

Written evidence

Shelter submission to Communities and Local Government Select Committee

Draft Tenant Fees Bill

December 2017

Shelter helps millions of people every year struggling with bad housing or homelessness. We provide specialist advice and support on the phone, face to face and online, and our legal teams can attend court to defend people at risk of losing their home.

However at Shelter we understand that helping people with their immediate problems is not a long-term solution to the housing crisis. That's why we campaign to tackle the root causes, so that one day, no one will have to turn to us for help.

We're here so no one has to fight bad housing or homelessness on their own.

Summary:

Shelter welcomes the draft Tenant Fees Bill and the Government's ongoing commitment to making private renting fairer and more affordable. Shelter is very pleased the Government has held firm on its promise to introduce an outright ban on upfront letting fees as this will ease the financial pressure on private renters, whilst also making the lettings market more competitive and transparent. We are keen to see the ban implemented as soon as possible to prevent tenants being exploited by opportunistic agents who continue to increase fees in anticipation of the ban.

Overall the Bill is a significant step towards a fairer and more affordable lettings market, but needs tightening to ensure it will not be undermined by agents/ landlords charging default fees. Introducing this concept creates a fundamental weakness into otherwise strong legislation as it is inconsistent with consumer contract law and creates a loophole which can be exploited so Shelter urges the Committee to reject the inclusion of default fees as a permitted payment.

The introduction of a cap on deposits is a further welcome sign of the Government's commitment to making renting more affordable. However, Shelter feels the Government has missed an opportunity to meaningfully tackle the barriers created by upfront costs by rowing back on its promise to cap deposits at one-month's rent. Shelter would encourage the Committee to review the levels of the cap on security and holding deposits as well as the conditions under which holding deposits should be returned, to ensure tenants are properly protected.

Subject to the suggestions above, Shelter anticipates the Bill will have positive benefits for tenants, landlords and the lettings industry. Realisation of these benefits will rely on there being meaningful enforcement by Trading Standards and Shelter is pleased to see the Committee is considering the resource implications for local authorities.

Overall, Shelter recommends the Committee:

- 1) Maintains the all-encompassing ban on upfront fees and does not allow this to be watered down.
- 2) Removes the exemption allowing agents and landlords to charge default fees.
- 3) Reviews the level of the cap on security and holding deposits.
- 4) Clarifies what constitutes "false and misleading" information with regard to the non-return of holding deposits and that this is not the same as failing a reference check.
- 5) Sets out clear requirements for the treatment of holding deposits.
- 6) Amends Section 8(3) and 8(6) to state the explicit agreement of the tenant is needed for repayment of non-permitted payments to be put towards a future rent payment or the deposit.
- 7) Carefully considers the resource implications for local authorities.
- 8) Ensures the Bill can be enacted as soon as possible.

Written evidence:

Q1. The Government's stated objective 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.' Do the provisions of the draft Bill enable this objective to be achieved?

1.1 Shelter warmly welcomes the Government's objective and is committed to supporting the Government to achieve this aim. The draft Bill will make a significant contribution towards this objective by providing an outright ban on upfront letting fees. This will give tenants greater clarity and control over what they pay and will rightly result in landlords, who are the consumer in the relationship, paying the cost of engaging an agent to set-up a tenancy.

1.2 This will create a fairer lettings market as tenants will no longer find themselves faced with non-transparent fees, which due to their lack of consumer power they have little choice but to pay. It will also make renting more affordable; 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 every time they move. Furthermore, 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.

1.3 As Shelter has consistently highlighted, an outright ban is the only way to achieve the Government's objective. Any watering down of the ban, to allow certain fees, risks creating a loophole which will be exploited. Evidence from Scotland suggests there is lingering confusion around the ban on letting fees which has affected compliance, with independent research highlighting that even after the ban was clarified, less than one-third of renters clearly understood there was a law banning fees.¹ This emphasises the importance of a simple ban and Shelter urges the Committee not to allow any watering down of the ban.

Default Fees

1.4 Shelter is concerned that permitting the charging of default fees risks undermining the aims of the Bill. It potentially creates a loophole through which agents or landlords can charge disproportionate fees to tenants for defaulting on unreasonable terms in their tenancy agreement. Whilst Shelter understands the rationale for allowing agents/ landlords to charge tenants to cover the cost of a default such as replacing a lost key, Shelter believes there are two clear reasons why this clause should be removed.

1.5 Firstly, default fees are penalty clauses and penalty clauses are unenforceable in the common law of contract where they exceed a party's actual loss or reasonable administrative expenses, and where there is no equality of bargaining power between the parties. Tenants are at the mercy of landlords/ agents when presented with a tenancy agreement, and it is a question of 'take it or leave it'. Where consumer contracts (such as tenancy agreements) are concerned, penalty clauses are governed by the Consumer Rights Act 2015. Part 2 of that Act provides that a contractual term will be unfair and unenforceable if "contrary to good faith, it causes a significant imbalance in the parties' rights to and obligations to the detriment of the consumer". The Act specifies an example of an unfair contract term as "a term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation".² Default fees are an arbitrary fine for failing to do something, and have nothing to do with compensation. Therefore the draft Bill appears to legitimise something that is illegitimate under consumer contract law and would set a concerning precedent.

1.6 Secondly, there is no way of ensuring default fees will be proportionate to the loss incurred for the default. Shelter sees numerous examples of tenancy agreements where default fees are out of all proportion to any costs incurred and Shelter's legal team have witnessed a growth in default fees in the last 10 years. In one tenancy agreement, a landlord included a £40 charge for a late rent payment, a £40

¹ Shelter, [Lessons from the Scottish Lettings Market](#), June 2014

² Consumer Rights Act 2015, S.62(4)

administration fee for every phone call or letter to chase overdue rent and a £40 charge for visiting the premises to collect overdue rent. Another clause allowed the landlord to charge £20 per hour for their time for any activity connected to serving notice, recovering rent arrears or enforcing any terms of the tenancy agreement. The issue with default fees has been highlighted elsewhere and a Shelter Cymru mystery shopping exercise highlighted that late payment fines were some of the least transparent of all letting agent fees in Wales, with many agents appearing to make up fees on the spot.³

1.7 By permitting default fees, the Bill will allow the least responsible agents to legally continue with some of the worst practices and will further entrench the split between responsible agents and rogue operators. Landlords or agents may counter that if such clauses are unfair, they will be 'caught' by the Consumer Rights Act. Only a court can declare a particular clause to be unfair and therefore this would not come under enforcement by Trading Standards, but a tenant would be required to bring a court action with all the costs that entails. Consequently the unfair terms legislation is likely to provide little protection for tenants and Shelter urges the Committee to reject the clause on default fees.

Deposits

1.8 Shelter feels the Government has missed an opportunity to make renting more affordable by rowing back on its intention to cap security deposits at one-month's rent. Paying a security deposit upfront significantly adds to the costs which tenants must budget for when moving home and for those on low incomes, without savings or the ability to borrow from family or friends, sometimes these costs can be an insurmountable barrier to securing a new home, resulting in homelessness.⁴ The introduction of a cap is therefore very welcome, however capping deposits at 6-weeks will mean renters in England still have to find up to an average of over £1100 (£1800 in London) to put down a deposit.⁵ Given most landlords already ask for 6-weeks or less, the cap is likely to have little meaning in practice.

1.9 Landlords have argued the cap needs to be greater than one-month's rent because otherwise tenants may substitute their last month's rent for the deposit. Our research suggests this does not happen often in practice: in our most recent landlords' survey, only 18% of landlords had experienced this in the last 5 years and less than half of them had experienced a tenant doing this without asking.⁶ Shelter has observed this practice has decreased more in recent years, due to the introduction of deposit protection legislation. Therefore Shelter would recommend the Committee reconsider a one-month cap as this would be more affordable, whilst not exposing landlords to unnecessary risks.

1.10 Shelter hopes the introduction of a cap will lead to a wider conversation on deposit reform, including consideration of initiatives such as deposit passporting.

Holding Deposits

1.11 Shelter has similar concerns about the cap on holding deposits and maintains a cap of 2 days would be fairer. It is important to cap holding deposits at manageable levels, firstly, because sometimes tenants need to pull out of tenancies due to unforeseen changes in circumstances and should not be punished unfairly for this. Landlords also have an interest in holding deposits not being so large that people feel under pressure to continue with a tenancy; for example, if a couple split-up, it is not in a landlord's interest for one party to sign up to a tenancy they cannot afford.

1.12 Secondly, as holding deposits are often handed over quickly, in a rush to secure a property, they are particularly vulnerable to fraud or tenants being misled about whether the money will be returned. Shelter is concerned the Bill makes it too easy for agents not to return holding deposits, as set out in Question 2, and this will particularly disadvantage those on low incomes or those unfortunate enough to encounter unscrupulous agents.

³ Shelter Cymru, [Letting Go](#), 2016

⁴ Shelter, [Shut Out](#), June 2017

⁵ English Housing Survey, Private Rented Sector 2015-16, average weekly rents

⁶ YouGov, 1137 private landlords, online, Jul-Aug 2017

1.13 Shelter maintains a 2-day cap (averaging £52, given average weekly rents of £184) would be sufficient to deter tenants from bidding on multiple properties, whilst also not unfairly impacting on those who lose holding deposits.⁷

Q2. Are the draft Bill's provisions necessary, clear and workable?

2.1 Shelter feels the approach to banning letting fees is necessary, clear and workable with the exception of permitting default fees. The ban on upfront fees is clear and all-encompassing, which will make it easy for tenants, landlords and agents to have clarity about what can be charged at the outset and when renewing a tenancy. The simplicity of the ban should aid implementation and enforcement.

2.2 The Committee may wish to clarify that it would not be permitted for an agent to charge a fee for granting, renewing or continuing a tenancy even if they offer a tenant a free alternative to paying the fee. Shelter Scotland have highlighted that some agents in Scotland have continued to make tenants pay for referencing by giving them the choice between providing all the relevant documents themselves or directly paying the referencing company. In Shelter Scotland's experience, where agents are doing this, most tenants have little choice but to opt for paying the fee because it is almost impossible for them to provide all the documentation asked for by the agent.

Default fees:

2.3 The current exemption for default fees is not clear or workable as it creates a loophole through which agents/landlords can effectively impose arbitrary penalty fines on tenants for defaulting on conditions in their tenancy agreement. As outlined above, Shelter believes this clause is inconsistent with contract law on penalty clauses, and the safeguards in the Consumer Rights Act, and consequently should be removed.

2.4 Shelter accepts that a tenant should cover the cost of replacing a lost key and the Committee may wish to add in that agents can require a tenant to pay to replace a lost key as a permitted payment. However, in this circumstance, the tenant should not be subject to a fee (essentially a penalty fine) but should only cover the expense of the new key. There are a number of ways this could happen – either the tenant could arrange for a new key to be cut and pay directly themselves or the agent/landlord could arrange for a new key to be cut and invoice the tenant for only the cost of the new key. The costs associated with the agent's or landlord's time should be considered part of their business expense and not passed on to the tenant. The requirement to pay to replace a key should be clearly set out in the tenancy agreement so the tenant is aware of their responsibilities.

2.5 Shelter does not believe agents/landlords should be able to impose fees for late rent payments (other than a reasonable rate of interest) as these do not necessarily result in them incurring any further costs. Chasing rent payments is part of a landlord's or agent's business expense and if a tenant fails to pay the rent then this would be recoverable as a debt or provide a ground for possession based on rent arrears. If it became necessary to issue court proceedings for any reason, the landlord can ask the court to make an order for the costs of those proceedings.

2.6 Other defaults, such as damage to a property, would be recovered via the security deposit at the end of a tenancy. As with the above key example, in these cases, any potential defaults should be set out in advance and the tenant should not incur a fee but should cover the reasonable expense incurred by the agent/ landlord for fixing the default. The free deposit dispute resolution services, provided by the Tenancy Deposit Schemes, offers a route for tenants to challenge any charges which they feel are unfair or excessive.

⁷ English Housing Survey, Private Rented Sector 2015-16, average weekly rents

Deposits:

2.7 Shelter recommends the Committee reviews the terms about when a holding deposit should be returned as they are currently unclear and open to abuse. There needs to be tight controls on the return of holding deposits to prevent rogue agents from collecting multiple holding deposits for the same property, as highlighted in an expose from the consumer watchdog Which.⁸

2.8 Shelter has concerns the Bill makes it too easy for agents not to return holding deposits by claiming the tenant has provided “false and misleading information”. Shelter is particularly concerned ARLA have suggested this is equivalent to failing a reference check.⁹ This is clearly not the case as a tenant can provide completely accurate information but still fail a reference check, perhaps due to something in a reference from their previous landlord.

2.9 Furthermore, tenants may not intentionally provide false information but there is a risk agents will interpret the information as misleading after referencing. This has been highlighted by several rulings from the Property Ombudsman. For example, TPO ruled in favour of a prospective tenant who had their holding deposit withheld after they told the letting agent they were pregnant and the landlord chose to pull out of the tenancy agreement due to concerns about the tenant’s income dropping and the need to claim benefits. The agent claimed the prospective tenant had deliberately withheld details of the pregnancy but the Property Ombudsman found no evidence of this or evidence the landlord had instructed the agent they did not wish to consider tenants in receipt of benefits.¹⁰ Shelter is concerned those on low incomes or in insecure employment may be particularly vulnerable to this sanction as it may be difficult for them to provide their exact income in the form being asked for by the agent.

2.10 Shelter has further concerns about holding deposits not being returned if someone fails a right to rent check. These checks can be complicated and an individual may not always know whether they have the right to rent or may fail simply because they do not have their documents in order.

2.11 In light of the above Shelter recommends the Committee:

- a) Clarifies what constitutes “false and misleading” information and that this is not the same as failing a reference check and acknowledges the challenges facing households in low paid work or in receipt of benefits, who may be subject to income fluctuations.
- b) Sets out clear requirements for the treatment of holding deposits. For example, there should be an obligation on agents to provide a paper trail both before a holding deposit is taken, setting out what will happen to it and when it will be returned; and subsequently, written notification specifying the reasons if a holding deposit is not being returned.

2.12 Finally, Shelter recommends Sections 8(3) and 8(6) are amended to state prohibited payments can only be put towards the rent or deposit, with the explicit agreement of the tenant. The default position should be that prohibited payments are immediately returned, unless there are rent arrears or the tenant specifically agrees they are happy for any repayment to be put towards a future rent payment or the deposit. Tenants may benefit from immediate repayment and agents should not decide the timing for repayment.

Q3. What are the resource implications for local authorities?

3.1 Meaningful enforcement is key for ensuring the Bill delivers the Government’s aims and Shelter is pleased the Committee is considering the resources available for enforcement. Shelter has consistently expressed concerns about whether Trading Standards will have sufficient resources to enforce a ban, given the well-documented reduction in resources across Trading Standards teams.

⁸ News release, <http://www.propertyindustryeye.com/agents-charging-multiple-holding-deposits-from-tenants-come-under-fire-from-which/>

⁹ News release, <http://www.arla.co.uk/news/november-2017/tenant-fees-bill-at-a-glance.aspx>

¹⁰ The Property Ombudsman, <https://www.tpos.co.uk/news-media-and-press-releases/case-studies/item/holding-deposit-negotiations>

3.2 It is important to keep in mind that local authorities have also gained additional responsibilities to enforce against rogue landlords and agents in the Housing and Planning Act 2016. Shelter supports local authorities being given additional enforcement powers; however, increased powers will only make a difference if local authorities have the necessary resources to exercise these powers.

3.3 Enforcement should be facilitated by the simplicity of the ban on upfront fees. This will make it easier for tenants to know their consumer rights and to challenge poor practice directly, without needing support from Trading Standards. Any watering down of the ban would increase the resource implications for local authorities, as it would result in a greater requirement for them to get involved. Similarly, the clause on default fees has the potential to increase the burden on Trading Standards as it will be difficult for private renters to robustly challenge agents over these fees independently.

3.4 It is positive Trading Standards can retain the proceeds of any penalties to support their enforcement functions. However, this approach will potentially penalise councils who proactively raise awareness of the ban with agents, as they are less likely to benefit from collecting penalties. Therefore, DCLG may wish to consider providing some initial upfront funding to support authorities and also consider investing in a communication campaign to raise awareness of the ban so this does not fall to local authorities.

Q4. What is the likely impact of the legislation on key stakeholders including tenants, letting agents and landlords?

Tenants:

4.1 The banning of upfront fees will immediately reduce the cost of moving for private renters. Shelter's most recent private renters survey showed average total moving costs were around £1,400, with those who were charged letting fees paying an average of nearly £250 in fees.¹¹ Banning fees will therefore remove a key barrier to securing a new tenancy, particularly benefitting those on low incomes.

4.2 Some have expressed concerns that tenants may experience increased rents, as landlords may pass on increases in their costs. As outlined below, there are good reasons to believe landlords will not see a significant increase in their costs and some landlords may be prepared to absorb small increases in their costs. Even if some landlords do slightly increase rents, this is preferable for tenants as it is more transparent and costs are spread over time.

4.3 This position is supported by evidence from Scotland. Independent research commissioned by Shelter found landlords in Scotland were no more likely to have increased rents since 2012 than landlords in other parts of the UK. Where rents had risen this could be explained by economic factors and not in relation to the ban on fees. Landlords were surveyed on their perception of the impact and only one out of 120 had noticed an increase in their own fees and passed this on to their tenants. Renters themselves were no more likely to report a rent increase than those in other parts of the UK.¹²

4.4 As currently drafted, the Bill still leaves open the potential for private renters to be exploited by a minority of agents who take advantage of potential loopholes. However, Shelter is hopeful that through the scrutiny process, the Committee will ensure safeguards are in place to prevent this.

4.5 Tenants may also be exploited whilst waiting for the ban so Shelter recommends the Bill should be enacted as soon as possible, without waiting for other legislation to be finalised (such as letting agent regulation). In anticipation of the ban, some opportunistic agents have been looking to maximise their income from fees whilst they are still legal. The average letting fee of £246, reported in this year's private renters' survey, is substantially higher than in Shelter's previous surveys, supporting the theory that agents have been increasing fees, knowing that they will soon be banned.¹³ We hope the pre-legislative

¹¹ YouGov survey of 3,978 private renters in England, online, weighted, July-August 2017

¹² Shelter, [Lessons from the Scottish Lettings Market](#), June 2014

¹³ YouGov survey of 3,978 private renters in England, online, weighted, July-August 2017

scrutiny process will provide agents with an opportunity to give detailed feedback on the Bill so the legislation is then in a strong position to be enacted as soon as possible after it is passed.

4.6 Finally, whilst tenants will benefit significantly from this Bill, other upfront costs will continue to be a barrier. It is positive the Government has recognised this by introducing some cap on deposits; however as outlined above, further work is needed to support tenants to overcome these barriers.

Landlords:

4.7 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. Combined with other measures to regulate the lettings industry, this should result in a better standard of service, although landlords may be required to shop around to find the best value service.

4.8 It is possible landlords may experience some increase in costs as agents will no longer have the option to split costs between landlords and tenants. However, Shelter does not anticipate landlords will absorb the full costs currently levied on tenants. Firstly, unlike tenants, landlords have the power to shop around in choosing an agent and therefore agents have a far greater incentive to charge transparent prices. Secondly, landlords are often already paying for many of the services for which tenants are also being charged, as agents have been taking advantage of the lack of regulation to increase their income by effectively double-charging.

4.9 Evidence from the Scottish lettings market supports the view that landlords will not experience a disproportionate increase in their costs. Independent research showed that less than one in five (17%) letting agency managers had increased fees to landlords and the majority (70%) of landlords who use agents had not noticed any increase in fees since 2012.¹⁴

4.10 Shelter does not think landlords will be adversely affected by the cap on security deposits. Our most recent private landlord survey highlighted the majority of landlords (55%) only ask for one-month's rent as a deposit, with only 6% asking for more than six weeks.¹⁵ Considering this, the proposed 6-week cap seems unlikely to have any impact.

Letting agents:

4.12 Shelter anticipates the Bill will support the Government's objective of driving up standards in the lettings industry – a goal which is in fact shared by many responsible operators across the industry. The ban on fees will inevitably impact on how agents operate as they will need to adapt their business models to focus on charging fees to landlords, rather than maximising their income by charging extortionate fees to tenants.

4.13 Some agents may find it difficult to adapt and potentially some will need to reduce their workforce or exit the market. However, 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.¹⁶

4.14 Agents have shown their adaptability on previous occasions. For example there was a growth in tenant fees after the sales market collapsed in 2008 and property agents were forced to look for other sources of income. Evidence from Scotland supports the view the lettings industry will be resilient to the banning of fees. In the Westminster Hall Letting Agent Fees debate on 6 September, Kevin Hollinrake

¹⁴ Shelter, [Lessons from the Scottish Lettings Market](#), June 2014

¹⁵ YouGov, 1137 private landlords, online, Jul-Aug 2017

¹⁶ YouGov, 1137 private landlords, online, Jul-Aug 2017

MP highlighted how evidence from Companies House shows since 2012 (when the ban on fees was clarified) the number of letting agents has increased in Scotland.

4.15 Finally, there is little evidence the current multitude of agents in the market benefits agents, landlords or tenants, as increased competition has not driven up standards or reduced prices. Therefore, 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. Combined with DCLG's plans to regulate letting agents and the introduction of banning orders for rogue agents, this should result in higher standards across the industry.

For more information please contact:

Rhea Newman
Policy Team
Shelter
Email: rhea_newman@shelter.org.uk
Phone: 0344 515 2037