

### Extract: Social Housing Fraud: Consultation

#### Introduction

1. At a time when there are 1.8m households on the waiting list for social housing and another 250,000 social households are statutorily overcrowded, it is estimated that there are at least 50,000 social homes in England being unlawfully occupied. Recent work has suggested that the number could be significantly higher.
2. While the term 'unlawful occupation' is commonly taken to mean the subletting of the whole of a home by the tenant. It also covers other activities such as **key-selling** and **unauthorised succession**. Each case involves someone living in the home that should not be there.
3. Many social landlords have recently stepped up their efforts to crack down on tenancy fraud; this has resulted in an increase in the number of social homes being recovered for their proper use.
4. In spite of the encouraging progress that has been made, it is apparent that further, stronger measures need to be considered.
5. Most forms of unlawful occupation, including subletting, are civil matters rather than criminal offences. This means that while the profit that can be reaped by abusing a social tenancy can be extremely lucrative, the legal consequences for those breaking the rules tend to be relatively minor. In addition to this lack of an effective deterrent, tenancy fraud investigators argue that they do not have sufficient investigatory powers, meaning that they can only detect a fraction of the homes being unlawfully occupied.
6. The purpose of this consultation is to invite views on whether existing legislation needs to be strengthened, and, if so, how that might be done, to reduce the prevalence of tenancy fraud in social housing.
7. There is no intention to remove social landlords' ability to pursue each case as a civil matter; rather, we wish to explore if they require a wider range of enforcement tools.
8. This paper is concerned only with the law as it affects England.

## Chapter 1: **Extent and nature of the problem**

9. The Audit Commission has estimated that there are at least 50,000 unlawfully occupied social homes in England - 2.5% of stock in London and 1% of stock elsewhere.
10. The National Fraud Authority has estimated that tenancy fraud costs around £900m per year. Replacing those unlawfully occupied social homes – to provide homes for those households who have effectively been displaced by tenancy fraudsters - would cost several billion pounds.
11. The reason for the difference in frequency of unlawful occupation between London and the rest of the country is most often attributed to the higher difference in the capital between social rent and market rent. Therefore, a tenant in London can make a substantial profit by charging market rent to the sub-tenant while they continue to pay the much lower level of social rent to the landlord.
12. In areas of the country where there is little difference between the two types of rent, it appears that subletting is less often for profit than in London and more often as a favour to friends or family to help them 'jump the queue'. Some landlords believe that succession fraud is more prevalent than subletting in their stock.

### Current rates of recovery

13. Tenancy fraud is not confined to London.
14. While no data is collected centrally on the success rates of housing associations, the number of unlawfully occupied local authority-owned homes recovered is recorded. Around 1000 local authority-owned properties were recovered in 2008/09. The figure for 2010/11 was approximately 1800.
15. A number of landlords have also indicated that the number of voluntary tenancy terminations increased when they began to publicise their crackdowns. These are not included in the above figures.
16. Central Government has promoted joint working between local authorities and the housing associations in their areas. Often having more resource, experience and expertise, it is not uncommon for a local authority to undertake work in a housing association's stock in return for nomination rights to any properties they recover. In some cases, local authorities have used grant funding given by central Government solely to investigate the stock of the housing associations in their area.

17. It is important to note that, despite this encouraging upward trend in the rate of recovery, many social landlords believe that they are still scratching the surface.

## Profiles

18. Feedback from landlords strongly suggests that there is no such thing as a typical tenancy fraudster or a typical 'recovered' home
19. Many landlords have reported that when they uncover tenancy fraud they also uncover other types of fraud. For instance, Housing Benefit and Council Tax Single Person Discount fraud appear to be the most common with visa overstays and serious organised crime also being detected.

## Subtenants

20. It is often believed that the person who is occupying the home in place of the legal tenant is fully aware of and complicit in the deception, it has been found that in many instances this is not the case.
21. The first time many of these subtenants are aware that their 'landlord' is in fact the named tenant of a social home is when the housing provider contacts them during a tenancy audit or following a tip-off from a neighbour.
22. Many of these subtenants are able to provide detailed information about their stay in the property and so are often valuable sources of evidence for the housing provider when seeking to evict the named tenant.
23. Landlords have reported that virtually no subtenants subsequently present themselves to the council as homeless when they leave the property, while feedback has shown that only around 5% of named tenants asked to be rehoused once they have been evicted for tenancy fraud.
24. In many cases, councils refuse to add them to the waiting list as they no longer consider they owe the now ex-tenant the main homelessness duty, deeming that person to have made themselves intentionally homeless.

## Chapter 2: **Tackling tenancy fraud within the existing law**

25. Tenancy fraud takes a number of forms. Below is a list and brief explanation of the main types of tenancy fraud:

### Civil matters

#### Subletting

26. While current law allows, in certain circumstances, social tenants to take in lodgers or sublet part of their properties, subletting the whole of the property is prohibited. This form of tenancy fraud is a civil matter only and in this

sense is no different from any other breach of civil statutory rules or of a contract. As with any other breach of contract, a landlord can apply to the court for a remedy, i.e. possession.

27. A tenant who has unlawfully sublet the whole of the property remains a tenant until such time as they leave or are evicted as a result of possession proceedings. However, if they are no longer in occupation then they may lose their status which makes possession easier to obtain.
28. A landlord could also recover damages and costs in cases of unlawful subletting. However, the amount of financial compensation would be limited by the fact that rent was still being paid to the landlord at the expected rate, and the prospects for recovery of any damages awarded would not be particularly strong.

### Key-selling

29. The practice of key-selling differs from that of subletting in that, in practice if not in law; the legal tenant usually severs all ties with the property in return for a lump-sum payment. While this practice is believed to be less common than subletting, it similarly constitutes a breach of contract and the landlord can recover possession in the same way.

### Unauthorised assignment (including by mutual exchange)

30. Assignment is the formal legal transfer of the letting agreement from one tenant to another. The effect of a valid assignment is that, broadly, the new tenant takes on the rights and responsibilities of the previous tenant.
31. Assignment of a tenancy is only possible in certain circumstances. If there is an unauthorised assignment, e.g. the tenant goes ahead without first obtaining the landlord's consent; the exchange will be treated as an invalid assignment. If the tenant obtains the landlord's consent by deception, landlords can take action for possession on the basis that there has been a breach of the tenancy agreement and that the assignment is legally ineffective.

### Wrongly claimed succession

32. When a social tenant dies, there are certain circumstances in which a spouse or family member can succeed to the tenancy. While the category of person who can succeed is wider for secure than assured tenancies, for both types there is a requirement that the successor was living with the tenant at the time of the tenant's death (and for certain categories of people for at least a year prior to the tenant's death).
33. Some people seek succession to a social home by virtue of claiming to fulfil the criteria when they were in fact either not residing with the previous tenant for the necessary period of time or do not fall into the category of

person entitled to succeed. A landlord can then seek possession as they would against a trespasser after serving a notice to quit. The occupant can defend possession proceedings by claiming that they have succeeded legitimately.

## Criminal offences

### **Right to acquire/Right to buy fraud**

34. This type of fraud involves the tenant providing misleading information when seeking to purchase the property they are renting from their social landlord regarding such details as how long they have lived in the property.
35. As a general rule, this type of fraud is illegal and can be dealt with in the criminal courts
36. Wherever tenancy fraud is undetected, the registered tenant may ultimately attempt to purchase the property under the right to buy or right to acquire and so obtain a significant discount on the price.

### Obtaining a tenancy through false statement

37. This is where a tenant knowingly or recklessly made a false statement in order to gain a tenancy. Section 171 of the Housing Act 1996 makes it an offence to provide false information, or knowingly withhold relevant information, in relation to an application for housing accommodation.

## Current penalties

38. For civil matters, the consequences of tenancy fraud are limited to the loss of the tenancy, damages and costs, subject to the practical limits on the latter two mentioned above. Criminal liability (and penalties such as fines or imprisonment) is not available in the existing law.
39. Confusion often arises when the media report that a person has been jailed for subletting. In fact, subletting is often linked to types of fraud that are in themselves criminal and in such cases criminal penalties can be handed down specifically for that criminal act rather than for the subletting itself.
40. Some social landlords have attempted to pursue instances of subletting as criminal offences using the Fraud Act 2006, but we are not aware that any defended case dealing solely with subletting has been successful. The Fraud Act offences require the accused person to have actively made a false representation, failed to disclose information where there is a legal duty to do so, or dishonestly abused a position which requires him or her to safeguard someone else's financial interests.
41. It is conceivable that some cases of tenancy fraud might fall within these provisions, there are very many that would not. This is because tenancy

fraud can be carried out without positive misrepresentations being made to the landlord, i.e. the tenant is silent on the matter rather than actively telling the landlord they are not doing it; there are no generally-applicable legal duties of disclosure (except in relation to housing benefit), i.e. the tenant is under no obligation to inform the landlord that the tenancy agreement has been breached or, where something is prohibited in statute, that the law has been broken; and the landlord and tenant relationship is not usually seen as one where the tenant has special responsibilities to look after the landlord's financial interests (unlike, for example, a trustee).

42. Therefore, it is the Department's view that there would be significant practical barriers to reliance on these offences to create any specific or general deterrence against tenancy fraud.

### Intention to return

43. While it is a condition of both a secure and an assured tenancy that the property must be used as the tenant's only or principal home, case law has established that a tenant can live elsewhere but still retain the tenancy to the property if they can prove they intend to return to it. This intent can be demonstrated by such means as keeping furniture or other possessions in the home.
44. The courts currently apply a case-by-case approach – a sufficiently long absence will create a presumption that the tenancy has been abandoned, but the tenant can refute this by showing a 'substantial, formal, outward and visible sign' of an intention to return within a reasonable time. However, landlords have said that, in practice, the intention to return defence has allowed tenants to be away for years at a time and still retain their tenancy. This in turn can deter landlords from pursuing cases against non-occupying tenants.

### Landlords' methods of detection

45. Presently, landlords use a variety of tactics to detect and tackle tenancy fraud. The main ones are:

#### **Dedicated staff**

46. An increasing number of landlords take the view that employing specialist officers is the most effective way of recovering properties. Generally, a dedicated officer should be aiming at recovering between 25 -30 properties a year. Usually a larger number of homes are recovered in the first year of work, reducing thereafter as there are fewer 'easy wins'.

#### **Tenancy audits**

47. Many landlords conduct tenancy audits, i.e. knocking on tenants' doors to verify occupation. This can be very time and resource intensive, so most

landlords audit only a proportion of their stock each year or adopt a risk-based approach by targeting properties in specific locations.

48. To speed up the audit process, some landlords take a photo of the tenant when the tenancy is issued and keep it on file. When the tenant's home is subsequently audited, a simple reference to the file can reduce substantially the amount of time needed to verify that person's identity.

### **Data matching**

49. An increasing number of landlords are using data matching to identify fraud. For instance, by doing an internal match of the various different sets of records they keep before going on to use a credit reference agency. In addition to highlighting cases of a tenant being registered at more than one address, such checks can flag up instances of bank accounts being registered at multiple addresses and even tenants who have died.

### **Tip-offs**

50. Around half of all identified cases of unlawful occupation are believed to be detected thanks to information supplied by members of the public. Local residents are often best placed to notice if new neighbours arrive or the old ones move away. Raising awareness via posters, leaflets or adverts in local newspapers can therefore be invaluable.
51. While tip-offs are an invaluable source of information, they represent only the start of a process that will rely on one of the tools mentioned above to verify tenancy fraud and then build a credible case.

### **Data sharing powers**

52. The Data Protection Act 1998 requires organisations to process personal data in a fair and proportionate way. Under this Act, data sharing must be fair and lawful.
53. Currently, tenancy fraud investigators use section 35 of the Act to obtain data from other organisations. However, this section does not allow them to *compel* organisations to supply personal data when asked, and there is also no general statutory power to share data on which the requesting body can rely.
54. Therefore, many tenancy fraud investigators find it difficult to obtain data from other organisations.
55. While section 29(3) of the Act can be used for criminal offences, like section 35 it does not require those asked for data to comply with the request.

## Chapter 3: **Strengthening landlords' powers to tackle tenancy fraud**

56. Landlords investigating tenancy fraud make two main points:
  - a) the potential legal consequences for a tenant who commits tenancy fraud are inadequate and do not act as a meaningful deterrent; and
  - b) The lack of access they have to data means that their powers of detection and prosecution are severely limited.
57. Parallels are often drawn with housing benefit fraud, where financial penalties and custodial sentences are available to courts and investigators have wide access to data - their powers include being able to compel (rather than just request) third parties such as the suspect's employer, landlord, banks and utility companies to provide reasonable information on receipt of a request from an authorised officer.
58. The Government is concerned that the current legal consequences for tenancy fraudsters and investigatory powers available to social landlords contribute to the fact that tens of thousands of social homes are being misused.
59. Nothing contained in the proposals below would remove a social landlord's ability to prosecute tenancy fraud as a civil matter; rather they would be able to consider what the best enforcement approach is in the context of each particular case.

### • **Criminal enforcement**

60. We are considering whether a new criminal offence of social housing tenancy fraud is necessary and proportionate. Criminal penalties could take the form of a fine, or a custodial sentence, or both. In addition, measures could be introduced to allow for any profits to be confiscated and for a restitution payment to be made to the landlord.
61. If a new criminal offence were to be created we propose that it should be able to be tried either in the Magistrates Court or in the Crown Court. The maximum sentence the Magistrates Court could impose would be 6 months imprisonment and a fine of £5,000. A Crown court can impose substantially greater penalties. As a starting point we are proposing that a suitable maximum penalty for tenancy fraud might be two years imprisonment and a fine of up to £50,000.

Do you agree that a new criminal offence should be created?

What would you consider to be a suitable maximum penalty for a Crown court conviction for tenancy fraud?

- **Give a broad definition to ‘tenancy fraud’**

62. We are considering whether a broad definition of ‘tenancy fraud’ would be appropriate. We would want to include at least the main forms, e.g. subletting the whole, key-selling and unauthorised assignment. We would welcome views on whether other forms of tenancy fraud should be covered by a new criminal offence and, if so, which ones.

Do you agree with our core proposal to give a broad definition to ‘tenancy fraud’? Which forms which should be included?

- **Allow restitution payments to be made to social landlords**

63. Currently, the Proceeds of Crime Act can be used to confiscate money made from certain kinds of criminal activity; however, this money goes back to the state rather than to the person or organisation against which the offence was committed.
64. We propose allowing restitution payments to be made to the social landlord in whose stock tenancy fraud was committed. Payments of this nature would allow a landlord to recoup, in both civil and criminal cases, any money the tenant made using the landlord’s property (independent of any loss to the landlord). Such an order could be made at the discretion of the court trying the offence, and any sum ordered to be paid could be recovered from the defendant as a debt owed to the landlord.

Do you agree that restitution payments should be introduced and, if so, should be available in both the civil and the criminal court?

- **Extend local authorities’ powers of prosecution to cover tenancy fraud related issues**

65. Local authorities already have the power to bring criminal prosecutions for housing benefit fraud, certain road traffic offences and other offences set out in statute and committed in their area. This proposal would add tenancy fraud to the list of matters for which they have the power to prosecute.
66. We do not think it would be practicable to give the same power to housing associations without raising questions around their possible re-classification from private sector to public sector bodies, although common law gives them the right to bring private prosecutions in respect of criminal offences.
67. In the event that local authorities could prosecute for tenancy fraud matters, it would be possible for them to do so on behalf of housing associations.

Do you agree that powers of prosecution should be extended in this way?

- **Introduce powers for investigators to compel certain named categories of organisation to comply with local authorities' requests for data**
68. As already indicated, social landlords currently have comparatively few powers to obtain data necessary to detect and tackle tenancy fraud effectively. While criminalisation alone would remove any doubt about the legality of sharing data, it would not *oblige* data holders to do so.
  69. Some existing legislation includes explicit 'gateways' by which information can be disclosed or received for particular purposes. Such gateways may be permissive (creating a discretionary power to disclose or receive data) or mandatory (compelling data to be transferred in certain circumstances). We are considering whether to create a mandatory gateway that would ensure local authorities could access data relevant to their investigations from certain types of named organisation. Organisations obliged to provide data on request would face a criminal penalty for non-compliance. We propose a penalty similar to that currently in place for non-compliance with data requests for housing benefit fraud investigation purposes.
  70. As with powers of prosecution, and for the same reclassification reasons, we would not look to give this power to housing associations. However, a local authority would be able to use any new data access powers to investigate potential fraud in a housing association's stock.
  71. There are already many examples of joint working throughout the country between the two types of providers. One common arrangement involves a local authority using its resources to investigate a housing association's stock in return for nomination rights to any properties recovered. We envisage joint working arrangements being extended to enable housing associations to benefit from any new powers given to local authorities.
  72. While we would welcome views on which categories of organisation should be covered by a mandatory gateway, we propose that it should include, as a minimum, banks, building societies and utility companies. Feedback from landlords has suggested that they hold data that would be important in detecting fraud
  73. It is important to note that local authorities already have the power to oblige data-holders to supply data for other matters. Therefore, pursuing this option would not so much be granting a new power as extending the application of an existing one.

Do you agree that a mandatory gateway should be introduced?

Do you agree that a mandatory gateway should cover banks, building societies and utility companies? Should other data holders be included?

- **Review the ‘intention to return’**

74. In order to prevent cases whereby a tenant can live away from the property for a substantial period of time and still maintain their tenancy, we would look to clarify when an ‘intention to return’ can prevent a landlord from gaining possession of a home not being occupied by the tenant.
75. There will clearly be times when a tenant has a very good reason for not living in the property, e.g. a stay in hospital, and any new rules would seek to differentiate between voluntary and unavoidable or necessary absences.

What would constitute a reasonable period of time for a tenant to be absent before a landlord could legitimately seek possession and what would constitute valid reasons for a tenant’s non-occupancy?

- **Level the playing field for secure and assured tenancies**

76. When a secure or introductory tenant sublets the whole of their property, they necessarily lose their secure or introductory status and cannot regain it even if the sub-tenancy is subsequently ended. However, an assured tenancy is lost only for as long as the assured tenant is no longer occupying the property as their only or principal home.
77. We propose that assured tenancies be brought into line with secure tenancies, meaning that status cannot be regained once the whole of the property has been sublet.

Do you agree that assured tenancy status should not be able to be regained once the whole of the property has been sublet?

### Possible use of new powers

78. We are keen to hear how landlords would use any new powers they were given, especially regarding the frequency with which they would demand data using a mandatory gateway and the number of times they would choose to use a criminal rather than a civil prosecution. We would also like to hear from holders of data about the costs of processing requests for data.

As a social landlord, which factors would you consider when deciding whether to pursue a case using the criminal rather than civil route, e.g. strength of evidence, length of time the home had been unlawfully occupied, amount of money involved, history of the tenant, etc.? How often do you think you would pursue cases using the criminal rather than civil route?

As a social landlord, how would the creation of a new criminal offence influence the likelihood of you taking cases of tenancy fraud to court rather than simply accepting a tenant’s voluntary termination of their tenancy?

As a local authority, how many requests for data for matters related to tenancy fraud would you envisage submitting per year, and to what type of organisation would you expect the majority of your requests to be submitted?

As a data-holder, what do you believe would be the unit cost of processing a data request?

## Questions

Q1. Do you agree that a new criminal offence should be created?

Q2. What would you consider to be a suitable maximum penalty for a Crown Court conviction for tenancy fraud?

Q3. Do you agree with our core proposal to give a broad definition to 'tenancy fraud'? Which forms should be included?

Q4. Do you agree that restitution payments should be introduced and, if so, should they be available in both the civil and the criminal court?

Q5. Should local authorities have the power to prosecute for tenancy fraud?

Q6. Do you agree that a mandatory gateway should be introduced?

Q7. Do you agree that a mandatory gateway should cover banks, building societies and utility companies? Should other data holders be included?

Q8. How should the 'intention to return' be amended? What would be an appropriate period of time for which a tenant could be absent? What would constitute a necessary absence and what would constitute a voluntary absence?

Q9. Should assured tenancies be brought into line with secure tenancies, meaning that status cannot be regained once the whole of the property has been sublet?

Q10. As a social landlord, which factors would you consider when deciding whether to pursue a case using the criminal rather than civil route, e.g. strength of evidence, length of time the home had been unlawfully occupied, amount of money involved, history of the tenant, etc.? How often do you think you would pursue cases using the criminal rather than civil route?

Q11. As a social landlord, how would the creation of a new criminal offence influence the likelihood of you taking cases of tenancy fraud to court rather than simply accepting a tenant's voluntary termination of their tenancy?

Q12. As a local authority, how many requests for data for matters related to tenancy fraud would you envisage submitting per year, and to what type of organisation would you expect the majority of your requests to be submitted?

Q13. As a data-holder, what do you believe would be the unit cost of processing data request?