
Mrs Heather Wheeler MP, Minister for Housing and Homelessness, Ministry of Housing, Communities and Local Government; **Becky Perks**, Private Rented Sector Policy Lead, Ministry for Housing, Communities and Local Government; **Anne Frost**, Deputy Director, Private Rented Sector Division, Ministry of Housing, Communities and Local Government	Q265–381

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

DTF numbers are generated by the evidence processing system and so may not be complete.

1 ARLA Propertymark (DTF0036)

2 Belvoir Christchurch (DTF0004)

3 Brittons Estate Agents Limited (DTF0038)

4 Carter Jonas (DTF0015)

5 Carter Jonas (DTF0016)

6 Carter Jonas (DTF0018)

7 Carter Jonas (DTF0014)

8 Chartered Trading Standards Institute (DTF0056)

9 Cheshire West and Chester Council (DTF0022)

10 Chris John & Partners (DTF0003)

11 Citizens Advice (DTF0042)

12 Citizens Advice (DTF0058)

13 College and County (DTF0034)

14 Darlington District Private Landlords Association (DTF0019)

15 Dean Gray (DTF0021)

16 Department for Communities and Local Government (DTF0044)

17 Dermot Mckibbin (DTF0051)

18 Dlighted (DTF0053)

19 GD Estates Ltd (DTF0017)

20 Generation Rent (DTF0055)

21 HJC Ltd (DTF0010)

22 Keystone IEA Ltd (DTF0008)

23 Landlord Advice Line Ltd (DTF0028)

24 Landlord Advice Line Ltd (DTF0029)

25 Landmark Estates (DTF0013)

26 Leaders Romans (DTF0027)

27 Lifestyle Property (DTF0012)

28 Local Government Association (DTF0035)

29 London Borough of Hackney (DTF0031)

30 LSL Property Services plc (DTF0040)

31 MakeUrMove (DTF0048)

32 MHCLG (DTF0059)

33 MHCLG (DTF0060)

34 Mr David Votta (DTF0020)
35 Mr Jeremy Clarke (DTF0005)
36 My Place in Cornwall (DTF0032)
37 National Landlords Association (DTF0030)
38 National Trading Standards (DTF0054)
39 National Union of Students (DTF0043)
40 Northern Housing Consortium (DTF0039)
41 Northwood (DTF0011)
42 OpenRent (DTF0057)
43 Private Rented Sector Professionals Ltd (DTF0009)
44 Professor Ian Loveland (DTF0052)
45 Regal Lettings (DTF0002)
46 Residential Landlords Association (DTF0023)
47 Royal Institution of Chartered Surveyors (DTF0041)
48 Shelter (DTF0047)
49 The Estate Agent Manchester (DTF0007)
50 The Guild of Letting & Management Limited (DTF0049)
51 The National Approved Letting Scheme (NALS) (DTF0050)
52 The Property Ombudsman (DTF0026)
53 The Property Redress Scheme (DTF0024)
54 UK Association of Letting Agents (UKALA) (DTF0037)
55 Woodholls (DTF0006)
56 York Law School (DTF0025)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

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First Report	Effectiveness of local authority overview and scrutiny committees	HC 369 (CM 9569)
Second Report	Housing for older people	HC 370