



Northern Ireland
Assembly

Committee for Communities

OFFICIAL REPORT (Hansard)

Private Tenancies Bill: Committee
Deliberations

21 December 2021

NORTHERN IRELAND ASSEMBLY

Committee for Communities

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Members present for all or part of the proceedings:

Ms Kellie Armstrong (Deputy Chairperson)
Mr Andy Allen
Mr Mark Durkan
Ms Ciara Ferguson
Mr Paul Frew
Ms Áine Murphy
Miss Aisling Reilly

Witnesses:

Ms Karen Barr	Department for Communities
Ms Eilish O'Neill	Department for Communities
Mr David Polley	Department for Communities

The Deputy Chairperson (Ms Armstrong): I welcome David Polley, Eilish O'Neill and Karen Barr. Good morning.

Members, we will start with clause 3, "Tenant to be provided with a rent receipt for payment in cash", and we have three matters to consider. The first is receipts for all cash payments in relation to the tenancy. At the meeting on 16 December, departmental officials advised the Committee that the Minister would accept an amendment to the clause or the insertion of a sub-clause for a receipt to be provided for all cash payments that arise under a tenancy. The Committee was pleased to note that the Department was drafting the amendment.

The text of the amendment has been received and is in members' papers. The text comprises 12 separate amendments. Some are technical and some are consequential. I request, please, David, that you take us through each one, even if it is just to say it that it is technical or consequential. Each point of insertion in the Bill represents a new amendment, and it is important that we are clear about the purpose of each one.

David, we now will look at the amendment with the 12 separate amendments. If you could go through those and just let us know whether they are technical or consequential. Thank you.

Mr David Polley (Department for Communities): The Committee asked us to look into drafting an amendment on this matter, and, as you can see, we have gone through the whole clause. We have picked up on a few areas where we have spotted an issue and tried to resolve it in the legislation. Karen will go through each area.

Ms Karen Barr (Department for Communities): The first one amends clause 3, page 3, line 7, and brings in new policy intent. We will now cover receipts for all payments and not just rental payments. The important words are "any payment" and "any payment in satisfaction", so other payments are included.

Clause 3 amends article 5 of the 2006 Order, and in the draft amendment, article 5(2)(b) includes what the payment is for. When only payments for rent were included, we did not need that, but that has been inserted into article 5(2).

As per the draft amendment, article 5(2A) provides for the circumstances in which a lump sum is given for different payments and states that there is a need to show how the sum is apportioned — so much for rent and so much for repairs or whatever — and whether each amount has been paid in full or whether there is some outstanding. Article 5(2B) provides for a situation where the landlord is not clear on the amount. For example, repairs may be required that the landlord has said will cost a certain amount, but, once the work has been done, end up costing more. To cover that scenario, the landlord must have estimated the cost to the best of his "knowledge and belief" and recorded that amount on the receipt. Is the Committee happy with that explanation?

Mr Polley: Chair, that might be a good place to pause, because that one amendment covers most of the policy intent that we have been trying to draw in from our discussion with the Committee on what we are trying to change in the clause. As per the draft amendment, the receipt will have to say what the money is for. We have covered the situation in which the receipt covers more than one thing, stating that the sum needs to be apportioned and that any amount outstanding for each one is recorded.

As Karen has said, in some scenarios, it is quite likely that the landlord will not know exactly how much is outstanding, so we had to consider whether to discount those bits of the requirement for non-rent payments. We decided to leave them but put in that the landlord must say, to the best of their ability, how much was outstanding.

The Deputy Chairperson (Ms Armstrong): Do members have any comments?

Mr Frew: I can see what you are doing. It is thorough, and I commend you for that. You have picked up all the pieces that the Committee was concerned about. Of course, the principle of the amendment is to catch payments other than rent that are made in cash, which is still a big issue for me. Whilst I have only had a wee bit longer than 24 hours to look at the text, I am supportive of it. I cannot believe that I just said that at this stage. *[Laughter.]*

Ms Barr: We will take that. That was the first amendment.

The second one amends clause 3, page 3, line 21, and it is a drafting amendment to use more appropriate language. In that, the drafter changed the way that the words appear as he felt that doing so made the language more appropriate, so it does not change anything.

The next one amends clause 3, page 3, line 26 and is a consequential amendment. We are going to include payments made before a tenancy that are linked to that tenancy, such as deposits or rent paid in advance. The amendment makes it clear that payments made before a tenancy begins and after it ends are included.

Mr Polley: We wanted to put what the Committee said to us in the Bill, namely that all cash payments that relate to the tenancy are included. Those cannot, therefore, be defined as payments that are made between the day that the tenancy starts and the day that it ends: they include payments that are made between a landlord and a tenant after the tenancy has ended and those that are made before it starts. We have made that clear.

The Deputy Chairperson (Ms Armstrong): No other members have indicated that they want to comment, so we are getting agreement here, David.

Ms Barr: The next one amends clause 3, page 3, line 29. That is another technical amendment and draws attention to the landlord as being the person who commits the offence and the person who is responsible. There are a couple of those in a row. The next one amends clause 3, page 3, line 32, and, like the last amendment, draws attention to the landlord, but this time it is for continued failure.

Mr Frew: In relation to "insert '(a)'", what is (a)? Is it further up in the new amendment?

Ms Barr: When you go down, (a) means that "the landlord" includes former and prospective landlords.

Mr Polley: It is the new article 5(5)(a).

Mr Frew: Yes.

Mr Polley: New article 5(5) states:

*"If the landlord under a private tenancy fails to comply ... the following are guilty of an offence under this Order—
(a) the landlord, and"*

— their agent, who is —

"(b) the person appointed by the landlord to provide the receipt".

The amendment draws attention to the fact that, in this instance, it is actually the landlord who is responsible.

Mr Frew: Yes.

Ms Barr: Yes.

Mr Polley: Karen, keep me right here, but that is the situation because of the law of agency. If you appoint somebody to work on your behalf, that is already the legal position, but the drafter wanted to make it abundantly clear in the Bill that the responsibility lies with the landlord.

Ms Barr: Yes, when it comes to criminal offences.

Mr Polley: So, the landlord cannot say, "Oh no, it wasn't my fault; the agent didn't do it".

Mr Frew: Yes, OK. I have got you there.

Ms Barr: Which one was that? I am lost. Was that the one that amends —

Mr Polley: I think that there are three of those.

Ms Barr: — line 32?

The Deputy Chairperson (Ms Armstrong): Yes.

Ms Barr: Clause 3, on page 3, line 36, talks about the fixed penalty notices. The reference is to new article 5ZA and a landlord being convicted of the offence. In this amendment, the fixed penalty notice is in respect of the offence that the landlord has personally committed.

The amendment to clause 4, page 3, line 41 is a technical one —

Mr Frew: Sorry, can I ask something just before you go off the issue of (a), so that I do not lose this and you guys have a better chance to answer?

Ms Barr: OK.

Mr Frew: New article 5(5)(b) is:

"any person appointed by the landlord to provide the receipt."

Are we saying that that will be removed?

Ms Barr: No. If I am reading this properly, you can charge both in the first instance. I do not have the other thing in front of me at the minute. David, I think that article 5(5) is the same as it was before: the landlord under the tenancy and any person who is appointed can be charged in the first instance. As far as I know, that has not changed.

Mr Polley: No, I do not think that that has changed.

Ms Eilish O'Neill (Department for Communities): No, it has not changed.

Ms Barr: Yes. It is just that, when it comes to criminal conviction, in the case of continued failure, only the landlord would be charged.

Mr Frew: Right. I wonder how that plays consistently. I will read the whole of new article 5(5) for completeness:

"If the landlord under a private tenancy fails to comply with paragraph (2) or (3), the following are guilty of an offence under this Order—

(a) the landlord, and

(b) any person appointed by the landlord to provide the receipt."

Ms Barr: Yes.

Mr Polley: Yes.

Mr Frew: By adding (a) into clause 3 at lines 29, 32 and 36, are we putting more burden on the landlord as opposed to the person whom they have appointed?

Mr Polley: As Karen said, the whole next bit — new article 5ZA — refers to the continued offence.

Ms Barr: Yes, it is the continued offence.

Mr Polley: That applies if you keep on doing it once you have already been convicted. That is how it was originally drafted, and, if you look at that bit, it says, "If the landlord". However, by adding (a) in those lines, we are making it abundantly clear that the continuing offence applies to the landlord.

Mr Frew: I have got you now.

Mr Polley: That is how it was originally drafted, so the amendment is just trying to clarify it.

Ms Barr: Yes.

Mr Frew: OK. All those (a)s are going into new article 5ZA.

Mr Polley: Yes.

Ms Barr: Yes.

Mr Frew: OK. I have got you now. Thank you.

Ms Barr: OK. We were on the amendment to clause 3 at page 3, line 41.

The Deputy Chairperson (Ms Armstrong): Yes.

Ms Barr: That is another technical amendment. It references an offence to which the defence in question operates and makes it clearer. The adding of new material into the whole article means that it

is helpful to add a link back to the offences that are mentioned in the new paragraph. I am not sure whether or not that is clear. David, I do not know whether you want to —

Mr Polley: Hang on a minute. I think that we may be getting a bit mixed up. This amendment is:

*"Clause 3, page 3, line 41, at end insert—
(4) In this Article "landlord" has the meaning given by Article 5(6)."*

That refers to new article 5(6), which includes the material on former landlords and prospective landlords. That clarifies that the continuing offence also applies to prospective and former landlords.

Mr Frew: Yes.

Ms Barr: Are you happy with that one, then?

Mr Frew: Yes. Again, I think that that amendment is important because of the nature of a relationship. You could technically be a former landlord or a prospective one and still cause harm to a tenant or a prospective tenant.

Mr Polley: We thought that there were quite a lot of cash payments before with rent in advance and deposits. It is possible that there could be damages in excess of the deposit amount, and a cash payment could be made in those instances. So, it was conceded that there could be some cash payments in that area as well.

We are now on new article 5ZB.

Ms Barr: Is this the amendment to clause 3, page 4, line 4?

Mr Polley: Yes.

Ms Barr: As per this amendment, article 5ZB only applies to rent payments. That is because it is a defence that applies in a very particular set of circumstances with controlled tenancies, where a rent officer has determined the rent. So, it only refers and applies to rent payments, not the other payments. There is a defence where a rent officer has determined the rent amount and the landlord thinks that that new rate has taken effect, so it is very specific to controlled tenancies.

Mr Polley: The point of this bit is not to add something in; it is to make clear that the new thing does not apply to this because this is a defence and a reason why, in a very particular set of circumstances, a landlord might not know how much rent is due and therefore be able to give a correct rent receipt. We thought that that did not apply to anything other than rent. The next bit that Karen will go through establishes that: it is about making sure that this bit applies only to rent and does not apply to any further cash payments.

Ms Barr: The next couple are all linked to that. I am referring to the draft amendment to clause 3 at page 3, line 14, which is new article 5ZB. Again, that refers to the payment of rent and states that receipts for other payments need to say that they are such. It is putting the rent amount in because, initially, everything was to do with rent. The amendment to clause 3 at page 4, line 19 is the same thing. Both those amendments include the word "rent" for controlled tenancies.

The amendment to clause 3 at page 4, line 25 is a consequence of including receipts for other payments. As far as I can see, David, all three of those amendments refer to the same thing. Are you happy with that?

Mr Polley: The one that we wanted to draw attention to was the last one, was it not?

Ms Barr: The one that clarifies the offences that the defence applies to. Is that what you were going to say?

Mr Polley: No, I was referring to the amendment that states:

"Clause 3, page 4, line 25, after 'landlord' insert '(or former landlord)'".

Again, we are clarifying that a former landlord of a controlled tenancy can use that defence.

Ms Barr: The last amendment is to clause 3, page 4, line 25. Again, that extends the definition to make it clear that the cash payments are for tenancies, even those that have ended, and apply to former and prospective landlords.

The Deputy Chairperson (Ms Armstrong): Does anybody else have any comments before we move on to the second area?

Mr Frew: I commend you for your work because there is great detail there and it is clear. Also, the way that you have presented it to us is very clear, so thank you.

Mr Polley: That is what we wanted to check: does what we have done match what the Committee wanted us to do?

Mr Frew: In part. *[Laughter.]*

Mr Polley: This bit of it.

The Deputy Chairperson (Ms Armstrong): We will get to that.

It is time to move on to look at the Committee's proposed new clause 2A. At the meeting on 16 December, the Committee further discussed the reasons why the Department does not wish to consider taking forward the amendment proposed by the Committee regarding placing a statutory duty on a landlord to offer a choice of payment options for rent and other payments related to the tenancy.

In closed session, the Committee then considered the text of two potential amendments on the matter as drafted by the Assembly Bill Office. It dismissed the second option as too limiting. The Committee agreed to share the text of the draft of the first option with the officials and the Office of the Legislative Counsel (OLC) and to ask the Bill Clerk to liaise with them in advance of the meeting today to get a steer on any unintended consequences of the proposal. We are also awaiting our own legal advice on the matter. We will have received that by the time that we meet on 11 January.

David, in your most recent response, you state:

"Officials are exploring the proposed amendment urgently and will provide an update, if possible, at" —

this meeting. Do you have an update on the Department's view on the text of the proposed amendment?

Mr Polley: We have been looking at that, and there is another meeting planned this afternoon to discuss it. In the interests of talking about it with each other as thoroughly and as quickly as possible, there are some things that we would like to talk about now if that is OK.

The Deputy Chairperson (Ms Armstrong): OK. Yes, please.

Mr Polley: The first point that we want to mention is that, as drafted, it does not include an offence. It does not say what the sanction will be if you do not comply. As drafted, it does not say who would enforce it and there is no indication of its severity.

There are at least two possible offences mentioned in the draft amendment. There is an offence from not offering the choice of three different payment methods. On that one, we would need to think about whether or not there is a continuing offence associated with that. There is also one around not abiding by the method of payment that has been chosen. We wondered whether or not that means that the tenant is bound to that as well.

We want to think through how that would actually work. You would imagine that the landlord would offer three choices to the tenant and that they would be in the tenancy agreement. So, there would be

a potential offence there if the landlord did not offer three, offered some that were not on the list or did not offer any choice at all. What would happen if the landlord tried to change that afterwards, regardless of what they offered at the start? From a tenant's point of view, what would happen if they attempted to pay by one of the methods that was not on the list?

So, some things need thinking through. In our experience, that process could be quite lengthy. By way of example, you will remember that, with schedule 2, quite a lot of the changes related to extensive drafting around continuing offences, whether you have fixed penalty notices as well and different types of offences and situations. So, we need to think through how all that would work.

Ms O'Neill: We had some discussions on the list of payment methods that were provided and the appropriateness of some of them. Although credit and debit cards were mentioned, the high interest rates that some credit card companies charge could put a tenant at risk of falling into arrears with their rent if they are unable to make their credit card repayments. Also, 83% of landlords own one or two properties, so they may not have the technology available to them to accept payment by one of the prescribed methods. That would effectively reduce the list of available options because they would not have the technology to accept those payments.

Postal orders and cheque payments are not used much nowadays. There was some discussion amongst ourselves on what could and should be on the list. A fundamental point is whether what we are discussing falls within the competence of our Bill or whether we are starting to stray into an area that is outside of that, which could subject the Bill to some form of legal challenge? Those sorts of discussions are also taking place.

Mr Polley: On the methods of payment, there is a provision that states that we could add or remove methods by negative resolution, which would be fairly straightforward. We would need to work out the extent to which some of them overlap, the extent to which new electronic payment methods are separate and have to be listed and the extent to which they are a form of bank transfer. For example, are PayPal and Apple Pay bank transfers or do they need to be listed separately? The answer to that at this point is that we just do not know.

We could, conceivably, end up with a very long list, which would mean that a landlord who offers three payment methods could work their way around the measure. By offering two methods that are almost impossible or expensive for a tenant to use and the cash option, they could do what they wanted to do all along.

Credit cards are on the list. We are a bit uncomfortable about explicitly saying that tenants can use a method that puts them instantly into debt with a high interest rate. With regard to cheques, some bank accounts do not offer the option to use them any more, while others do provide the option but you have to pay a fee.

Those are just some thoughts after thinking through the issues after starting to make a list

Ms Barr: Another important issue to consider and get advice on is where a tenant renews their housing benefit claim and the money is paid directly to the landlord. There is a whole issue around benefit payments and whether a tenant can choose the way in which the rent is paid. Does that equate to a payment choice and does it need to be on the list? What if the benefit does not cover the full amount of the rent and top-ups are needed? Would a tenant have to pay in two different ways? There are a lot of issues for benefit clients that need to be looked into as well.

Mr Polley: Eilish, there is the issue of commencement. We need to consider in drafting when the measures would commence.

Ms O'Neill: Yes.

Mr Polley: There was some discussion at the last meeting about competence, and the Committee changed its approach. Our view is that the new approach is more likely to fall within competence, but we are still considering that and have yet to take a final position. There still is no foundational policy work to base a position on, which would help. The clause still has the potential to stray into areas that are excepted and, as I have said before, are beyond me. The Committee sought its own advice on that issue, and that will be available after Christmas.

The Deputy Chairperson (Ms Armstrong): We will be speaking to the Bill Clerk after this meeting to discuss the issues that you have raised. You said that you are having a meeting later today. If that discussion between Bill Clerk and yourselves can continue, it would be helpful.

Mr Frew: I take it from that commentary that you are not absolutely ruling this out [*Laughter.*] There is the competency piece, which is a wider and bigger piece on which you will have to seek legal advice. We are doing that, too, so we will just have to wait until that advice comes in.

This question may put you on the spot about an earlier point, and it is fine if you do not want to answer it. Looking at the two options, are you saying that you would be more content with the smaller, briefer option because of what you said about the list?

Mr Polley: The two options being?

Mr Frew: The first being the two lines offering choice — the tenant must be offered the choice — and the second being the more descriptive one with the list.

Mr Polley: Our initial view on competence is that the list version would be more likely to fall within competence. Our questions, as you have heard, are practical and about how it would work. When two people choose to be landlord and tenant, what would happen as a result? What do we want to happen? Are there any unintended consequences? How do you reflect that in what will be primary legislation? As we said, most obviously, you need to think through what offences you are creating and for whom. We gave the Committee a commitment that we would look into that and see how you would do it and what it might look like.

Mr Frew: Offences is a big one, too. Our thinking on that has to evolve; I get that 100%. However, I believe that the whole principle of this amendment is that it offers protection. You know how much I go on about proposed new article 5(3)(b). This could be a way of offering the maximum protection for tenant and landlord, as far as it is possible to legislate for that.

The list of payment options does not have to be exhaustive, and there is a stipulation in paragraph (4) that allows the Department to amend that by regulation. Just because it is on the list does not mean that it is a good option. A credit card or cash would not be a good option, but at least you would be affording choice. The Committee discussed the possibility of ending up with a dishonest or unprincipled landlord who gives a Hobson's choice whereby there is not much of a choice, as you explained. We would also like to try to guard against that in the best way that we can. I get the point about the offences. It is very primitive thinking at this stage, but, for us, it is all about protection and trying to prevent something happening.

You made a good point about housing benefit, where the Housing Executive pays part of the rent. I could be wrong but, to me, there is only ever one option there: to pay the landlord, usually monthly, through a bank transfer or standing order; I do not know if that is the technical term. Landlords like that because it is a regular payment. Usually, the tenant has to top up by £10 or £20 a week to make up the difference in the rent. The amendment would relate to that transaction between the tenant and the landlord. Whether it is £200 a week or £20-a-week part payment, we are trying to protect that and give choice in that. I hope that that explains the dual payment piece.

Ms O'Neill: It does. When I look at the amendment and the original policy intent, I am trying to get my head around the scale of the problem. We do not have any information. I accept completely that the Committee is focused on offering protection to tenants who are making cash payments. However, from our conversations with landlords, we know that they want the thing to be as seamless as possible and to have the money paid into a bank account. I have no doubt that there are unscrupulous, and scrupulous, landlords who prefer cash payment. Alternatively, lots of tenants want to pay in cash and do not have bank accounts and do not want to go down that route. We are trying to think about what amendment to table that is proportionate to the scale of the issue that we are trying to resolve.

Mr Frew: In my mind, it is very clear: it is just about choice. I agree with you. In some cases, tenants who only have to top up a payment by £10, £20 or £30 every week or fortnight — whatever and how often that regular payment is — want to pay in cash because, as it is only a tenner or a score, they can lift it from their purse or wallet rather than having to set up a bank transaction; I get that. Cash is still on offer; it is part of the choice. It would be for the tenant to choose what option they prefer, and the landlord should accept that. We are not trying to eradicate cash. We are making sure that that option is there and also that, with payment in cash, there is protection in a proof of payment.

The Deputy Chairperson (Ms Armstrong): It protects the landlord, too, because it gives the landlord the possibility of naming three options that the tenant can choose from. However, we need to be careful to make sure that a Hobson's choice does not come into that.

Mr Frew: I will always be upfront, frank and honest with you guys. So that you are clear, notwithstanding the bigger argument and debate about competence, I really like this amendment.

Ms O'Neill: For us, it is about seeing whether it can be taken forward, notwithstanding the competence question that has been raised with us.

The Deputy Chairperson (Ms Armstrong): We will certainly have a discussion about that. I know that you guys will be having a meeting about it later. We will keep in contact about that, because we are getting close to the end of Committee Stage.

Mr Polley: We were aware of that as well, Chair. We sort of thought that, with a bit of thought and the two parties working together, we might be able to find ways around quite a lot of the things that Eilish and I mentioned, but we are getting short of time.

The Deputy Chairperson (Ms Armstrong): We are indeed.

Ms O'Neill: I maybe should not think out loud — sometimes my brain and my mouth do not coordinate — but, if there are a lot of competence issues, is there an option to put in an enabling power to take this forward, or would that not get around the competence issue? Sorry; that is a conversation for David, Karen and I to have later.

The Deputy Chairperson (Ms Armstrong): Yes. That is one of the issues that we will need to think about as well. You are absolutely right, Eilish.

Mr Polley: That might give us time to work through all those payment option issues.

Ms O'Neill: It just might. It would give us more time but still allow us to have an enabling power to say that the choice has to be there. While that is looked at, the guidance could cover the fact that, as a tenant, you should make sure that your feelings on your preferred method of payment are known. However, there is no doubt that the power sits with the landlord at the point that the tenancy agreement is signed.

The Deputy Chairperson (Ms Armstrong): Thirdly, members, we need to consider Paul's favourite: proposed new article 5(3)(b) at clause 3. Last week, the Committee further discussed this, the Department's response to its letter dated 10 December, and the reasons why the Department does not wish to consider taking forward an amendment to remove proposed new article 5(3)(b). The Committee is yet to take a final decision on the matter. Members, we will go into closed session after this part. We might even be able to come to a decision later on. Does anybody have anything further to add on this while the officials are here?

Mr Frew: Chair, I am still of the mind that it should not be there. I understand why it is there. I understand that you are affording reasonableness; I get that. I do not know whether I have my poker face on, but, to me, the Committee amendment that we are looking at to afford the choice and the protection for both tenant and landlord is more important than proposed new article 5(3)(b). We will see how that plays out, but I am certainly of the mind, as things stand, that proposed new article 5(3)(b) should not really be there. That is not a final position, but it is my position at present.

The Deputy Chairperson (Ms Armstrong): I move on to clause 7, "Restriction on rent increases". The Committee's amendment is that the period set out in proposed new article 5D(4) be increased to three months. Last week, the Committee was pleased to note that the Department is taking this amendment forward. The text of the amendment is at page 12 of members' packs. Members, are you content with that amendment?

Mr Frew: I am jumping about all over the place.

The Deputy Chairperson (Ms Armstrong): I know. My papers are a mess at the minute.

Mr Polley: This is about the notice that a landlord has to give a tenant of an increase in rent. The Committee asked us to consider that it should be three months instead of two months, and the Department has agreed to that. The amendment is to take out "2" and put in "3".

The Deputy Chairperson (Ms Armstrong): I was happy with that.

Clause 9, "Energy efficiency regulations", introduces schedule 2. The Committee did not take a position on this at the meeting on 16 December and requested a written breakdown of each amendment and what it does. That can be in the form of an updated explanatory and financial memorandum (EFM) or a written briefing to be provided as soon as possible. David, I understand that you guys will provide an updated EFM? When might the Committee see that?

Mr Polley: In the next day or two, all being well.

The Deputy Chairperson (Ms Armstrong): Christmas present; excellent *[Laughter.]*

Mr Polley: We want to get it done before Christmas.

The Deputy Chairperson (Ms Armstrong): Brilliant. I look forward to that.

Clause 11 is "Validity requirements for notices to quit given by landlords and tenants". Members, at the meeting on 16 December, officials outlined the Department's response that it wishes to reserve its position on any amended notice-to-quit period until the outcome of its recently launched consultation, which closes on 25 January 2022. Last week, we discussed with the Department the potential for Committee amendments similar to the Private Tenancies (Coronavirus Modifications) Act (Northern Ireland) 2021. In closed session, we considered a draft amendment from the Bill Office.

The Committee has not yet taken a position on its possible amendment to clause 11. We are waiting on the views of the Assembly's Legal Services as to whether the Committee's proposed amendments would engage article 1 of protocol No. 1 to the European Convention on Human Rights (ECHR) and the potential consequences of that. Members, I propose that we decide on that amendment on 11 January, once we are in receipt of the legal advice.

Members indicated assent.

The Deputy Chairperson (Ms Armstrong): Thank you.

Members, yesterday, we received the report on the Bill from the Examiner of Statutory Rules (ESR). It states:

"The Bill contains a number of powers, each delegated to the Department for Communities ... under which subordinate legislation may be made."

Her:

"advice is limited to consideration of whether the provisions of the Bill inappropriately delegate legislative power, and whether the exercise of legislative power provided for is subject to an inappropriate degree of scrutiny by the Northern Ireland Assembly".

The ESR is satisfied that, as the Bill is drafted:

"these rule making powers are not inappropriate."

She is satisfied that, in each case:

"the exercise of these rule making powers are subject to an appropriate level of scrutiny by the Assembly."

Members, do you wish the ESR to come to a meeting on 11 January to go through her report?

Members indicated assent.

The Deputy Chairperson (Ms Armstrong): Thank you.

Members, as schedule 2 will now be amended, do you wish to request that the ESR provides us with addendum advice on the new schedule?

Members indicated assent.

The Deputy Chairperson (Ms Armstrong): Thank you.

Members, do you wish the ESR to run through her report and then provide any subsequent addendum advice?

Members indicated assent.

The Deputy Chairperson (Ms Armstrong): Thank you.

Members, Committee Stage ends on 14 January. We will make all final decisions at our meeting on 11 January. I am sure that David, Eilish and Karen will look forward to finishing that meeting. On that day, we will do the clause-by-clause deliberation and review the draft report, as far as possible. Do members have any comments? No.

The Deputy Chairperson (Ms Armstrong): David, Eilish and Karen, I know that a lot of work has been put into this. We will go into closed session now. We might come back to you again, but we will let you know as quickly as possible. For now, thank you so much.

Ms O'Neill: Thank you, Chair.

Mr Polley: Thank you very much.

Ms Barr: Thank you.

The Committee went into closed session from 9.48 am until 10.59 am.

The Deputy Chairperson (Ms Armstrong): Members, we are back in open session. Thank you, Eilish, Karen and David, for waiting for us.

Mr Polley: No problem, Chair.

The Deputy Chairperson (Ms Armstrong): We need to ask you about a couple of things. First, can you give clarification on the fixed penalties in the Private Tenancies (Northern Ireland) Order 2006? Article 6 of the 2006 Order mentions fixed penalties, but it does not confirm the amount. We imagine that a fixed penalty will have to be amended as time goes on, but what is the formulae for a fixed penalty? Who sets the fixed penalty?

Mr Polley: You are breaking up a bit, Chair.

The Deputy Chairperson (Ms Armstrong): Apologies. What is the fixed penalty? Article 6 of the 2006 Order mentions fixed penalties, but they are not defined. How is the fixed penalty calculated? Who decides the fixed penalty amount?

Mr Polley: The fixed penalty is a fraction — sorry, I am trying to find the 2006 Order as I am talking to you — of the tariff amount in the offence. Say that the offence is at level 3, 4 or 5; the fixed penalty will be a certain fraction of that amount. It can be paid to discharge the liability without it going to court.

The Deputy Chairperson (Ms Armstrong): Yes. We looked to see where that is in the 2006 Order.

Ms O'Neill: Sorry, Chair. We are flicking through the Order.

The Deputy Chairperson (Ms Armstrong): Article 6 of the 2006 Order mentions the fixed penalty, but it does not go into detail. It must be later in the 2006 Order.

Ms O'Neill: It is.

Mr Polley: There are fixed penalties in the 2006 Order. We talked about bringing in fixed penalties in schedule 2.

The Deputy Chairperson (Ms Armstrong): Yes.

Mr Polley: Is your question —?

The Deputy Chairperson (Ms Armstrong): Who sets the fixed penalty amount? That must be defined somewhere in the legislation.

Ms Barr: I think that it is something like one fifth of the fine.

Mr Polley: Chair, from memory, it is 20% of the overall limit. A level 5 fine is £5,000, so that fixed penalty will be £1,000.

Ms O'Neill: It will be set by the council. The amount of the fixed penalty notice is determined by the council that is responsible for the enforcement of the Private Tenancies Order 2006.

Mr Polley: Yes. The process is that the council would spot that there has been a breach of the landlord's obligation and enforce a fixed penalty notice. The landlord could say, "I do not agree with that", go to court and take their chances. In that instance, a sum up to the full limit may have to be paid. If it was a level 5 fine, the fixed penalty will be £1,000. The landlord could go to court, argue their case and not have to pay anything. However, they would be taking the risk that the court will fine them up to five times the fixed penalty notice.

Ms O'Neill: Karen, I am looking at article 62 of the 2006 Order, "Provision of directions and guidance to district councils", which states:

"The Department may—

(a) give directions of a general or specific nature, or

(b) issue guidance,

to district councils as to the manner in which they are to discharge their functions under this Order and the Rent Order."

It then states:

"Without prejudice ... the Department may direct any" —

Ms Barr: Article 68A of the Private Tenancies Order is "Fixed penalty for certain offences", which is about tenancy deposits and landlord registration fees. It states:

"The authorised officer may give P a notice in the prescribed form".

It is there somewhere that it says how much the fine is.

Mr Frew: Article 68A does not actually specify a total.

Ms Barr: Does it not say something like "one-fifth"?

Ms O'Neill: Can we check that and get back to you?

Mr Polley: Article 68A states:

"The fixed penalty payable to a district council under this Article in respect of an offence under Article 5B(10) or 65A(4) is an amount determined by the council, being an amount not exceeding one-fifth of the maximum fine payable on summary conviction of that offence."

Ms Barr: Yes.

Mr Frew: Yes; got it.

Mr Polley: As you have seen, all our offences have a tariff level such as level 4 or level 5. It will change over time, but, at the minute, level 5 is £5,000 and level 4 is £4,000. The fine relates to that tariff.

The Deputy Chairperson (Ms Armstrong): I think that you are talking to the Society of Local Authority Chief Executives SOLACE about the registration moving from the Department to councils. Will, as it says there, a standardised approach and guidance be produced by the Department to ensure that, across Northern Ireland, councils all treat offences in a similar way?

Ms O'Neill: This is at the early stages, and we are looking at a report that has been produced. We are working with the councils to look at what legislation needs to be in place. That includes looking at what the penalties will be for non-compliance with the landlord registration scheme and at what that scheme will look like at the point of transfer. Uniformity across all the council areas will be very important to make sure that, whatever the new legislation is, it is applied equally to all landlords.

The Deputy Chairperson (Ms Armstrong): We, as a Committee, were just looking for that clarification.

The Committee is still attached to the Committee amendment, proposed new clause 2A, but we are asking this question: will the Minister provide an enabling power amendment for proposed new clause 2A? That would follow on from what the Committee is looking for, which is that that choice of payment method be provided for the landlord's tenant. Are you guys minded to table an enabling power amendment?

Mr Polley: We will discuss that with the OLC this afternoon to see how straightforward that would be. We will then take the mind of the Minister. I can see the attractions of that, to be honest, Chair, given our discussion earlier and our discussions so far with our different types of advisers. I think that the Committee is suggesting doing something that might end being more complex than you thought it would be when it was suggested last week. Considering the amount of time that there is left, for me, there is an attraction to using an enabling power to give us more time to think it through and do it properly.

The Deputy Chairperson (Ms Armstrong): Would there be a consultation on that?

Mr Polley: Yes.

The Deputy Chairperson (Ms Armstrong): In the interim, is there a way that you can put it into the guidance and the templates for a landlord?

Ms O'Neill: Absolutely; yes.

The Deputy Chairperson (Ms Armstrong): So, in the interim, the choice could be included in the guidance, and you guys will consider with the Minister whether to provide an enabling power. We are still working on ours. There are two sides to this at the moment. We will keep that going for a while, because we need to get our own legal advice. As you know, we are still waiting on that.

Mr Frew: If you were to go down the enabling power route, what would be a reasonable timescale for you guys after Royal Assent?

Ms O'Neill: We would have to develop the policy around it and then carry out a consultation exercise. I hate saying this to you because I know that you have asked us about commencement before. However, we have been reluctant to commit to dates for the regulations to come forward because we want to make sure that we do them properly and comprehensively. I suppose that I am fudging it a bit.

Mr Polley: To prepare for and do a consultation will take 12 weeks. On the basis of that, we will try to construct something and bring it in. We would need to decide whether the enabling power would be by negative or affirmative resolution. It would probably take about a year. My concern about committing too firmly is how much else we will have going on in that same year. We will be taking the regulations for schedule 2 on energy efficiency and for schedule 3 on electrical safety.

Ms Barr: And statement of tenancy terms.

Mr Polley: Yes, we will be taking the statement of tenancy terms at the same time. We will have plenty going on.

Mr Frew: So, six months is reasonable enough then. *[Laughter.]* Leave it with us.

The Deputy Chairperson (Ms Armstrong): Sorry, I am laughing. You are going nuclear, Paul.

It would be very useful if you guys could come back to let us know whether you will consider tabling an enabling power amendment. That could certainly help to move things along.

Does anybody else have anything for the officials at this stage? No. We are getting close — well we have to get close, guys, because we need to have this completed by 14 January. I imagine that we will see you again on 11 January to go through the amended EFM and any other tidying up that we need to do. For now, I wish you all a very merry Christmas. We look forward to some Christmas afternoon reading when we get the amended EFM from you. Happy Christmas. We will see each other again next year. Thank you very much.

Ms O'Neill: Same to you, Chair. All the best.

Mr Polley: Thank you very much. See you next year.

Ms Barr: Same to you. Bye.