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Date: 22 December 2021

Dr Janice Thompson
Communities Committee Clerk
Room 430
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Dear Janice,

Deliberations on the Private Tenancies Bill

This response provides further information on two of the issues raised during the public session on 21 December 2021 with Departmental Officials and for which Committee requested a response before the Christmas break.

Schedule 2

At 16th December meeting Committee requested a written breakdown of each amendment and what it does and that this can be in the form of an updated EFM or a written briefing. Officials still need to finalise a revised EFM and to assist Committee have provided a written briefing outlining each amendment with an explanation of its purpose. This is attached at Annex A.

Proposed Committee Amendment Clause 2 A – Unintended Consequences

Committee asked officials to consider their proposed amendment on payment options. This is attached at Annex B.

A further response on any outstanding queries raised in your letter of 21 December will be provided before the next meeting of Committee on 11 January 2022.

If you require any further clarification, please feel free to contact me.

Yours sincerely,

Fionnbarr Dorrian
Departmental Assembly Liaison Officer
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ANNEX B

Proposed Clause 2A – Methods of Payment

1. As the Department has indicated during deliberations on the Bill, it has no detailed evidence to clarify any of the issue(s) raised with Committee as a result of its call for evidence and, therefore, the need for policy and legislative intervention. It cannot, therefore, be definitive in terms of intended or unintended impact.

Offence(s) and Enforcement

2. The first and most obvious unintended consequence is that the amendment as drafted does not include any offence(s) for non-compliance. When there is a duty under legislation, there is normally an offence for non-compliance and, if proved, a sanction or penalty. Without an offence there is no power to effect change in landlord behavior.
3. There is then further detail needed to specify in detail the offences (for example Landlord provides no options, less than 3 options, no choice offered) when they can occur (prior to the tenancy, at the granting of the tenancy, during the tenancy) what evidence is used and where/how it is captured (e.g. within the written tenancy terms but that would unlikely capture payments prior to the tenancy), whom enforces (PTO offences are normally investigated and enforced by District Councils) the severity of the offence and the nature of the sanction based on that severity (most PTO offences are at level 4 equating on conviction to a maximum fine of £2,500), if a Fixed Penalty Notice (FPN) alternative is available and what happens for recurring or continuing offences.

Available Payment Methods

4. The Department has no evidence on the current payment practices of Landlords and Tenants, so is unaware if the payment methods outlined in the amendment are those currently in use.
5. There are a number of similar payment methods included in the amendment (with and without online technology). Based on this, in reality there may be 4 broad Tenant to Landlord payment methods:
 - Cash;

- Cheque/Postal Order (that require in person cashing or deposit);
- Debit Cards, Direct Debit, Standing Order and other on-line payment methods e.g. Paypal or Revolut (i.e. arrangements whereby one person gives his authority for payments to be made from an account of his, or on his behalf, to another person or to an account of that other person); and
- Credit Cards- i.e. a credit card company provides credit to facilitate payment for goods/services.

Use of Credit Cards

6. There are unintended consequences in proposing Credit Card as a payment method. Unless a tenant has the ability to pay the amount owed to the credit card supplier within the period in their credit card agreement they are effectively creating rent arrears for themselves. Whilst not actually creating rent arrears (as the rent amount has been received by the landlord) they are effectively creating a credit liability with the interest chargeable on such liabilities.

Charges arising from some payment methods

7. In the time available officials have not had the time to explore the extent to which some of the payment methods have charges associated with them (for both landlord and tenant) Committee will want to note that some of the payment methods are likely to include charges (for each transaction or for a change in amount) which may be a significant issue for some tenants.

Payment of Rental Payments direct to landlord

8. The amendment does not deal explicitly with Tenants in receipt of Universal Credit (UC) or Housing Benefit (HB) where all or some of the rent is paid directly to the Landlord via automated systems. UC housing costs are normally paid directly to the landlord and for HB the tenant can choose whether it is paid to themselves or to the landlord. The amendment should deal with this issue and either consider that the reach of this amendment includes this as a potential payment choice or it is not a payment choice and,

therefore, it is only the element of any “top up” (i.e. difference between UC or HB entitlement and the rental amount) that is paid directly from Tenant to Landlord that needs to be considered here.

3 Options

9. Committee wished to have 3 payment options offered to tenants to minimize a difficult landlord offering a very limited choice which, in reality, will mean that a tenant will be obliged to pay in cash. Whilst 3 options will mitigate this to some extent, the Department has no evidence to establish current practices to indicate if 3 should be the minimum number of options offered.
10. “Accidental Landlords” i.e. those with one or two properties, are unlikely to have the technology to support some payment methods in person, particularly debit card/credit card thereby reducing the number of options available to his/her tenant.

1 Payment Method

11. The amendment as drafted does not clarify how decisions on the payment method are determined – does the Tenant choose from the 3 options, does the Landlord choose or is there an agreement between the 2 parties.
12. This links to the reference regarding offences and enforcement above. Depending on how a payment method is determined the Landlord could commit a number of potential offences – not offering any options, offering less than 3 options, offering options not on the list, insisting on a payment method other than the tenant’s preference.
13. Linked to the latter, there are additional potential offence(s) if one payment method is determined by Landlord, the tenant insists on paying via another and Landlord refuses payment (e.g. Landlord states cash, Tenant offers payment by debit card and Landlord refuses payment).
14. As indicated above, the amendment as drafted does not deal specifically with UC/HB payments made directly to the Landlord. If they are within scope there is an unintended consequence that those needing to “top up” will require two permitted payment methods i.e. the automated payment from UC /HB and the top up payment that Tenant has to make to landlord. As drafted two payment types are not permitted.

15. There may be other situations where the flexibility for more than one payment type may be needed. For example to quickly secure a tenancy a prospective tenant wishes to pay the required deposit in cash, but thereafter pay monthly rental by direct debit. Indeed Landlords wanting to manage the risks associated with providing the tenant with the keys to his/her property may wish to have this payment in cash rather than awaiting the clearance of cheque, direct debit etc. Not having this flexibility may mean obligating Tenants to pay in cash until a change in payment method can be determined.
16. Linked to this the amendment as drafted does not deal specifically with changes in payment methods during the tenancy. For a number of reasons both the Landlord and Tenant may wish to change the payment method during the tenancy. The unintended consequence here is that this may increase rather than decrease the number of tenants obliged to pay by cash.
17. Some tenants may not have access to a bank account (for example international students) and may wish to pay cash instead of other methods such as standing order/bank transfer. If cash is always an option to choose from, this Clause may have the unintended consequence of more tenant/landlord transactions in cash.

Commencement

18. Committee wish to have this introduced quickly. Committee may wish to consider these comments which, whilst bringing clarity, would make their proposal more detailed and would of necessity take longer to commence.
19. The Department would also have to engage with an Authority (most likely Councils) to agree the scope of and develop and implement the enforcement element and this too will take some time

	Amendment text	Description/ explanation
1	<p>Schedule 2, page 16, line 10 Leave out sub-paragraph (a)</p>	<p>The prohibition will apply to all types of dwelling house, unless an exemption applies</p>
2	<p>Schedule 2, page 16, line 16 Leave out paragraph (3) and insert –</p> <p>‘(3) Regulations under paragraph (1) may provide for the granting to a person, in respect of a dwelling-house, of—</p> <p style="padding-left: 40px;">(a) an exemption on the ground that the dwelling-house is of such description as is provided for in the regulations;</p> <p style="padding-left: 40px;">(b) an exemption that is to have effect for a period of time and is subject to the condition that specified works or measures for improving efficiency in the use of energy in the dwelling-house are carried out within that period (an “improvement exemption”);</p> <p style="padding-left: 40px;">(c) an exemption on such other grounds as may be provided for in the regulations.</p> <p>(3A) In paragraph (3)—</p> <p style="padding-left: 40px;">(a) “exemption” means an exemption from a prohibition imposed under paragraph (1);</p> <p style="padding-left: 40px;">(b) “specified” means specified in the improvement exemption.</p> <p>(3B) Regulations that provide for exemptions by virtue of paragraph (3) may include, in particular, provision—</p> <p style="padding-left: 40px;">(a) for exemptions to be granted by a prescribed person or prescribed persons (the “authority”);</p> <p style="padding-left: 40px;">(b) about the making of applications to the authority (including provision about the evidence which must or may be provided with applications);</p>	<p>This is a large amendment which:</p> <ul style="list-style-type: none"> • Sets out what exemptions can be given for in regulations, and in particular introduces the concept of an ‘improvement exemption’. • Sets out that exemptions can apply for certain periods of time. • Allows Regulations to set up a system (overseen by an authority) to apply for exemptions, for exemptions to be granted and publically listed. Regulations can include various powers to enable that authority in its work, including to conduct inspections and for a system of appeals to be put in place. • Regarding improvement exemptions, for a limit on the cost of works to be done in a time period, and (in 3C) enabling access for landlords to premises to carry out the works (to allow them to fulfil their obligations in an improvement exemption). • For a time limited exemption to be granted to someone who becomes a landlord while they engage with the process (this mirrors a provision in HMO licencing legislation).

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| | <ul style="list-style-type: none">(c) for exemptions to have effect for a specified period of time (including provision for the authority to determine that period);(d) for a limit on the estimated cost of works or measures that may be specified in an improvement exemption (including a limit set by reference to the value of the dwelling-house or any other prescribed circumstances);(e) for the authority to maintain a publicly-accessible register of exemptions granted;(f) about appeals to a prescribed person or body against decisions regarding exemptions (including provision about how such appeals may be disposed of and the effect of any exemption pending the determination of an appeal);(g) about the inspection of dwelling-houses for the purposes of an application for an exemption or for the purposes of an appeal;(h) in a case where an application or appeal has been made under the regulations, for the applicant or appellant to be exempt from a prohibition imposed under paragraph (1)(b) in respect of the dwelling-house in question pending the determination of the application or appeal;(i) about the consequences of providing false or misleading information in an application to the authority or in proceedings on an appeal (including provision creating criminal offences or invalidating exemptions);(j) for a person who acquires an estate in a dwelling-house to be exempt from a prohibition imposed under paragraph (1)(b) in respect of that dwelling-house for a prescribed period of time. | |
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	<p>(3C) Regulations may provide that if a person— (a) is granted an improvement exemption, and (b) complies with prescribed conditions regarding the giving of notice to any tenant of the dwelling-house, or with such other conditions as may be prescribed, works or measures specified in the exemption are to be regarded, for the purposes of Article 12, as works that the person is under a duty to execute.</p> <p>(3D) Regulations may also include such supplementary, incidental or consequential provision as the Department considers appropriate, including provision modifying any statutory provision.</p>	
<p>3</p>	<p>Schedule 2, page 16, line 32 Leave out ‘an offence’ and insert ‘offences’</p>	<p>As a continuing offence is introduced, a Landlord may be guilty of breaching and committing more than one offence.</p>
<p>4</p>	<p>Schedule 2, page 16, line 36 At end insert – ‘(1A) Regulations under Article 11G may provide that a person commits an offence if – (a) the person is granted an improvement exemption; (b) the person fails, without reasonable excuse, to carry out the works or measures specified in the exemption within the period of time so specified; (c) Article 11G(2) applies to the dwelling-house immediately after the expiration of that period of time; and (d) at any time during which the exemption had effect, the person – (i) granted a private tenancy of the dwelling-house; or</p>	<p>Introduces an offence for applying for an improvement exemption to allow a house to be let out, letting that house out, but not doing the works agreed to in the improvement exemption.</p> <p>Allowing inspections by the authority to ascertain if the improvements have been made (and therefore if an offence has been committed or not).</p> <p>Acknowledges that there will be reasons in some cases for not carrying out the works committed to.</p>

	<p>(ii) continued to let the dwelling-house out under a private tenancy that was granted before the exemption had effect.</p> <p>(1B) The regulations may provide for inspections of a dwelling-house in respect of which an exemption has been granted by virtue of Article 11G(3)(b), for the purpose of investigating whether an offence created by virtue of this Article has been committed.</p> <p>(1C) The regulations may set out circumstances in which a person is, or is not, to be regarded as having a reasonable excuse for the purposes of an offence created by virtue of paragraph (1A) (including circumstances where a person ceases to hold an estate in the dwelling-house).'</p>	
5	<p>Schedule 2, page 16, line 37 Leave out 'virtue of paragraph (1)' and insert 'regulations under Article 11G'</p>	Is a technical amendment as Paragraph (1) is now greatly expanded by the Amendment before – still refers to Article 11G
6	<p>Schedule 2, page 16, line 40 After 'scale' insert '(but, in the case of an offence in respect of a prohibition imposed under Article 11G(1)(b), this is subject to paragraphs (3) and (4))'</p>	This sets out that breaching the 'continuing offence' (continuing to let out a house in defiance of the prohibition) will be treated differently – as set out in the next amendment.
7	<p>Schedule 2, page 16, line 40 At end insert – '(3) Where regulations under Article 11G create an offence in respect of a prohibition imposed under Article 11G(1)(b), they must provide that where – (a) a person is convicted of such an offence ("the initial conviction"), (b) the letting that was the occasion of that offence continues after the initial conviction, and</p>	<p>This sets out that the possible fine for the continuing offence will be linked to the length of time that the offence goes on for – one hundredth of the level 5 max (currently this is £50 a day).</p> <p>It also sets out that where there is a continuing offence, and the landlord pays a fixed penalty notice but continues to let out the house in defiance of the prohibition, that they can also be fined for this 'post payment' offence – as above, on the basis of the number of days this offence continues for.</p>

	<p>(c) the person is convicted of such an offence in respect of the letting that continues after the initial conviction (“the continuing offence”), the continuing offence is to be punishable with a fine not exceeding one-hundredth of level 5 on the standard scale for every day or part of a day for which the letting continues after the initial conviction (and, accordingly, the fine may exceed level 5 on the standard scale).</p> <p>(4) Where regulations under Article 11G create an offence in respect of a prohibition imposed under Article 11G(1)(b), they must provide that where –</p> <ul style="list-style-type: none"> (a) a person breaches such a prohibition, (b) the person is given a fixed penalty notice under Article 68A in respect of such an offence on the grounds of that breach, (c) the person pays the fixed penalty stated in the notice, (d) the breach continues after payment of the fixed penalty, and (e) the person is convicted of such an offence in respect of the breach that continues after payment of the fixed penalty (“the post-payment offence”), <p>the post-payment offence is to be punishable with a fine not exceeding one-hundredth of level 5 on the standard scale for every day or part of a day for which the breach continues after payment (and, accordingly, the fine may exceed level 5 on the standard scale).’</p>	
8	<p>Schedule 2, page 16, line 42 Leave out ‘virtue of Article 11H’ and insert ‘regulations under Article 11G’</p>	<p>This adds these offences to the things District Councils can prosecute (in 68(3) of the 2006 Order).</p>
9	<p>Schedule 2, page 17, line 4 Leave out ‘virtue of Article 11H; or’ and insert ‘regulations under Article 11G (but this is subject to paragraph (1A));’</p>	<p>This relates to the fixed penalty notices, and adds these offences to the things councils can give fixed penalty notices for in 68A of the 2006 Order – with an exemption in the next Amendment</p>

<p>10</p>	<p>Schedule 2, page 17, line 4 At end insert – (aa) after paragraph (1), insert –</p> <p>“(1A) This Article does not apply where-- (a) an authorised officer has reason to believe that P has committed an offence created by virtue of Article 11H(1) in respect of a prohibition imposed under Article 11G(1)(b) (“the continuing offence”), (b) P has previously been convicted of such an offence (“the initial offence”), and (c) it appears to the authorised officer that the continuing offence has been committed by P continuing, after that conviction, the letting that was the occasion of the initial offence.”;</p>	<p>The Amendment closes a potential loophole where a landlord avoids larger fines for continuing offences after conviction by regular payment of (smaller) fixed penalty notices – this amendment limits the opportunity to pay a fixed penalty notice in these cases.</p>
<p>11</p>	<p>Schedule 2, page 17, line 5 Leave out sub-paragraph (b) and insert (b) after paragraph (8) insert – “(8A) The fixed penalty payable to a district council under this Article in respect of an offence created by regulations under Article 11G is an amount determined by the council, being an amount not exceeding one-fifth of the amount prescribed in accordance with Article 11H(2)(b) (but this is subject to paragraph (8B)).</p> <p>(8B) Where – (a) an authorised officer has reason to believe that P has committed an offence created by virtue of Article 11H(1) in respect of a prohibition imposed under</p>	<p>This amends 68A of the 2006 Order and defines the size of the fixed penalty notices for continuing offences, which are up to a fifth of what the maximum overall fine as indicated in Section 7</p>

	<p>Article 11G(1)(b) (“the continuing offence”),</p> <p>(b) P previously breached a prohibition imposed under Article 11G(1)(b) (“the initial breach”),</p> <p>(c) P was given a fixed penalty notice under this Article on the grounds of that breach,</p> <p>(d) P paid the fixed penalty stated in the notice, and</p> <p>(e) it appears to the authorised officer that the continuing offence has been committed by P continuing, after that payment, the letting that was the occasion of the initial breach.</p> <p>the penalty payable is an amount determined by the council, being an amount not exceeding one-five-hundredth of the amount prescribed in accordance with Article 11H(2)(b), for every day or part of a day for which it appears to the officer that the letting has continued after payment (and, accordingly, the fine may exceed one-fifth of level 5 on the standard scale).”.’</p>	
<p>12</p>	<p>Schedule 2, page 17, line 7 After ‘regulations’ insert – ‘(a) in paragraph (3), before “14” (as inserted by section 11) insert “11G,”;’</p>	<p>This adds the Regulation making powers in 11G to the list of provisions concerning regulations in Article 72 of the 2006 Order</p>
<p>13</p>	<p>Schedule 2, page 17, line 14 Leave out ‘and’ and insert – ‘(ca) such persons as appear to the Department to be representative of tenants, and’</p>	<p>Before making the Regulations allowed by this Schedule, the Department must consult such persons as appear to the Department to be representative of tenants</p>
<p>14</p>	<p>Schedule 2, page 17, line 16 After ‘landlords’ insert ‘or tenants’</p>	<p>Before making the Energy Efficiency Regulations allowed by this Schedule, the Department must consult such persons as appear to the Department to be representative of tenants</p>

15	<p>Schedule 3, page 19, line 6 Leave out '11H' and insert '11G'</p>	<p>This is a technical amendment to Schedule 3, to align with the 2006 order after the amendments above (in Schedule 2) have been made to it.</p>
16	<p>Schedule 3, page 19, line 7 Leave out '11J' and insert '11I'</p>	<p>This is a technical amendment to Schedule 3, to align with the 2006 order after the amendments above (in Schedule 2) have been made to it.</p>
17	<p>Schedule 3, page 19, line 9 Leave out sub-paragraph (a) and insert – '(a) after paragraph (1)(ab) (as inserted by Schedule 2) insert – “(ac) an offence created by regulations under Article 11I; or”;</p>	<p>This is a technical amendment to Schedule 3, to align with the 2006 order after the amendments above (in Schedule 2) have been made to it.</p>
18	<p>Schedule 3, page 19, line 11 Leave out from 'after' to end and insert – “or 65A(4)” insert “or an offence created by regulations under Article 11I”.</p>	<p>This is a technical amendment to Schedule 3, to align with the 2006 order after the amendments above (in Schedule 2) have been made to it.</p>
19	<p>Schedule 3, page 19, line 12 At end insert – '(za) in paragraph (2), for “paragraph (3)” substitute “paragraphs (3) and (3A)”;</p>	<p>This is a technical amendment to Schedule 3, to align with the 2006 order after the amendments above (in Schedule 2) have been made to it.</p>
20	<p>Schedule 3, page 19, line 22 Leave out 'and' and insert – '(ba) such persons as appear to the Department to be representative of tenants, and'</p>	<p>Before making the Electrical Safety Regulations allowed by this Schedule, the Department must consult such persons as appear to the Department to be representative of tenants</p>
21	<p>Schedule 3, page 19, line 24 After 'landlords' insert 'or tenants'</p>	<p>Before making the Electrical Safety Regulations allowed by this Schedule, the Department must consult such persons as appear to the Department to be representative of tenants</p>

