



## Tackling unlawful subletting and occupancy: Good practice guidance for social landlords





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# Ministerial foreword



Public housing is a hugely valuable national asset. It provides security and stability that help people to overcome disadvantage, and provides quality accommodation for low income families who otherwise would not be able to afford it.

There is great demand for public housing and that's why the government has invested an additional £1.5bn over this year and next to build 112,000 new affordable homes. But we must also make sure that the housing we have available goes to those who need and deserve it.

It is unacceptable that some people abuse their tenancy and profit from it by unlawfully sub-letting their property to someone else. The Audit Commission has estimated that as many as 50,000 social homes across the country may be occupied fraudulently – this equates to more than 1 in 100 housing association and council homes.

Some landlords, both local authorities and housing associations, are doing successful and innovative things to tackle fraud in their stock. Yet, many other landlords feel that they do not have the necessary expertise to take action where they have suspicions. This guidance sets out the most effective ways of preventing, detecting and tackling housing fraud, citing numerous examples of measures that are already in place around the country.

In addition to this guidance, I have made almost £4m available to local authorities to work in partnership with the housing associations in their areas to tackle the problem. This will be the first co-ordinated national drive to clamp down on social housing fraud and claim back properties for those who need them and have played by the rules. We are also providing local authorities with thousands of leads, supplied by the Audit Commission National Fraud Initiative which we expect them to follow up with this money.

This guidance also highlights the important role that the public has to play in helping landlords identify fraud and act against the fraudsters, so I have made funds available for local authorities to give cash rewards to the first thousand people who give information that leads to the recovery of a property.

We have given local authorities the guidance, money and leads to investigate in order to weed out fraudulent tenancies and provide the homes that many British families need and deserve.

A handwritten signature in black ink, appearing to read 'J. Healy'. Below the signature is a short horizontal line.

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# Part 1:

## Introduction

- 1.1 Social housing is a public good. It provides security and stability to millions of families. Significant public resources are allocated to the sector. Those who live in social housing and those who own or manage it have an obligation to follow the rules under which tenancies are provided and public investment made. Unlawful subletting and occupancy amount to fraud which this Government is determined to root out. This good practice guidance sets out how landlords can do this.
- 1.2 At a time of increasing demand for access to social housing it is estimated by the Audit Commission that at least 50,000 socially rented homes are occupied unlawfully<sup>1</sup>. Research continues and some commentators think the problem is more extensive even than this. Although unlawful occupancy is believed to be most acute in high demand areas, it is apparent across all regions. This guidance will assist landlords identify and deal with the challenge.
- 1.3 All landlords are expected to view this problem as of fundamental importance and to intensify their efforts to deal with it. This priority is shared by the regulator the Tenants Services Authority which has included in its proposed Tenancy Standard a requirement on all landlords to set out how they will work to prevent unlawful occupancy. In focusing on this priority, both government and regulator are seeking not merely to ensure effective use of public resources but also to respond to the concerns of the law-abiding vast majority in social housing who want this fraud dealt with. It is also a vital measure in strengthening community vitality and enabling effective management by landlords of their stock and indeed the neighbourhoods in which such housing is sited.
- 1.4 While all social landlords clearly have a duty to protect the public funds, rental income and organisational resources with which they have been entrusted, it is recognised that in some parts of the sector addressing tenancy breaches and unlawful subletting has not been given a high priority. In part, some landlords are keen to take action but do not have the necessary resources or specialist expertise to navigate the sometimes complex and resource-intensive process<sup>2</sup>. However, with increased government pressure on housing providers to demonstrate best use of existing social housing, all landlords need to take firm steps to eliminate tenancy misuse and explore how local authorities and other social landlords can work together to

<sup>1</sup> *Protecting the public purse: Local government fighting fraud* (September 2009) Audit Commission

<sup>2</sup> The housing minister's announcement 31 July 2009 set out Governments commitment to tackling unlawful subletting, and the provision of new funding provision to support this work.



mitigate some of the challenges and share expertise and resources to deliver local solutions. This guidance supports the provision of a response that is proportionate and appropriate to local needs.

- 1.5 In recent years, there have been many positive changes to counter-fraud activity in the local authority sector. Most local authorities have set up audit committees and fraud investigation teams, and at the same time the Audit Commission's National Fraud Initiative (NFI) has become increasingly established within the local authority sector.
- 1.6 Tackling unlawful subletting is likely to involve significant issues relating to personal data, some of which may be sensitive. All social landlords, therefore, must be aware of the requirements of the Data Protection Act 1998. All public and private organisations are legally required to protect the personal information they hold and may be required to notify the Information Commissioner's Office. Data must be processed fairly and lawfully and in a way which is compliant with the other conditions of the Act unless one of the limited exemptions applies. In addition, local authority landlords must be aware of their responsibilities under Article 8 of the European Convention on Human Rights (right to respect for private and family life). Although it may be possible to justify any exercise which aims to prevent or reduce the instances of unlawful subletting, any such attempt must be proportionate. Therefore, blanket sharing of information may fall foul of the law. For further information see the website for the Information Commissioner's Office at: [www.ico.gov.uk](http://www.ico.gov.uk)

## Aims and objectives of the guidance

- 1.7 The key aims of the guidance are to:
  - Encourage all landlords to develop an improved awareness of the existing levels of tenancy misuse and unlawful subletting within their own stock, and to demonstrate appropriate and proportionate action in response.
  - Challenge landlords to address unlawful subletting and build capacity.
  - Support landlords to develop effective tenancy management policies and procedures that actively identify and respond to incidents of unlawful subletting.
  - Increase awareness of the relevant legislative framework and appropriate course of action to take, and detail how to build a strong case to achieve a positive judgment.
  - Increase levels of partnership working between local authorities, housing associations and other landlords at a local level to establish the most efficient and cost-effective methods of managing unlawful subletting.

- Reinforce the benefits of: information sharing, dissemination of good practice, benchmarking and the development of shared working initiatives.
- Encourage the development of consistent organisational performance monitoring and reporting processes for the management of subletting, and the development of cost analysis information (aligned to Audit Commission local authority reporting requirements and the comprehensive area assessment (CAA)) to support the establishment of a consistent standard of performance information through which landlords can benchmark and share good performance across the sector.
- Support the establishment of reliable national statistics and trend analysis in relation to the regions, along with differences and variations between landlord type and location to inform future policy initiatives and funding.

## Who the guidance is for

- 1.8 This cross-sector guidance supports all social landlords to understand the importance of tackling unlawful subletting and offers practical guidance on both prevention and how to investigate potential cases and take effective action. The guidance acknowledges that there are differences in the way local authorities and housing associations are governed and operate, but seeks to highlight good practice examples that can be replicated across the sector and that demonstrate effective partnership working to incentivise action.
- 1.9 The guidance aims to cater both for organisations with well-developed tenancy management and housing fraud investigation services, and for those just starting to develop an evidence base for service improvement.
- 1.10 The primary focus of this guidance is on general needs social housing tenancies. This guidance does not extend to the management of unlawful subletting and occupancy in supported housing or shared ownership/leasehold schemes, although many of the principles and good practice advice included within this publication can be adapted and applied to other tenancy types.

## How the guidance is structured

- 1.11 The main body of the guidance is divided into four further parts:
- **Part 2:** sets out the organisational building blocks landlords need to have in place to effectively tackle unlawful subletting and tenancy misuse, and considers what underpins an effective organisation's response

- **Part 3:** considers a tenant's rights to take in a lodger and sublet as laid down by housing law, and considers circumstances where authorised subletting can provide an appropriate solution
- **Part 4:** provides useful practical information and checklists around prevention, identification and taking effective action to tackle unlawful subletting and occupation, and other tenancy breaches
- **Part 5:** sets out the key legislative framework for the management of unlawful subletting and unauthorised occupation. It is not, however, intended to provide comprehensive legal advice for the management of individual cases.

## How the guidance has been developed

1.12 This guidance draws together existing legal advice and the practical experience of housing professionals working within the sector, and has been written by:

- Joanne Kent-Smith, CIH
- Sam Lister, CIH

1.13 An advisory group supported the development and publication of this guidance:

John Bryant	National Housing Federation
Valerie Dawes	Homes for Islington
Derek Elliott	Audit Commission
Doug Goldring	Homes for Islington
Tim Gray	Tenant Services Authority
Wayne Hylton	Hackney Homes
Roger Jarman	Audit Commission
Brian Maddon	Hackney Homes
Dymphna Moran	London Borough of Lambeth

1.14 Whilst examples are up-to-date at the time of producing this publication, we recognise that legislation and practice within the sector continue to change over time; it is therefore important that landlords should regularly check for the most up-to-date legislation and advice.

## Part 2:

# The building blocks

## The challenge

2.1 Tenancy misuse can present itself in various forms, and can occur at any stage during the tenancy life cycle – from obtaining a tenancy by deception, through to failing to notify the landlord when the tenant moves out or passes away. In some instances, unlawful subletting can generate lucrative profits for individuals or organised groups. It is therefore essential that all landlords can convincingly demonstrate that the tenants who should be occupying their homes really are in residence. Tenancy misuse does not refer to cases where tenants have taken in a lodger or sublet with the landlord's consent, but does include unlawful subletting. Whilst unlawful subletting is thought to be most heavily concentrated within the London boroughs and high demand areas, unauthorised occupancy is apparent across all regions. The following list is not exhaustive, but demonstrates the most common types of tenancy misuse:

- Unlawful subletting, including:
  - subletting the whole property to a single household, or
  - multiple sublets within one property
- Non-occupation by tenant as their principal home
- Wrongly claimed succession – retention of a tenancy following the death or vacation of the tenant following a previous succession, or of a non-qualifying person (see paras 5.40-47)
- Unauthorised assignment (see paras 5.28-34)
- 'Key selling' – where the tenant leaves the property and passes on the keys in return for a one-off lump sum payment or favour
- Fraudulently obtaining a social housing tenancy, including
  - Misrepresentation of identity(see paras 5.74-75)
  - Misrepresentation of circumstances

2.2 Occasionally, as a consequence of unlawful subletting and occupation, the use of the property can present issues concerning:

- Anti-social behaviour

- Drug use or cultivation
- Illegal immigration and national security
- Sex and slave trades
- Financial and identity fraud.

2.3 For an explanation of why the term 'illegal subletting' has not been used within this guidance see paragraph 5.4.

## Establishing a baseline

2.4 Every organisation should be able to demonstrate a thorough understanding of the environment within which they operate in order to develop long term strategies and action plans – landlords are no different. Having a thorough understanding of the issues impacting on the local area is essential if service provision is to be responsive to local need.

2.5 The following self-assessment checklist supports landlords to assess their current level of awareness and activity around tackling unlawful subletting and tenancy misuse:

### **Self assessment checklist: Tackling tenancy misuse and unlawful subletting**

- Do you subscribe to the Audit Commission's National Fraud Initiative and act on the information it provides?
- How robust are application and sign-up processes at validating identity and household circumstances?
- Do you currently cross match in-house data with publicly-accessible information sources to identify potential data discrepancies or mismatches?
- How rigorously do you monitor and manage authorised subletting or lodgers?
- Is there a high level of awareness of the indicators of tenancy misuse among all staff, including front line housing staff, and repairs and maintenance staff?
- Do front line staff have sufficient confidence to challenge and report any tenancy concerns?
- Do your residents know how to report potential incidents of unlawful subletting or tenancy misuse? Do you regularly run campaigns to improve resident awareness?
- Have you liaised with other landlords or the local authority to compare levels of tenancy misuse?

### Self assessment checklist: Tackling tenancy misuse and unlawful subletting (*continued*)

- Are you able to identify any trends in unlawful subletting and occupation within your stock?
- Do you know which property types or tenant groups are most at risk of unlawful subletting or tenancy misuse?
- Do you take effective action to ensure that social housing is occupied by those to whom it is allocated?
- How frequently do you check occupation and update household details?
- Do you undertake tenancy audits? If so, how frequently? Are audits targeted at high risk tenancies?
- What is your success rate at achieving possession where tenancy abuse is identified?
- How satisfied are you that you are doing all you can to tackle tenancy abuse?

### Audit Commission KLOE 6: Tenancy and Estate Management

The housing key lines of enquiry (KLOE) provide a consistent framework for effective evaluation of housing services. They are designed to provide inspectors and others with a framework to view and assess services. Descriptors of fair and excellent services help landlords to understand how service quality is judged.

The following extract sets out the current expectations in relation to activities to detect and eliminate unauthorised occupation and subletting as part of the delivery of excellent services:

- Has effective arrangements for staff and service-users to report abandoned property and unauthorised occupation
- Reacts promptly, effectively and legally to remove unauthorised occupiers' occupation, and takes appropriate action quickly
- Carries out periodic tenancy checks to ensure that the legal tenant is in occupation, and that the property is maintained in a reasonable condition.

### Stock sample

2.6 The priority and resources allocated to the detection of unlawful subletting and occupation differ greatly between landlords: Some social housing landlords have specialist teams to investigate tenancy misuse, others use existing housing front-line staff and legal services to respond to reported incidents. Importantly, landlords should have a sound evidence base on which to substantiate their level of activity and inform decision-making in relation to resources and capacity. It is not acceptable to

use perceptions or anecdotal evidence of levels of unlawful subletting as the reason for not taking action. Approaches should be evidence-based, proportionate and appropriate to local circumstances. Where a landlord is unable to provide evidence to support their level of counter-fraud activity, running a 'pilot' exercise that identifies existing levels of unlawful subletting or tenancy misuse in a small sample of current stock will help to provide baseline evidence that will substantiate or challenge existing decisions. (See case study one: Family Mosaic Housing Associations and LB Southwark page 22)

### Managing a pilot project

2.7 A pilot exercise can establish accurate information about the existing level of unlawful subletting to inform future service development and support decision-making.

The following factors should be considered:

- Sample size and selection
  - Sample can be random or selected using a risk-based approach (see paragraph 4.16)
- Completion of data-matching exercises and desk-top checks that can be undertaken prior to visits to identify discrepancies and prioritise risk
- Participation in the Audit Commission's NFI
- Duration of project
- Timetable for visits and availability of staff
- Maintenance of confidentiality
- Allocation of resources
- Existing or potential partnership opportunities
- Access to specialist advice or investigative expertise to manage identified cases of unlawful subletting or occupation (see para 4.29)
- Monitoring and reporting of pilot outcomes

## The need for action

*"Fraud can have a devastating effect on individuals and businesses alike, causing a range of financial and emotional harms, which have often remained unrecognised"*<sup>3</sup>

<sup>3</sup> The National Fraud Strategy (2009) National Fraud Authority

2.8 The following tables set out the impact of failing to act on housing misuse on landlords, people and communities.

<b>Impact on landlords:</b>
Unable to make best use of existing housing stock
Increased number of incidents of overcrowding or under-occupation of existing housing stock
Increased use of temporary housing
Increased risk of properties being used for illegal purposes
Reduced ability to tackle homelessness, and lack of control over the allocation of their properties
Increased risk of damage to the property associated with modification of property for multiple occupation or illegal activity
Difficulties gaining access to undertake maintenance, repairs and gas servicing
Reduced potential for resident involvement

<b>Impact on people and communities</b>
Those in greatest housing need are unable to access secure and stable social housing tenancies
Prolonged periods of residence for applicants living in unsatisfactory, overcrowded or temporary housing (including hostels and bed & breakfast accommodation)
Impact on health and education for those living in unsuitable housing conditions
Longer housing waiting lists and extended waiting times, and disruption to local communities caused by crime and anti-social behaviour
The public pay the cost of fraud through increased national and local taxation and reduced public service expenditure
Social harm caused to families living in temporary accommodation can result in more transient lives, an inability to put down permanent roots in communities and difficulties in establishing a stable educational environment for children. <sup>4</sup>
Unauthorised sub-tenants may be unaware of their status and are vulnerable to being charged increased rents and deposits, unlawful eviction and homelessness once discovered by landlord
Drain on public resources and organisational revenue due to investigation and court costs

<sup>4</sup> *Protecting the public purse: Local government fighting fraud (2009)* Audit Commission



## Corporate commitment

2.9 All landlords have an important role to play in tackling unlawful subletting and tenancy misuse and communicating these intentions publicly. Delivering on any commitment requires strong governance, corporate commitment and leadership that are supported by sufficient resources and organisational capacity, as well as clear lines of responsibility and accountability.

2.10 Strong commitment, leadership and accountability will ensure:

- A strong organisational counter-fraud culture, with a pro-active approach
- Increased confidence in the landlord, leading to greater reporting by the public
- Organisational capacity and the prioritisation of resources
- Direction and clarity in relation to priorities for action, and a focus on high-risk areas
- Partners, individual staff members and residents understand what is required of them
- Residents have clarity about the services they can expect
- Well-developed partnerships with other agencies
- Clear organisational strategy and action planning, with supporting policy and procedures that demonstrate both a responsiveness to fraudulent activity and best use of existing homes
- Local arrangements for the sharing of good practice and performance comparison

### **More Information: Managing the risk of fraud – Actions to counter fraud and corruption (CIPFA)**

This CIPFA publication provides detailed guidance on the countering of fraud in the public sector. The publication provides advice and good practice around five key areas: adopting the right strategy; accurately identifying risks; creating and maintaining a strong structure; taking action to tackle the problem; and defining success.

### Self-assessment checklist: Achieving success

- Has your approach to tackling unlawful subletting and tenancy misuse been considered by the relevant Board/Cabinet/Committee?
- Do you have clear and challenging objectives for preventing and tackling tenancy misuse?
- Is there a robust strategy, action plan, policies and procedures in place to deliver your priorities? Do these take account of the potential for increased fraud as a consequence of the current economic circumstances?
- Have you assessed the effectiveness of current counter-fraud arrangements?
- Do you have dedicated counter-fraud resources?
- Does activity focus on the most high-risk areas?
- Are there clear and agreed targets for improvement, and effective performance measurement processes in place to monitor return on investment in counter-fraud activities?
- Are resources sufficient to achieve your objectives and sustain performance improvement?
- Has there been adequate specialist training for managers and staff, including fraud awareness training for all staff and new starters?
- Have you explored, and acted upon, potential partnership opportunities with the local authority, other landlords and local agencies in the area to reduce fraud?
- Are there service delivery and information sharing protocols/procedures in place to aid partnership working?

### Checklist:

Policies and procedures linked to the management of tenancy misuse, such as tenancy and estate management, should include:

- A clear statement recognising the importance of tackling unlawful subletting and tenancy abuse and an explicit acknowledgement of its effect on residents and communities
- Details of the organisation's aims, attitude and general approach to unlawful subletting and tenancy misuse
- A definition of what is considered to be tenancy misuse
- An outline of any specific commitments made to tenants or the wider community about the service standards that can be expected

**Checklist: (continued)**

- An outline of how unlawful subletting and counter-fraud services fit within the organisational structure
- Reference to any tenancy clauses relating to unlawful subletting and tenancy abuse
- An unequivocal statement that all incidents of unlawful subletting and tenancy abuse will be investigated and early action will be taken to tackle them
- A commitment to partnership working with key agencies
- A commitment to working with residents to identify and resolve tenancy misuse

2.11 When developing policies and procedures, it can be useful to review your own organisational policies and procedures in conjunction with partners and other landlords operating locally. Comparing strategies and the success or otherwise of practical initiatives with partners will both facilitate the sharing of good practice and support of true understanding of the level of unlawful subletting or tenancy misuse in your area.

**More information: Audit Commission Toolkit – Changing Organisational Cultures**

The Audit Commission has developed a comprehensive toolkit to help public sector organisations to address fraud risks. It can be used by an organisation or partnership as a self-assessment tool. It identifies risks through facilitated workshops that focus on improving your organisation's culture and arrangements.

**[www.audit-commission.gov.uk](http://www.audit-commission.gov.uk)**

## Characteristics of success

2.12 The Audit Commission<sup>5</sup> examined how three London Boroughs tackled housing tenancy fraud with limited resources and a risk-based approach to tenancies. Over a year, 274 tenancies were brought back into social use. The activities of those Boroughs demonstrated the following common characteristics:

- A clear commitment by all organisations to prevent and detect tenancy abuse
- A recognition of the full cost and harm caused by tenancy misuse
- The use of campaigns to raise public awareness of tenancy misuse and to encourage residents to report suspected illegal occupancy
- Regular housing tenancy audits to confirm the correct tenant was in residence

<sup>5</sup> Extracted from – *Protecting the public purse: Local government fighting fraud* (2009) Audit Commission

- The use of specialist counter-fraud staff to support housing officers where appropriate
- Effective use of NFI results and other data matching
- The use of indicators and other information that may highlight the likelihood of tenancy abuse, e.g. a tenant's failure to provide access for gas inspection.

## A common approach to performance

2.13 Current information on the levels of unlawful subletting and non-occupation within the social rented sector is patchy and difficult to measure with any accuracy. While evidence suggests that the level is between 1 per cent and 5 per cent of stock, with higher percentages in areas of high demand and the London boroughs, more robust reporting arrangements and further evaluation are needed to determine trends and variations between different regions and landlords.

2.14 Current information reporting varies significantly. The development of more consistent reporting across the sector will support the evaluation of performance and enhance opportunities to benchmark and share good practice.

2.15 Consistent reporting is encouraged to support landlords to:

- Develop insight into the extent and nature of problems in their area
- Make informed decisions about the allocation and targeting of resources
- Develop effective anti-fraud strategies and action plans
- Demonstrate accountability to residents and communities
- Support trend analysis and benchmarking
- Learn from better performing landlords and partners
- Support effective partnership arrangements with other landlords and local authorities
- Identify the resource and cost implications of actions
- Measure the outcomes and effectiveness of actions
- Support the development of national statistics to help inform local, regional and national policy decisions and funding.

### National reporting requirements

2.16 To support a single definitive source of information on reported fraud in local government for the National Fraud Authority, the Audit Commission has updated arrangements for collecting reports of fraud<sup>6</sup>.

<sup>6</sup> *Protecting the public purse: Local government fighting fraud* (September 2009) Audit Commission

2.17 With effect from 31 March 2009, all local authorities in England (including local authorities with ALMOs) are required to report the following information as part of the annual Fraud and Corruption Survey<sup>7</sup>:

- Number of properties in your housing stock, both directly managed and via arms length management organisations
- Tenancy subletting fraud:
  - Number of cases identified where a tenant lets part or all of their home to somebody else contrary to the tenancy agreement (value of fraud not required)
  - Did any of these cases involve employees or councillors?
- Number of cases of other tenancy fraud – this can include issues such as wrongly claimed succession or fraudulent application (value of fraud not required)
  - Did any of these cases involve employees or councillors?
- Right to buy frauds
  - The number of cases identified
  - Value of the discount given
  - Did any of these cases involve employees or councillors?
- Do you assist other registered social landlords in your area to combat tenancy fraud? If so, please provide details?

2.18 As good practice, all social landlords should consider reporting the same information as is required of local authority landlords and ALMOs by the Audit Commission. This facilitates benchmarking and comparison of performance for all landlords, and contributes to the establishment of baseline statistics across the social housing sector.

### Performance benchmarking

Online performance indicator tracking services are used by hundreds of social landlords to provide timely, comparative performance information. Subscribers of e.g. HouseMark can input data and generate statistical reports and graphs at any time. The system updates in real time as new data is entered.

Subject to subscribers' demand, HouseMark will incorporate the Audit Commission indicators in its annual indicator set from 31 March 2010. This will help landlords understand how they perform compared to other similar organisations, and learn from those facing similar problems.

<sup>7</sup> Extracted from Audit Commission Fraud and Corruption Survey 2008/09

### Audit Commissions fraud reports AF70

All local authority and ALMO landlords are required to report all identified incidents of housing fraud to the Audit Commission, including all cases of: unlawful subletting and occupation, obtaining a property by deception, wrongly claimed succession and non-occupation.

Landlords should complete the standard Audit Commission AF70 form for each identified case of housing fraud. Calculating the value of wrongly claimed subletting or other tenancy abuses can be complex. Special guidance produced by the Audit Commission in 2008 allows for the value to be omitted from the AF70 fraud report, although details of the case should still be reported to the Audit Commission.

**For further information email:** [infogovcounterfraud@audit-commission.gov.uk](mailto:infogovcounterfraud@audit-commission.gov.uk)

## Partnership working

2.19 While housing associations need to operate within the aims and objectives of their own organisational strategy for tackling unlawful subletting and tenancy abuse, working in partnership with local authorities can achieve long term sustainable solutions that deliver a comprehensive strategic and operational response to issues within an area.

2.20 In particular, the advantages of partnership working between local authorities and housing associations include:

- Improved ability to deliver a comprehensive range of services that are responsive to local priorities
- Effective partnership working arrangements (assessed as part of comprehensive area assessment)
- Shared work programme and enhanced co-operation between organisations
- Shared expertise or specialist fraud investigation teams across a local area
- Joint evidence-gathering
- Enhanced opportunities for shared problem solving and data-sharing
- Pooled resources, shared costs and improved efficiencies
- Streamlined investigations and reduced duplication
- Seamless service provision to residents, and consistency regardless of landlord type
- Single public point of contact to report fraud

- Improved ability to address homelessness and the use of temporary accommodation
- Improved opportunities to network, benchmark and share good practice
- Opportunities for joint public campaigns, and the delivery of joint staff awareness and specialist training to improve cost efficiency and improve partnership relationships.

### **Emerging partnerships between local authorities and housing associations**

2.21 Historically, unlawful subletting is recognised as a serious problem for most London Boroughs. As a consequence, specialist investigative teams and working practices dedicated to tackling tenancy abuse are more established there. More recently, examples of partnership working between local authorities and housing associations are emerging to bridge the gap in fraud investigation across the sector as a whole, and provide joint solutions to local issues.

2.22 Examples of partnership working between local authorities and housing associations include:

- Provision of support to housing associations to manage complex cases
- Local authorities undertaking data matching exercises – cross-matching housing association tenancy databases against all council records to identify potential discrepancies and providing results to the housing association for action
- Local authority fraud team detecting and acting on potential incidents of tenancy abuse, and undertaking all associated work to regain possession on behalf of the housing association
- Local authority funding an additional fraud investigation post to work with three housing associations in the area to deliver a consistent counter-fraud service to residents within the borough, regardless of landlord
- Local authority running a pilot project with a housing association to demonstrate the effectiveness of a dedicated fraud investigative team
- Local authority fraud team undertaking all work associated with the identification and management of all incidents of unlawful subletting on behalf of the housing association in return for nomination rights to properties where possession is obtained
- Establishment of a borough-wide single telephone reporting hotline, and joint campaign and branding to tackle unlawful subletting

## Case study one: London Borough Southwark and Family Mosaic Housing Association

### Partnership working

LB Southwark is the largest social landlord in London with homes for more than 44,000 tenants, with more than 13,500<sup>8</sup> households waiting to be allocated council housing or be transferred into more appropriate housing. In 2003, Southwark established a Special Investigation Team to carry out targeted tenancy checks on high-risk tenancies. This has now been extended to undertake regular checks on every tenant.

Southwark Council's investigations team has a successful track record in tackling unauthorised occupation within the borough's own stock, recovering 246 homes during the period 06/07 – 07/08. Success is attributed to having a specialist team with expertise in dealing with unauthorised occupants and the legislative framework. The team has an effective working relationship with the County Court and is registered to exchange data as a fraud team, enabling them to conduct checks outside a housing officer's usual remit. As a statutory agency the investigations team has access to a range of tools and information sources which are unavailable to non-statutory agencies such as housing associations. These sources include: credit checking agencies, Companies House and the immigration service. However, little was known of the levels of unauthorised occupation among the borough's housing association stock.

Between December 2007 and March 2008, Family Mosaic and Southwark Council undertook a pilot, funded by the Housing Corporation, to extend the borough's approach to tackling unauthorised occupation of housing association homes in the borough. In return for the provision of specialist investigation services to identify unauthorised occupants and gain vacant possession of the properties, Family Mosaic offered all the properties released as a result of the initiative to nominations from Southwark Council.

Investigations focused on an estate in which there were historically high levels of unauthorised occupation, and used a selection of street-based properties for comparative purposes.

Southwark Council's investigation team:

- Conducted home visits and occupancy checks
- Conducted interviews and investigations to obtain evidence
- Prepared cases for court possession hearings
- Presented cases at court, and
- Liaised with the Housing Options service regarding clients likely to become homeless

<sup>8</sup> Statistics as at 9 January 2007, used to inform the initiation of the pilot project.



## Case study one: London Borough Southwark and Family Mosaic Housing Association (*continued*)

### Pilot outcomes:

A total of 300 properties were visited during the three month period, of which 253 properties were found to be occupied by the legal tenant. Fourteen cases of unauthorised occupation were identified, and vacant possession was achieved on 12 of these properties. At the end of the three month pilot, investigations were still ongoing on the remaining 33 properties, with 26 final warning letters, and eleven Notices to Quit having been served. The properties released (ten 1 bedroom properties and two 2 bedroom properties) were found to be concentrated in street-based converted housing, which was unexpected.

*(Due to the limited duration of the pilot the evaluation does not report on the outcomes of the remaining cases as they follow through to court hearing stage.)*

### Comparison between local authority and housing association stock

Based on the pilot sample size of 300 properties and 14 identified cases of unauthorised occupation, this indicates the level of unauthorised occupation in Family Mosaic's stock in Southwark to be 4.66 per cent. This compares to the Council's own stock estimates of between 2 per cent and 4 per cent. This may be reflective of the Council's emphasis in recent years on tackling unauthorised occupation through regular tenancy checks and rigorous enforcement that may have resulted in a deterrent effect.

### Evaluation

Key financial evaluation:

Officer costs: £26,000 the cost of a full-time agency member of staff for 3.5 months

Void costs: £5,400 notional figure based on average void turn around

Legal costs: none to date (at time of project evaluation)

Alternative accommodation costs: none

Unit cost: A crude calculation of the unit cost for recovering each property is estimated at £3,617. This compares to the average grant bid for a new build housing association unit in Southwark of £140,880 (based on 2008/2011 bidding round)

### Key learning points

Close co-operation and information sharing between the two services was crucial.

Given the wide range of housing officer duties, it is unlikely that a housing officer would have the specialist expertise to tackle unauthorised occupation effectively. The most cost-effective model would be for housing officers to complete the tenancy checks and refer any suspect cases to specialist services to conduct an investigation, making more efficient use of the Investigating Officers and expertise.

### **Practice example: London Borough Wandsworth and London and Quadrant, Metropolitan and Wandle Housing Associations**

#### **Partnership working**

The local authority's Internal Audit Service has historically undertaken occupancy checks of its own housing stock to identify potential housing tenancy abuse. The occupancy check involves cross matching data from various databases and council records to identify discrepancies that indicate potential tenancy misuse or unlawful subletting. This is followed up with an unannounced occupancy visit to investigate tenancies where a risk is highlighted.

Recognising that LA stock accounts for only half of social housing tenancies in the borough, an additional Internal Audit post has been established to enable work with housing association landlords. The additional post increases the volume of fraud detection work that can be undertaken, and delivers a more joined-up approach to work within the borough. In partnership with three housing associations in the area, the occupancy check/data matching exercise has been expanded to include the housing association tenancy databases. Anomalies identified by the data matching exercise are passed back to the housing association for further investigation.

LB Wandsworth also supports London and Quadrant Housing Association around the management of complex individual cases to regain possession of the property.

#### **More Information: National Fraud Strategy**

The National Fraud Authority published the first National Fraud Strategy for the UK in March 2009 which sets out a framework that supports public, private and voluntary sectors work together in partnership, and to which local authorities are expected to align their counter-fraud activities.

The strategy suggests a programme to focus activity, share data and good practice and raise public awareness.

**[www.attorneygeneral.gov.uk](http://www.attorneygeneral.gov.uk)**

#### **Wider partnership opportunities**

2.23 Opportunities also exist for partnership working with other landlords or private sector service providers to strengthen and support activities to tackle unlawful subletting and occupation. For example, aligning the scheduling of tenancy visits with other landlords in an area, or using contractors to support the collection of tenant profile information.

### Practice example: Welwyn Hatfield Borough Council – Welwyn Hatfield Community Housing Trust (ALMO)

#### Tenant profiling and tenancy audit in partnership with private sector heating contractor

Welwyn Hatfield has introduced a new initiative in partnership with private heating contractor AFR Ltd, to undertake a rolling programme of tenancy audits and customer profiling, combining the annual gas servicing and safety visit with the collection of household information for every tenancy by the contractor. Information gathered is used to support customer profiling and tenancy audit activities and understand the needs and diversity of current occupiers. AFR Ltd provides the service without additional cost to the landlord as part of demonstrating their commitment to communities.

Visits are conducted on a rolling programme, and aligned to the contractor's annual gas servicing and safety visit. Household information is gathered by the engineer whilst on site and returned to the council offices in a sealed envelope. Information collected is compared to existing tenancy records and where a discrepancy is identified, or there is no return, further investigation is triggered.

2.24 For further information in relation to data sharing see para 2.26.

### Practice example: Croydon Fraud and Enforcement Forum

The Croydon Fraud and Enforcement Forum was established to provide anti-fraud and fraud investigation officers from several public bodies working in the local area with an opportunity to meet and network with each other on a regular basis. The forum was borne out of the recognition that many of the individuals committing fraud were known to other public sector organisations in the same area. The forum includes representatives from the local authority, Department for Work and Pensions, UK Border Agency, NHS, housing associations and local police. The key outcome has been the enhanced co-operation between agencies, shared investigations and an increase in the resources and skills available to each of the participating organisations.

**Adapted:** *Protecting the Public Purse* (September 2009) Audit Commission

#### Effective partnership arrangements

2.25 The need for co-operation and effective linkages between local landlords should not be underestimated if the achievement of locally agreed aims and objectives is to be met. While most landlords are already aware of the potential benefits of joint working, in practice forming successful partnerships with other organisations can be time consuming. Those with developed successful partnerships stress the importance of commitment to establishing and maintaining the relationship, as

well as the support of key officers at both an operational and strategic level. All landlords and agencies need to be confident in, and trusting of, each other to share information openly. Comparing performance with similar organisations is a useful tool for assisting landlords to understand their own level of performance, and draw comparison between other landlords operating within a local area. While good relationships with local partners can significantly improve a landlord's ability to deliver services that are responsive to local circumstances, the efficiency and impact of any partnership arrangement should also be monitored as part of the wider performance-monitoring framework.

### Partnership checklist

The following checklist can be used to identify strengths and weaknesses of existing partnership arrangements:

- Are all key landlords involved in the partnership?
- Is there an agreed set of strategic goals?
- Is there a strategy that sets out how each of the goals will be achieved?
- Is there an agreed action plan(s) for the next 12 months, with attributed roles and responsibilities for each partner and clearly defined, measurable targets?
- Are there agreed performance indicators which enable progress and success to be measured?
- Are there clearly defined information-sharing protocols and data exchange procedures in place?
- Are working practices streamlined to avoid duplication?
- Is partnership working at a day-to-day operational level encouraged? For example:
  - joint publications/promotion
  - joint staff training
  - resident communications or events

### Information sharing protocol<sup>9</sup>

2.26 Information sharing protocols set out agreements allowing for information from different sources to be shared between parties. Whilst protocols can assist local authorities, landlords and other agencies, developing information sharing protocols can be difficult, particularly for landlords operating in a number of different geographical areas.

<sup>9</sup> Adapted from: *Tackling ASB in Scotland: An Action Framework for Social Housing Practitioners and Governing Bodies* (2008) CIH.

2.27 An effective protocol should include:

- a list of all organisations involved in sharing the data
- the names of officers responsible for ensuring compliance
- the type of information authorised to be exchanged
- the process for exchange, and agreed timescales
- details of how data will be held securely
- the reasons for data sharing
- how complaints will be managed
- the signatures of all parties

### Practice example: Homes for Islington

Homes for Islington have developed a protocol for managing potential subletting and tenancy misuse cases that may also involve Housing Benefit fraud. The protocol facilitates a two-way process and exchange of information between teams.

### Further information:

#### Information Sharing Protocols

A specialist toolkit on developing Information Sharing Protocols, which includes a template protocol, is available on The UK Home Office Crime Reduction website:

**[www.crimereduction.gov.uk/infosharing\\_guide.htm](http://www.crimereduction.gov.uk/infosharing_guide.htm)**

#### The Information Commissioner

The Information Commissioner's Office is the UK's independent authority set up to promote access to official information and protect personal information. Further guidance, including information on data protection, and the exchange of information is available from: **[www.ico.gov.uk](http://www.ico.gov.uk)**

## Involving residents

2.28 All social landlords are required to demonstrate that the services they provide are responsive to local needs, and that residents are involved throughout the planning, delivery and evaluation processes. Activities to tackle unlawful subletting and tenancy abuse need to be appropriate, visible and timely if landlords are to meet residents' expectations around delivery.

### Opportunities for resident involvement

The setting and balancing of priorities in relation to organisational financial constraints, for example:

- Deciding where to concentrate investigative work, for example prioritising a specific neighbourhood, property type or tenant profile

Agreeing the level of organisational performance to be delivered, for example:

- The scope and regularity of tenancy audits
- Additional services to be offered to tenants as part of the tenancy audit visit

Raising awareness and support through tenants' and residents' associations

Setting and monitoring targets and standards

Evaluation of landlord's performance

### Benefits of involving residents include:

Insight into the values and expectations of residents to help shape services

Improved resident understanding of tenancy abuse and unlawful subletting issues, and clarity about services that customers can expect to receive

Increased trust and communication between landlord and residents

Improved management of expectations

Innovative customer-led solutions

## Part 3:

# The right to take in a lodger and sublet

- 3.1 All secure tenants have a statutory right under the Housing Act 1985 to take in lodgers, to sublet part of their home if the landlord consents, and to pass on their tenancy to a successor (unless there has already been a succession). However, they may not sublet the whole of the home, and if they do the tenancy ceases to be secure and cannot subsequently be reinstated. The tenancy may only be assigned in limited circumstances, set out in the Act.
- 3.2 For assured tenancies under the Housing Act 1988, if there are terms in the tenancy agreement regarding assigning then these will apply, and if the landlord's consent is required then the landlord will not unreasonably be able to refuse it. However, if the tenancy agreement is silent regarding assignment and subletting, the Act implies into a periodic tenancy agreement that the tenant needs the landlord's consent to sublet or part with the whole or part of the home, including an assignment of the tenancy. Where a need for the landlord's consent is implied into the tenancy by the Act in this way, there is no need for the landlord's refusal to be reasonable. If an assured tenant parts with possession of the whole home (whether by assignment or subletting) then the requirement that it is the tenant's only or principal home will no longer be satisfied, with the result that the tenancy will stop being assured. However, unlike the position with secure tenants, the position can be reversed – if the tenant moves back and once again satisfies that requirement, the tenancy will revert to being assured.
- 3.3 This section considers in more detail the management of rights to sublet, etc. and considers circumstances where authorised subletting can provide an appropriate solution to a problem for both the landlord and the tenant.

## Authorised subletting

- 3.4 There will be situations where a tenant may wish to rent out a room or rooms in their home, in which case the new occupier will be referred to as a lodger or sub-tenant. Typically, this can arise where the tenant needs to study or work away from home, take time to travel, care for relatives for short periods of time or needs help to cover household bills. However, a distinction needs to be made between sharing the home and allowing somebody else to occupy the whole property, where a secure tenancy is involved. Subletting the whole property is not allowed for a secure tenancy. Under an assured tenancy, subletting the whole should only be a temporary arrangement, in circumstances where the property does not stop being the tenant's only or principal

home. In some circumstances, taking in a lodger or subletting offers the most appropriate solution to a problem. It can also help to meet local housing need and make better use of existing stock through reducing under-occupation.

- 3.5 It will not necessarily count as subletting the whole of a secure tenancy if the tenant is unavoidably obliged to live elsewhere temporarily (e.g. in hospital or prison, or for the purposes of work) and arranges during this period for a relative or friend to live in the property, to look after it and pay the rent. So long as the tenant intends to return to live in the property as their only or principal home and has not parted with possession, this type of arrangement can result in security of tenure being maintained and the property being safeguarded.
- 3.6 Authorised subletting, or arranging for somebody to live in and look after the property on the tenant's behalf, for short periods of time (or in some cases for as long as necessary), can reduce the risk of:
- Damage to the property and contents as a consequence of being left unoccupied
  - Vandalism
  - Rental loss
  - Squatters and unauthorised occupation
  - Anti-social behaviour
- 3.7 In situations where consent to sublet is given, the legal relationship between the tenant and the landlord remains the same. The tenant's responsibility for payment of rent and charges, and adherence to tenancy terms remain unaffected. The legal considerations for different tenancy types are set out in detail in section five of this guidance (paragraphs 5.18-27).

### **Practice checklist: Subletting policies and procedures:**

Subletting policies and procedures should:

- Be accessible and clearly communicated to tenants
- Ensure all tenancy agreements are clear about the statutory and contractual rights tenants have to take in lodgers and/or sub-tenants with or without the landlord's consent
- Ensure tenants are provided with clear and accurate information about lodgers and sub-tenants for their particular tenancy type
- Determine how applications from tenants will be responded to, detailing timescales and the level of service tenants can expect to receive



### Practice checklist: Subletting policies and procedures: *(continued)*

- Provide clear advice to tenants on the implications of having lodgers and sub-tenants as soon as they apply for consent, or you become aware they have a lodger
- Encourage tenants to advise if they have taken in a lodger even when they are not obliged to
- Keep a record on the tenancy record of known lodgers and sub-tenants
- Provide clear information to tenants intending to leave about the position of lodgers and sub-tenants and the requirement to provide vacant possession
- Make sure tenancy agreements have the correct clauses in them about lodgers and sub-tenants
- Demonstrate that action will be taken towards unlawful subletting
- Have standard forms with which tenants can apply for consent to take in lodgers or sub-tenants
- Determine the criteria for granting consent, clearly setting out acceptable reasons and periods of time for subletting to be permissible
- Have standard formats to guide staff who are granting or withholding consent for lodgers or sub-tenants
- Advise tenants of how to appeal against a refusal to grant consent or against any terms of the consent
- Advise of recourse by the landlord should the conditions be broken
- Be regularly reviewed to ensure they remain legally correct and reflect current good practice in managing the risk of fraud.
- Reinforce messages to tenants about lodgers and subletting, including implications for the tenant, in tenants' handbooks, websites and leaflets.

### Effective tenancy terms and conditions

3.8 Tenancy terms and conditions should be explicit around the requirement to occupy the dwelling as the tenant's only or principal home, and legal consequences and action that will be taken if this is not complied with. It is good practice to clarify circumstances where consent to sublet may be given, and the application process.

## Giving consent

3.9 With one exception, consent is always required for subletting, because even where this is not stated in the tenancy agreement, a term to that effect will be implied into the tenancy agreement under the relevant Act. The exception is that under assured tenancies it is possible for a landlord to include a term in the tenancy agreement that subletting is permitted without the landlord's consent. However, it is recommended that this approach is not used, and that consent is required for all instances of subletting and encouraged where a tenant takes in a lodger. The landlord should ensure that tenants are fully aware of the position, and should consider including provision in the tenancy agreement even where this is not strictly needed. They should be supported by clearly defined procedures for dealing with applications or notifications from tenants that set out the level of service customers can expect to receive. In addition, robust monitoring arrangements should exist to ensure the tenant returns to the property as their only or principal home at the end of the agreed sublet duration (where an assured tenant has sublet the whole), and the detection of subletting where consent was refused.

3.10 Maintaining a good record of authorised lodgers and sub-tenants is important for a number of reasons:

- Knowing who is living in your stock, and tailoring services accordingly
- Tenants' housing and council tax benefit may be affected
- It can result in overcrowding
- Landlords may otherwise find unauthorised occupants in the property when the tenant leaves.

3.11 Potential indicators of new lodgers and sub-tenants can include:

- Locks fitted to individual rooms
- Informal comments from neighbours

### Practice checklist: Granting consent for subletting

In all situations, tenants are required to ask consent of the landlord before subletting part or (in the case of assured tenants) all of their home. Discretion available to landlords differs according to the tenancy type, however the decision to give consent should consider:

- Whether the rent and deposit required of the sub-tenant is reasonable, taking account of any furnishings and facilities
- The length of time for subletting appropriate in the circumstances
- Whether subletting will create overcrowding or under-occupation
- Whether all parties are aware of their rights, obligations and responsibilities
- The sub-tenant understands there is no right to succession upon the death of the tenant
- The certainty that the tenant intends to return to the property and resume occupation as their only or principal home within the agreed period of time
- Whether the sub-tenant has a history of anti-social behaviour
- The tenant remains clear about their responsibility to maintain rent payments and for the conduct and behaviour of sub-tenants.

**Note:** Consent should **not** normally be given to sublet the tenancy where a Notice of Intention to Seek Possession (NSP) has been served or a Possession Order has been obtained.

## Distinguishing between lodgers and sub-tenants

3.12 The legal distinction between a lodger and a sub-tenant is that a lodger will be a licensee whereas a sub-tenant will have a tenancy. However, in practice, the differences in status can be defined by the following characteristics<sup>10</sup>:

<sup>10</sup> Extracted from CIH Practice on-line [www.cih.org](http://www.cih.org)

A lodger will:	A sub-tenant will:
Usually be charged rent and other charges that may reflect the furnishings and amenities available	Usually be charged rent and other charges that may reflect the furnishings and amenities available
Not have exclusive possession of any part of the property – i.e. the tenant has access to the lodger’s room to clean or for other reasons	Have exclusive rights to part/all of the property – i.e. the tenant has no right to enter the sub-tenant’s room without obtaining consent first
Live there by consent of the tenant	Normally have a room key
Have no room key	
Usually be a licensee in law	

### Legal considerations: Subletting

#### Secure Tenants

Section 93(1)(b) of the Housing Act 1985 gives secure tenants the right to sublet part of their home provided they have the landlord’s written consent. The landlord cannot reasonably withhold consent. However, where the tenant sublets or parts with the whole of the property then the tenancy ceases to be secure. Once security of tenure has been lost it cannot be regained, even if the tenant moves back into the property.

Section 94 of the Housing Act 1985 provides that the landlord must not unreasonably withhold consent to sublet part of the property, and if it does so consent is deemed to have been given.

Section 94(3) states that in making its decision the landlord may take into account whether:

- The proposed subletting would lead to statutory overcrowding
- It intends to carry out works to the property which would affect the accommodation likely to be used by the sub-tenant

The landlord must not apply conditions to the consent and must give the tenant a statement of reasons for refusal, (section 94(6)(a)). If the landlord does not respond to a tenant’s request then consent is deemed to have been withheld, (section 94(6)(b)), and can be challenged by the tenant in the county court as to its reasonableness.

Where a property is sublet without the consent of the landlord the tenants will be in breach of tenancy conditions.

For further legal guidance see paragraphs 5.23-24

## Legal considerations: Subletting

### Assured Tenants

Section 15(1) of the Housing Act 1988 makes it an implied term of assured tenancies that the tenant may sublet all or part of the property, but only where they have obtained the prior consent of the landlord. However, this section does not apply if the tenancy agreement contains its own express terms covering subletting, etc.

If the tenancy agreement makes no mention of subletting and the implied term applies, the landlord can withhold consent to subletting on any ground it chooses, whether reasonable or not. If, on the other hand, the tenancy agreement states that subletting is allowed only with the consent of the landlord, the agreement will be subject to the requirement that such consent cannot be unreasonably withheld.

If a tenant sublets the whole of the property they will not only normally be in breach of the terms of their tenancy agreement, they will also have ceased to occupy as their only or principal home, and unless they can prove they were only temporarily absent, they will have lost their status of assured tenant. They will still have a contractual tenancy which can be terminated by service of a notice to quit and application for a possession order in the county court. However, unlike the position under the Housing Act 1985, the tenant can regain assured tenancy status by returning to the property and complying with the conditions in section 1 of the 1988 Act.

For further legal guidance on assured and assured shorthold tenancies see paragraphs 5.26-27.

### Introductory Tenants

Introductory tenants do not have a right to take in a lodger or to sublet part of the property, and they would therefore require landlord's consent if they wish to do either.

For further legal guidance on introductory tenancies see paragraph 5.25.

**Extracted from CIH Practice on-line [www.cih.org](http://www.cih.org)**

## **Legal considerations: Taking in lodgers**

### **Secure tenants**

Section 93(1)(a) of the Housing Act 1985 gives secure tenants an absolute right to take in lodgers. The landlord's consent is not required.

### **Introductory tenants**

The landlord's consent is required.

### **Assured tenants**

All periodic assured tenants require the consent of the housing association to take in lodgers, unless there is specific provision in the tenancy agreement to the contrary.

### **Fixed-term assured shorthold tenants**

Fixed term assured shorthold tenants can take in lodgers without consent under common law unless the tenancy agreement prohibits lodgers or requires consent to be obtained.

For further legal guidance on taking in lodgers see paragraph 5.18.

**Extracted from CIH practice on-line [www.cih.org](http://www.cih.org)**

# Part 4:

## Taking action

### Effective prevention

4.1 There is a range of motivations for unlawful subletting and occupancy, and therefore work to tackle this issue needs to be balanced with effort to tackle the causes and help prevent incidents from occurring in the first place. Work to reduce the levels of unlawful subletting and fraud should be linked to wider organisational strategies and policies on issues such as:

- Mobility
- Tackling worklessness, and support for training and apprenticeships
- Financial inclusion and debt advice, and support for credit unions
- Benefit take-up initiatives and campaigns
- Support for home swaps and exchanges
- Encouragement and incentives to downsize where under-occupation exists
- Incentives to tenants to relinquish their tenancy when they move out
- Help with market rent deposits

#### Practice example: Circle Anglia Homes

Circle Anglia's tough stance on unlawful subletting is supported by a programme of rolling tenancy audits. However, detection and action taken where unlawful subletting or occupancy is identified is underpinned by a wide range of strategies and initiatives to address the causes of unlawful subletting including:

- Addressing labour mobility
- Support for Homeswap
- Programmes aimed at freeing up properties to facilitate moves in the London area include:
  - Financial incentives to downsize
  - Creation of family homes through reverting flat conversions
  - Help with market rent deposits

### Further information: House Exchange Direct

House Exchange Direct is an online service for all local authority and social housing tenants looking to move home [www.houseexchange.org.uk](http://www.houseexchange.org.uk)

### Beginning the tenancy

- 4.2 All landlords should feel assured when a property is allocated to a new tenant that it is both being allocated to the person in greatest priority need and will be used by the tenant as their only or principal home. CLG's code of guidance provides detailed advice and guidance to landlords about the allocation of social housing under Part 6 of the 1996 Act<sup>11</sup> and the identification and verification checks required. However, all landlords should be aware that where a property is obtained by deception, and false statement has been given, the tenant can be prosecuted within six months of the tenancy start date (see paragraphs 5.75-76).

### Use of photographs and information technology

- 4.3 Taking photographs of tenant/s (and potentially other household members) is increasingly common practice. Using photographs:
- Discourages tenancy misuse and unlawful subletting
  - Increases the likelihood of detection through recognition
  - Supports the completion of tenancy audits.
- 4.4 Sophisticated IT solutions enable photographs taken at sign-up to be electronically linked to the tenancy agreement and all files associated with the customer. This enables staff at any location to enter or recall information regarding the tenant, their dependants and other household members and supports investigation teams in the identification of individuals.

### Practice example: Brent Housing Partnership

#### Photographs

Full face photographs taken at sign-up of all new tenants are imported directly onto the tenancy agreement and the tenant is provided with a bound copy of their tenancy agreement which contains their photograph.

Capturing the image significantly reduces the opportunity for identify impersonation and unlawful subletting, and supports investigation teams in identifying tenants as part of occupancy audits. The photo scheme complements other checks in place to validate identity.

<sup>11</sup> *Allocation of Accommodation: Code of guidance for local housing authorities* November 2002 revision (CLG)



### Practice example: Servite Houses Housing Association

#### Efficient use of IT

Servite Houses Housing Association has stock in London, the Midlands and West Sussex. They use their Universal Housing System to provide an alert to staff that unlawful subletting is suspected. The alert prompts members of staff to ask relevant questions on the telephone that only the tenant would know. It also alerts those who are visiting the property for repairs or other issues to check the photograph of the tenant held on file before attending.

### Settling in visits

- 4.5 Settling in visits are traditionally used within the sector to ensure the new tenant has taken up occupancy of a property and to review any outstanding tenancy concerns, for example outstanding repairs or housing benefit. The settling in visit is usually undertaken within the first two weeks of the tenancy. In addition, a growing number of landlords follow this up with a second visit towards the end of the introductory (or starter) tenancy period to ensure the tenant has settled into their new home and to discuss any concerns regarding the tenancy. These visits should not be overlooked as an opportunity to validate the legal tenant is in occupation and provide an opportunity to detect any suspicious activity.
- 4.6 Where a property has been obtained by deception, for example the falsifying of information on the application form, the landlord can take action to end the tenancy. Visits should therefore be scheduled to take account of timescales for taking action in respect of:
- Obtaining a property by deception or false statement (see paragraph 5.75)
  - Conversion from introductory or starter tenancies to secure or assured tenancies
- 4.7 Settling in visits should:
- Ensure the tenant has moved into the property as his/her main residence
  - Provide evidence that all household members are in occupation, particularly all children detailed on the housing application, and ensure property has not been obtained by deception
  - Validate identity of tenant/s
  - Be unannounced

## Raising public awareness and encouraging reporting

4.8 Almost half of all identified incidents of unlawful subletting or occupancy currently originate from information received from members of the public. Essentially, it is local residents who develop day-to-day relationships with their neighbours and so are well placed to notice if new neighbours arrive or the previous resident moves away. Raising awareness of the issues and building confidence among communities that their landlord is serious about eliminating unlawful subletting and non-occupation is critical to encouraging residents to report suspicious incidents.

4.9 A range of activities and mechanisms can be used to highlight issues including:

- Awareness raising campaigns – which can be delivered in partnership with other local landlords and/or local authorities
- Resident newsletters
- Targeted mailshots
- Notices and posters in housing offices, and local community centres
- Tenants' handbooks
- Use of existing communication mechanisms to reinforce messages, such as:
  - Rent statements
  - Repairs receipts
- Liaison with tenant and resident associations and street ambassadors
- Work with local press and news media to tackle perceptions and raise awareness

4.10 In addition, it is important to have a range of ways in which people can report suspected incidents, including:

- Well-publicised reporting procedures that are easily accessible to all members of the community
- Facility that allows for anonymous reporting of information
- A telephone reporting hotline – landlords may also work in partnership with other local landlords or the local authority to establish a single reporting hotline for the area
- Online web-based or email reporting facility
- Offer the opportunity to report incidents in person, for example:
  - Housing offices
  - Partner community hubs
  - To any member of staff

- Prompt acknowledgement of information received
- Consideration given to the provision of cash incentives to encourage reporting of cases

4.11 Whilst every encouragement should be given to the reporting of suspected unlawful subletting and tenancy misuse, landlords should also have in place robust mechanisms for the identification and management of malicious or vexatious complaints.

### **Practice example: Servite Houses Housing Association**

#### **Cash reporting incentive**

The association takes a tough line when it encounters unlawful subletting, and runs regular advertising campaigns to maintain 'high level' awareness among staff and residents. Servite offers a reward of £250 to members of the public who report a suspicious tenancy which leads to the recovery of the property. They also offer a small incentive to Housing Officers who obtain possession of a sublet property.

### **Practice Example: London Borough of Lambeth**

#### **Telephone reporting hotline**

LB Lambeth has an established telephone reporting hotline which manages any reports of suspected fraud, including unlawful subletting or occupation. Details of the hotline are promoted quarterly in the local free newspaper and included in all annual council tax bills.

## **Responding to reports from residents**

4.12 Landlords must be able to demonstrate that all reported incidents are taken seriously and acted upon swiftly and appropriately. All staff and customers should have easy access to clear and detailed advice in relation to:

- How to report suspected incidents of tenancy abuse and unlawful subletting, including on-line and telephone reporting methods
- The investigative stages involved
- A named contact with responsibility for undertaking investigations
- The type of evidence required to be successful
- Whether (and, if so, how and when) the person reporting an incident can expect to be informed of the outcome.

## Detection and identification

4.13 Changes in many landlord structures and working practices over recent decades have led in part to considerable changes in working practices within the social housing sector; The recent increase in organisational mergers, the use of call centres, automated rent payment methods and the growth of contracted or partnering arrangements for repairs and maintenance have all contributed to an atmosphere of greater anonymity among some residents – often diluting the traditional landlord-tenant relationship and reducing the level of regular face-to-face contact landlords have with their customers. Maintaining a personal relationship with all tenants has become increasingly difficult for some landlords, and the introduction of annual tenancy visits is one way to redress this imbalance and support the detection of tenancy abuse. Tenancy audits, however, are only part of the solution. Visits should be underpinned by:

- An organisational culture that encourages staff to be pro-active.
- High level awareness among staff and residents of the impact of tenancy abuse and the confidence to report suspicious cases
- Complementary processes to support the detection and identification of unlawful subletting and tenancy abuse, including participation in the Audit Commission's National Fraud Initiative, and acting on discrepancies held on in-house records.

### National Fraud Initiative

The Audit Commission's National Fraud Initiative (NFI) is a data-matching exercise which is run once every two years. The initiative compares sets of data held by local authorities and public agencies to identify potential fraud or error. New powers given to the Audit Commission under the Serious Crime Act 2007 mean the NFI has an enhanced role in safeguarding the public purse. Recently, the NFI has been extended to include housing tenancy records of local authorities and social landlords. Results of the data-matching exercise are reported back to landlords. Findings are listed according to the degree of risk of potential fraud. This enables the landlord to take a risk-based approach to subsequent investigations.

In addition to identifying mismatches in data, the NFI will also identify where a person holds two or more tenancies in the social rented sector. Landlords should determine:

- At which property, if either, the person resides
- If one or both properties are sublet
- If any of the tenancies were obtained by deception.

### Practice checklist: Detection and identification

Strategies which support the identification and detection of incidents of unlawful subletting and tenancy misuse should consider the following:

- Act on discrepancies identified from comparison of in-house records, e.g. tenancies where rent payment is received by direct debit from a person with a different name to that of the tenant
- Participate in the Audit Commission's National Fraud Initiative, and act on intelligence leading from it
- Regular programme tenancy audits in place, that use a risk-based approach
- Allow for a clear flow of research and information between teams
- Have consistently robust identity validation requirements for application, sign-up and tenancy audit processes
- Photographs of legal tenants taken at sign up for tenancy records
- Maintain a high level of tenancy fraud awareness among all housing and maintenance staff
- Establish links between specialist investigators and gas service teams to ensure all incidents of no access for gas and safety servicing are referred for investigation
- Provide accessible referral processes for suspected incidents of tenancy misuse for all staff and residents, including
  - Fraud reporting hotline
  - On-line reporting
  - Advice within tenant handbooks
- Maintain a high level of public awareness through regular campaigns and communication with residents
- Consider incentives to residents to encourage reporting

## Tenancy audits

4.14 Introducing and maintaining tenancy audits on a regular basis across an entire stock can be both time and resource intensive. To reduce pressure, landlords may consider auditing a percentage of stock each year on a rolling basis or adopting a risk-based approach to conducting tenancy audits, targeting visits in a manner that is proportionate, reflects local circumstances and prioritises high risk tenancies.

- 4.15 Currently, the completion of regular tenancy audits across the sector is inconsistent, with some organisations having long-standing, established cycles of audit and others with no processes in place at all. There are also distinct variations in practice between organisations that do undertake tenancy audits in relation to regularity, percentage of stock audited and who actually undertakes the audit visit. Some landlords have dedicated investigation or counter-fraud teams to oversee and manage the entire process; others enlist the support of housing management, estate services or contractor staff to undertake tenancy audits, referring any suspicious cases to specialist investigators to manage. Each landlord's approach will be reflective of organisational capacity, resources and priorities, and should reflect local priorities and circumstances. For example, a landlord may wish to target audits towards properties with two or more bedrooms to support organisational initiatives to encourage downsizing. In addition, a joint approach with other landlords or agencies can support the delivery of a consistent approach within high-risk neighbourhoods, and improve efficiency and effectiveness.

#### **Practice example: Gentoo Sunderland**

##### **Tenancy audits – entire stock**

Gentoo Sunderland owns and manages approximately 30,000 properties. A rolling programme of tenancy audits and property inspections is undertaken visiting all tenancies over a two year period. Visits are conducted by Tenancy and Estate Officers, with weekly quotas set for each officer. As part of the visit, tenant and household details are gathered and updated in order to inform future service provision.

The last cycle of audits took place during 2006-08 period. Gentoo has used 2009 to evaluate and act on the information gathered and cross check information with the Audit Commission's NFI.

#### **Practice example: East North East Homes Leeds**

##### **Tenancy audit procedures**

East North East Homes in Leeds undertakes an annual tenancy audit on 100 per cent of its stock. ALMO staff conduct the tenancy audits, supported by detailed guidance notes and interview procedures prepared by Leeds City Council for each of the Leeds city ALMOs.

## Taking a risk-based approach to tenancy audits

4.16 Used smartly, the combination of landlords' customer insight information<sup>12</sup> and performance information, such as the nature, location and volume of identified fraud cases, will help landlords identify where current and potential hotspots for unlawful subletting or tenancy abuse are likely to emerge. The collection of accurate information is essential for the identification of trends and the delivery of effective tenancy management services. Understanding who is most likely to misuse their tenancy, but also which properties are at the greatest risk is invaluable to choosing the right course of preventative or enforcement action and targeting resources effectively.

### Checklist: Targeting tenancy audits

Landlords may adopt a risk-based approach to the selection of property for tenancy audit. Criteria for inclusion may be tenancies that are potentially high risk or that align in some way to existing organisational priorities, for example:

- No contact with the known tenant during the past six months
- City centre locations, where variations between private and social rent are highest or demand is likely to be high
- Multi-storey blocks where there is greater anonymity from neighbours
- Properties or areas with traditionally high turnover
- Properties where there is 'no access' for annual gas servicing/safety check
- Where no repairs have been reported in the previous twelve months
- Accounts where rent is always paid:
  - Several months in advance or where there is a significant credit on the rent account
  - In cash
  - Where name on the bank standing order or direct debit does not match with that of the tenant
- NFI results or other desk-top data matching intelligence suggests the tenancy to be high risk
- Specific individuals or community groups who may be more vulnerable to organised crime
- Tenancies where consent to sublet was previously refused, or period for which consent was granted has expired
- Properties with two or more bedrooms (also supports the identification of under-occupancy)

Where high risk tenancies are selected for tenancy audit, the landlord may also include a small sample of properties not identified to be high risk properties for comparison purposes.

<sup>12</sup> For further guidance on developing customer insight – *Good Practice Briefing 32: Customer Insight – Knowing your customers* (2008) CIH

### Practice example: Homes for Islington

#### Aligning tenancy visits to gas safety checks

The Investigation team and Gas Safety team have developed a close working relationship around the identification of properties suspected of unlawful subletting or tenancy misuse. Where the gas safety team is unable to contact the tenant or gain access to a property to conduct an annual gas safety check, an Investigation Officer attends the forced entry with the gas engineer, bailiff and carpenter. An assessment is undertaken immediately in relation to possible property misuse or abandonment.

#### Signs of non-occupation or unlawful subletting

- 4.17 Where a tenant is found to be at home at the time of an unannounced visit, the risk of non-occupation or unlawful subletting is very low. However, where unlawful subletting or tenancy misuse is suspected, checks should be completed to ensure Right to Buy or Right to Acquire applications are not being processed.
- 4.18 Where a number of visits to the property are unsuccessful, the visiting officer should be alert to indications of non-occupation or unlawful subletting. Key indicators include:

Non-occupation:	Subletting:
Failure to find tenant at the property at a time when you would expect the tenant to be home	Telephone and/or utility bill not in tenant's name
Documents to prove identify are unavailable at the property	Tenant refuses to provide copies of household bills, or delay in providing bills whilst services are changed
Property partially or unfurnished	Card or key meter installed for gas and electricity, with no history of arrears on utility bills
Fridge unplugged	Locks fitted on internal doors
Large amount of unopened mail	Clothing at the property does not match size, age or gender of the tenant and their household
Lack of personal items	Photographs on display are not of tenant or their household
Lack of toiletries in the bathroom, and dust on bathroom fittings	Car regularly parked on driveway that does not belong to the tenant or tenant's household
Garden in poor state of maintenance	Post on view is not addressed to the tenant
Number of beds in the property inadequate for household size	Children's toys or clothing items do not correspond with current number and age of tenant's children
Curtains and blinds always closed during the day	Informal comments from neighbours



**Note: Non-occupation**

4.19 The term 'non-occupation' in this Guidance does not refer only to abandonment where the tenant has permanently left the property. Non-occupation includes tenancies where: some belongings are left at the property, housing benefit continues to be claimed at the address and the tenant visits the property periodically but is not using the property as their only or principal home.

**Checklist: Conducting tenancy audits:**

- Where possible, programmed visits should take place during spring/summer months with lighter evenings.
  - Increases likelihood of tenants opening their doors
  - Reduces health and safety risks for visiting officers
- Staff conducting the visits should wear ID badges
- A risk-based approach should be taken to visiting properties in pairs
- The date and time of visits should be kept confidential to avoid residents becoming aware of planned visits
- A standard tenancy audit pro-forma with scripted questions should be used for all visits
- Where the landlord holds photographs of tenants on housing records, a copy of them should be provided to the visiting officer
- If the tenant is not present at the property at the time of tenancy audit, the pro-forma should include a set of standard questions to be asked of whoever is present at the time. Information gathered at this stage may help to inform any future investigation
- The tenancy audit form should be signed and dated on completion by the tenant, or, where the tenant was absent, the person providing information, and countersigned by the visiting officer
- Three unannounced visits should be conducted at different times before requesting the tenant contact the office or, depending on the strength of other evidence, serving a notice
  - Visit one: daytime visit
  - Visit two: early evening
  - Visit three: early morning (before 9am) or evening or weekend visit

### Checklist: Conducting tenancy audits: *(continued)*

- Where visits are being made outside office hours, a senior staff member should be accessible on one of the landlord's telephone numbers to reassure tenants with concerns about bogus callers. This number should be visible on visit pro-forma
- Failed calls should not be carded until three attempts to catch the tenant at home have been made
- Tenancy visits can be used to capture full-face photographs of tenants who have held the tenancy prior to the introduction of photographs at sign-up
- Informal checks with next-door neighbours can provide helpful information about who is living in the property and when is the best time to call. Officers should be sensitive to the fact that unlawful sub-tenants may not be aware of their status
- Where the visiting officer is unable to catch the tenant at home following three unsuccessful visits the case should be referred for further investigation (see para 4.35).

### Adding value to tenancy audits

4.20 In addition to identifying incidents of unlawful subletting and occupancy, tenancy audits can support long term tenancy sustainment of legal tenants by:

- Undertaking an assessment of household circumstances to offer additional support and tailored service provision where appropriate
- Offering advice in relation to claiming housing and welfare benefits or accessing debt advice
- Assessing general property condition and arranging for any outstanding repairs and maintenance issues to be addressed
- Clarifying correct contact details and consents, including next of kin details where appropriate
- Clarifying preferred method of communication and discussing opportunities for resident involvement.

4.21 Annual tenancy visits to older tenants also provide an ideal opportunity to deliver advice and support in relation to:

- Eligibility of social security benefits and care allowances
- Fuel poverty and affordable warmth
- Other support and care needs

### Practice example: Wherry Housing Association (Part of Circle Anglia Group)

#### Using tenancy audits to offer tailored service provision

Wherry Housing Association has approximately 6,900 owned and managed homes concentrated in the Norfolk Broads, Cambridge and Ipswich areas. Twenty per cent of housing stock is audited on a yearly basis, using customer profile information to identify and target the most vulnerable tenants or high risk tenancies for audit.

The audit visit has progressed from a basic occupancy check, and has been expanded to incorporate an assessment of household circumstances. Wherry HA is then able to offer a more tailored and personalised approach to service delivery.

### Practice example: Homes for Islington

#### Using tenancy audits to identify under-occupation

Data collected during tenancy audit visits is further analysed to identify properties that are under-occupied. This information is then used to facilitate targeted campaigns and incentivise tenants to downsize. This approach is complemented by the targeting of tenancy audits towards properties with two or more bedrooms.

## Validating identity and occupancy

4.22 The primary purpose of a tenancy audit visit is to confirm that the legal tenant is occupying the property. Some landlords incorporate the provision of other advice and support services within the interview, such as welfare and housing benefit advice, training and employment advice or an assessment of the tenant's support services needs. While this additional support can be valuable to tenants, investigating officers must ensure that the identity of the resident and other household members remains a priority.

Officers should:

- Obtain the names and dates of birth of the tenant and all household members, including relatives and lodgers living at the property, and confirm these match those on the tenancy file
- Establish that the legal tenant is present at the time of the visit

- Validate the identity of the legal tenant. If photographs of tenants are not taken as part of the sign-up process and stored on tenant files, the following documents can be accepted to validate identity:
  - Full UK or EU driving licence (with photograph)
  - Ten year UK or EU passport (with photograph)
  - Home Office documents confirming status
  - A current, valid credit or debit card with supporting bank statement with address
  - Child benefit or Job seeker's allowance book showing names and address
  - Pension book showing name and address
  - For elderly residents, the travel pass issued for free public transport (with photograph)
- If none of the above is available, the following documents may be considered, but do not provide conclusive proof of identity
  - Student identity card – from reputable university or college
  - Public sector work ID card
  - National Insurance Number Card
  - Medical card with national insurance number
  - Birth/adoption/marriage certificate
  - P46/P60
  - Certificate of employment in HM Forces
- The following documents should not be accepted as identification, but can be used to prove residency :
  - Household/utility bill
  - TV Licence
  - Car Registration documents
  - Driver's licence (without photograph)
  - Correspondence from Government departments such as DWP, NHS or Borders and Immigration

4.23 Details of documentation supplied by the tenant to verify identify should be recorded on the audit pro-forma or photographed using a digital camera.

## Supporting Victims of unlawful subletting

4.24 Officers conducting visits should be sensitive to the fact that the sub-tenant may be unaware of their unauthorised status, and as such will need to be given support and housing advice in relation to future housing options and rights. Unauthorised occupiers may be vulnerable or have support needs so it is important to be responsive to particular needs and liaise as appropriate with other relevant departments. Unauthorised sub-tenants also face a real risk of being illegally evicted by the tenant once the situation has been uncovered.

4.25 Landlords should ensure that arrangements are in place to deliver the following advice and support:

- An assessment of housing need and advice on housing options
- Homelessness advice
- Signposting to independent legal advice, e.g. in relation to protection for eviction and recovering advance rents and deposit from the tenant.

4.26 For legal advice in relation to the status of unauthorised unlawful sub-tenants see paragraphs 5.12-15.

### Good practice example: Homes for Islington

#### Protecting unauthorised sub-tenants from illegal eviction

Homes for Islington works in close partnership with Islington Council to protect unauthorised sub-tenants from illegal eviction by the tenant. Where a case of unlawful subletting has been identified and the tenant tries to illegally evict the sub-tenant, Homes for Islington's Investigations Officer will undertake a joint visit with the council's Tenancy Relations Officer. The main purpose of the visit is to protect the sub-tenant's rights, and provide advice and support to prevent illegal eviction occurring.

## Case study two: London Borough Lambeth

### Taking action against letting agents

Landlords may consider prosecuting letting agents who facilitate the subletting of their properties. In 2004, the London Borough of Lambeth found that one of their properties had been sublet. The sub-tenant had rented the property in the belief that it was owned by a private individual. She paid a month's rent as a deposit and one month in advance, at prevailing market rent for the area. She was very shocked to find that it was a council-owned property as she had found the property through a local high street letting agent.

Lambeth commenced legal proceedings against the letting agent on the basis that they were in breach of the Accommodation Agencies Act 1953 Section 1 (1)(c).

This states that:

*A person shall be guilty of an offence if that person issues any advertisement, list or other document describing any house or dwelling as being let without the authority of the owner of the house or his agent.*

The onus is on the letting agent to ensure that the purported owner of the dwelling is in fact the true owner.

The case was heard at Camberwell Magistrates on 17th February 2005. The Court ordered the defendant to pay £775 compensation to the sub-tenant to reflect their costs and inconvenience. They also fined the letting agent £250 with costs of £150.

## Building a strong case

- 4.27 Unlawful subletting is not, on its own, a criminal activity – it is, however, a breach of tenancy contract and in some cases of the statutory rules. As a rule, a large percentage of unlawful subletting or occupancy cases end with the tenant voluntarily surrendering the tenancy once the breach is identified or upon the service of notice. However, where the tenant does not voluntarily end the tenancy the landlord will usually take action to do so and regain possession of the property through the county court. In some circumstances, landlords may also take civil action for damages.
- 4.28 Obtaining possession of property can be a detailed and sometimes complex process. The type and nature of evidence to be collected varies according to tenancy type and nature of the breach; for instance, evidence needed to prove unlawful subletting is different to the evidence required to prove wrongly claimed tenancy succession.

Essentially, investigation officers need to have a comprehensive understanding of tenancy law and the evidence necessary to secure a successful outcome in court. Where officers understand the significance of the evidence required and are confident about their working procedures and evidence collection methods, the likelihood of regaining possession is strong. Whilst the legal requirements may differ according to tenancy type and nature of the breach (see part 5), where legal action is being considered the following principles should be applied to each case:

- Action is proportionate and appropriate
- Sufficient warning/pre-court notices have been issued
- Appropriate evidence has been collected to ensure an order is likely to be granted
- All investigators have acted appropriately and in accordance with data protection requirements
- Investigating officers have access to good quality and timely legal advice and support services.

### **Specialist investigative teams**

4.29 The use of specialist or dedicated housing investigation staff by landlords is not common practice across the sector. While many local authorities have specialist fraud teams, outside of the London boroughs much of the investigative work undertaken is focused heavily towards the detection of benefit fraud. For many housing associations, the availability of resources and capacity to maintain specialist investigation teams is challenging. However, having access to specialist housing investigators or dedicated teams provides:

- Officers whose time is wholly dedicated to the identification and reduction of tenancy misuse
- Specialist detection, investigative and evidence collection skills
- Housing investigators with a housing management background who are also skilled at navigating housing tenancy databases/files and have an understanding of relevant housing law
- Established networks and working relationships with other local agency fraud teams to streamline investigations and reduce duplication
- Expertise in the preparation of legal documents, witness statements and court evidence
- Confidence around the management of complex cases
- Established relationship with local courts
- Confidence with the court process and provision of professional witnesses
- Strong negotiation and interview skills, including skills to interview under caution
- Legal knowledge in relation to housing legislation

### Practice example: Hackney Homes

#### Investigation Team

Hackney Homes has established a three-tier team of dedicated specialist officers and professionals to undertake counter-fraud and housing investigation activities for the ALMO. Individuals with a housing management background were recruited, and Hackney Homes supported their training and professional qualification in investigative work. Investment by Hackney Homes was matched by the LB Hackney Council who dedicated two of their fraud investigation team to work closely with investigators from Hackney Homes on the detection and elimination of unlawful subletting and occupation. Each member of the ALMO's investigations team is an experienced investigator with responsibility for case management, evidence gathering, undertaking investigations, enquiries and interviews. Investigation officers are estate-based to maintain a presence on the estate.

#### Investigative techniques

4.30 The techniques required for investigating housing tenancy misuse differ considerably from the detection of other types of fraud. Frequently, the documentary evidence required to prove unlawful subletting or other tenancy abuse is circumstantial, and is gathered largely from visits, interviews and discussions with neighbours and sub-tenants. Working procedures should clearly describe the types of evidence to be gathered and its significance, and determine acceptable methods of evidence collection to prevent investigations from becoming diverted.

4.31 Staff should be confident about:

- Structuring an investigation
- Conducting investigations and interviews, including background checks and links to other addresses
- Gathering and recording evidence, and
- Having a detailed understanding of the relevance of any evidence required by the courts.



## Types of evidence

4.32 The following table describes different categories of evidence that can be collected

Type of evidence	Characteristics
Direct evidence	Is usually presented directly in court, such as witnesses examination
Written statements	Written evidence from witnesses
Interviews	Evidence of interviews conducted under caution
Documentary evidence	Unequivocal documentary evidence, likely to be circumstantial. Such as electoral roll, person search, copy of tenancy agreement
Photographic and video evidence	

## Structuring an investigation

4.33 Any investigation should be structured to take account of:

- The aims and objectives of the investigation. This will be different depending on the nature of tenancy abuse, for example unlawful subletting, non-occupation or wrongly claimed succession
- The roles and responsibilities of any investigative partners
- Evidence already held
- Types of evidence to be gathered and potential sources
- The most effective and efficient method to gather necessary evidence and resources required, including:
  - Time
  - Equipment
  - Timescales
  - Health and safety implications
- Legal restrictions including
  - Data protection Act 1984 and
  - Human Rights Act 1998
- Legal gateways including
  - S29 and S35 of the Data Protection Act 1998
  - Regulation of Investigatory Powers Act 2000 (in relation to surveillance)

### **Further information: Data Protection Act 1998**

The Data Protection Act 1998 legislates for the storage, use and exchange of personal information.

Comprehensive legal advice on the Data Protection Act 1998 is available from the Information Commissioner at: [www.ico.gov.uk](http://www.ico.gov.uk)

## **Undertaking an investigation**

4.34 Specialist investigation teams will receive a referral of potential unauthorised occupancy or subletting from a variety of different sources, including housing staff, the public and as a consequence of other identification and detection activities such as data-matching. It may be unreasonable to expect an investigator to explore all avenues of enquiry available to them for each and every potential case of unlawful subletting or occupation that is referred for investigation. An officer will need to decide on the most efficient and effective way to structure an investigation and obtain the necessary evidence.

### **Sources of evidence include:**

- Tenancy file and previous tenancy audit records
- Tenant employer
- Information from sub-tenants
- National Fraud Initiative results
- Tenancy audit reports
- Electoral roll
- Land registry
- Council tax, housing benefit and school records
- DWP and benefit records
- Rent payment records and direct debit details
- Credit checking services
- CCTV footage from communal areas
- Internal records and databases
- Information from neighbours, estate services and housing staff
- Telephone database services
- Property letting websites
- Rent accounting records, names on standing order or direct debit payments

## Investigative visits

4.35 An unannounced visit will often uncover some basic information. The use of known information, e.g. age, employment status and household composition, is useful in predicting the best time of day to undertake a visit. Where an unannounced visit finds the tenant at home, the investigating officer should complete a standard tenancy audit to verify identify and occupancy (see paragraph 4.22).

4.36 Where the investigating officer is unable to find the tenant at the property or evidence suggests that the tenant is not residing at the property, the tenant should be invited into the office for an interview. Depending upon the strength of evidence already held, the investigating officer may also want to consider whether it would be appropriate to serve a warning letter or Notice to Quit at this stage (see paragraphs 5.19 and 5.22).

It is good practice to:

- Conduct the interview at the office
- Conduct the interview in two parts:
  - Part one: allow the tenant to explain the living arrangements at the property and opportunity to explain any sublet agreements
  - Part two: investigating officer should present any contrary evidence and ask the tenant to comment on evidence
- The interview should be documented, and the interview notes should be signed and dated by the tenant and countersigned by the investigating officer
- Request that the tenant accompanies the investigating officer to the property immediately upon completion of the interview for inspection. This is particularly effective at catching out tenants who are subletting the tenancy.

At any time during the interview the investigative officer can:

- Terminate the interview pending collection of stronger evidence
- Challenge the tenant immediately and offer an opportunity to relinquish the tenancy
- Caution the tenant and arrange for a further interview in cases where it appears a criminal offence has taken place

### Practice checklist: Health and Safety considerations

Where any officer undertakes any visit as part of either a tenancy audit or of an investigation, landlords should conduct an independent health and safety risk assessment of the visiting process, taking into account the local area.

The assessment should identify potential risks and control measures to mitigate any identified risks. Examples of measures to reduce risk include:

- Personal safety training
- Scheduling programmed audits to take place during spring/summer months (lighter evenings)
- Issue of alarms and mobile telephones
- Procedures to monitor officers' movements
- Development of a lone-worker policy

Further information: Health and safety guidance on the risks of lone working is available from the Health and Safety Executive: [www.hse.gov.uk](http://www.hse.gov.uk)

### Evidence from unauthorised sub-tenants and occupiers

4.37 In situations where a tenancy has been sublet without consent or there is an unauthorised occupier living at the property, securing the co-operation of the occupier can aid the collection of valuable evidence, and can provide evidence in court at a later date.

4.38 Evidence collectable from unauthorised sub-tenants or occupiers includes:

- Information on the tenant:
  - Contact address and telephone numbers
  - How frequently does the tenant visit the property?
  - How long has the tenant been away from the property, and the reason?
  - Is the tenant expected to return to live at the property? If so, when?
  - Does the tenant live locally, or how long does it take for the tenant to get to the property?
  - Does the tenant still have a key to the property?
  - When was the last time the sub-tenant saw the tenant?
  - Does the tenant drive? If so, get a description of the vehicle?
- Names and dates of birth for all occupants at the property, and contact numbers

- Does the unauthorised sub-tenant have exclusive use and occupation of the property?
  - Are there any rooms the sub-tenant is not allowed to enter?
  - Does the tenant ever stay at the property?
  - Has the tenant left any belongings at the property?
- Copy of subletting tenancy agreement
- Details of rent payment and deposit, including:
  - Amount
  - Regularity of payment
  - Payment method
- Exchange of money – proof of deposit and rent payments made to the tenant, for example:
  - Receipts
  - Bank statements
- Proof of residency, for example:
  - Telephone or utility bills
  - Home insurance
  - Bank statement, or
  - Car documentation
- Information on how they obtained the tenancy, for example:
  - Where the property was advertised?
  - Through a friend/introduction
- Clarification on whether the let was for furnished or unfurnished accommodation, and if any of the tenant's goods remain in the property. This can be supported with photographs, subject to the sub-tenant's consent
- An agreement to give evidence in court
- A statement of facts signed and dated by the sub-tenant, and counter-signed by the investigating officer

### **Evidence for wrongly claimed succession**

4.39 Where a previous succession of the tenancy has taken place, there is no right to a further succession. However, where there has not previously been a succession to the tenancy, an eligible successor will be entitled to succeed the tenancy. Technically, no authorisation or agreement by the landlord is necessary – an eligible successor steps into the tenancy under the provisions of the relevant Act. However, eligibility will

depend on the statutory conditions, and in practice, therefore, landlords may refuse to recognise a claimed succession if there is evidence that these conditions have not been met. The rules differ with regard to secure and assured tenancies, but in all cases require residence as only or principal home immediately before the tenant's death. Succession to a secure tenancy by a family member also requires residence with the tenant for 12 months before his or her death.

- 4.40 Uncovering a wrongly claimed succession can be problematic for landlords around disproving residency preceding the death of the tenant. However, where tenancy audits are completed on a regular basis, these provide the landlord with signed, documented evidence of who was residing at the property with the tenant.
- 4.41 For more detailed legal guidance in relation to succession rights and eligibility criteria, see paragraphs 5.40-57.

### Checklist: Case monitoring

Regular and robust case monitoring will support the earliest achievement of satisfactory resolutions. Organisations should ensure that adequate procedures are in place to regularly monitor all current cases for:

- File accuracy and maintenance of up-to-date records
- Visiting within 24 hours all reported incidents of suspected unlawful subletting or occupancy, and devising a relevant action plan within two days
- Consistency and efficiency of case progression
- Regular contact with persons reporting the case, and any witnesses, throughout the investigative and court process
- The availability of adequate resources to respond to cases
- Identification of emerging trends
- Evaluation of the effectiveness of investigations and actions

## Using civil action to recover damages

- 4.42 Landlords dealing with incidents of unlawful subletting who wish to regain the property must normally take action through the courts for possession. The claim for recovery of damages and unlawful profit from the tenant should also be considered by social landlords as part of the claim for possession.

4.43 Claiming for damages is not appropriate in all cases of unlawful subletting. Nevertheless, in cases where the tenant is known to have substantial assets and where the unlawful subletting took place as a commercial activity, it may be possible to recover substantial damages and costs for the landlord<sup>13</sup>. The benefits include:

- Increased deterrent to tenants who sublet in a commercial manner for significant profit
- Prospect of substantial recovery of monies
- Recovery of monies can support funding of additional investigative activities

4.44 A claim for damages can include the recovery of:

- Any unlawful profits made by the tenant by letting out the property unlawfully at a higher rent. For example, charging market rents or adaptation of the property for multiple occupation
- Damage to the property through dilapidation or modification, and the cost of rectifying
- Recovery of housing benefit
- Recovery of legal costs to regain possession of the property

<sup>13</sup> See DHM Stallard: Recovering unlawful profits for the public

## Part 5:

# Legal procedures

## Extent

### What kinds of tenancy does this guidance cover?

- 5.1 This guidance covers the status of unauthorised occupiers of social housing where the original tenancy was let on a periodic basis only. It does **not** cover the rules for fixed term agreements. Where the tenancy is let on a fixed term agreement, different rules and procedures may apply and if in doubt landlords should seek advice from their lawyers.

## Definitions

### Meaning of terms used in this part

- 5.2 “Tenant” means the original lawful tenant or joint tenants and does not include any subsequent unauthorised occupiers whether or not their agreement with the original tenant is legally binding.
- 5.3 “Occupier” and “occupiers” mean any person or persons living in the dwelling other than the tenant or where the context otherwise requires it all of the persons living in the dwelling including the tenant.

### Why does the guide not refer to “illegal subletting”?

- 5.4 Unlawful subletting is often (wrongly) referred to as illegal subletting in the media and by others. As a general rule, unlawful subletting is not illegal because subletting without prior consent is not a criminal offence (only criminal acts are ‘illegal’) irrespective of whether the home is a local authority, housing association or private sector property. However, a sub-tenancy which is created in breach of the terms of the letting agreement and/or which contravenes statutory rules will be unlawful (para 5.11).
- 5.5 Although unlawful subletting is not itself illegal, other criminal acts may have been committed (usually by the tenant) in connection with the subletting. For example, a tenant who is living elsewhere but continues to claim housing benefit could be charged with benefit fraud. Making a profit from unlawful subletting may constitute fraud.



## Introduction (illegal and unauthorised occupation)

### What is “unauthorised occupation”?

5.6 Unauthorised occupation is a generic (non legal) term used in this guide to describe any kind of possession by an occupier which is either prohibited or requires consent by the landlord which has not been granted or where an existing tenant continues in possession although the property is no longer their only or principal home. It includes all of the following:

- Unlawful subletting
- Continued occupation by a tenant whose main residence is now elsewhere
- Unlawful or unauthorised assignment or exchange
- An assignment or exchange which was authorised but where a payment (a premium) was made
- Unauthorised occupation following the death of the original tenant (wrongly claimed succession).

5.7 The guide describes how each of these unauthorised practices may vary in their occurrence in accordance with local housing market conditions (for example, unlawful subletting is more prevalent in areas of extreme housing market pressure).

### Is unlawful subletting of social housing a criminal offence?

5.8 No – there is no separate statutory offence. However, it may be that in the particular circumstances the case involves offences (such as fraud) or one or more of various specific statutory offences, in connection with the unauthorised occupation. For example, it may appear through investigation into the subletting that benefit frauds are involved. It may also be discovered that the tenancy was granted as a result of a false statement made to the landlord, and this may amount to fraud or may be an offence under the Housing Act 1996 (paragraphs 5.75-76).

5.9 This guidance does not deal with general criminal law, but landlords may wish to make use of the expertise within local authority fraud teams. Landlords should be aware of the value of using the criminal law as a tool for tackling unauthorised occupation because it can:

- Provide an effective deterrent
- Provide a gateway for the use of investigatory powers to collect evidence (such as the exchange of personal data) where unauthorised occupation would otherwise be difficult to prove
- Help reassure the public that the issue is taken seriously and that people are not able to jump the housing queue by employing unfair means.

- 5.10 Some basic information is provided on the statutory offences of making false statements to procure local authority housing and some related social security offences (paragraphs 5.74-78). It is beyond the scope of this guidance to provide advice on prosecution procedures.

## The status of unauthorised agreements, sub-tenants and others

### **What is the legal status of subletting which is in breach of the tenancy agreement?**

- 5.11 Where the tenant requires the landlord's consent in order to sublet the dwelling but has not obtained it the subletting will be unlawful rather than illegal (paragraph 5.4). It is unlawful because it breaches civil law. In this sense it is no different from any other breach of civil statutory rules or of a contract (in this case the tenancy agreement). As with any other breach of contract, the landlord can apply to the county court for a remedy (such as possession and judgement for any amount owed, e.g. for rent arrears).

### **What is the status of an unauthorised sub-tenant?**

- 5.12 A sub-tenancy which is created in breach of the tenancy agreement not to assign or sublet the tenancy does not prevent it from being a legally binding agreement between the tenant and the sub-tenant<sup>14</sup>. However, it may expose the tenant to eviction for breach of the agreement, and the sub-tenant to eviction from the property in the course of those proceedings.
- 5.13 Where the original tenancy is secure and security is lost as a result of the subletting, the resulting non-secure tenancy can be ended by serving a notice to quit (paragraphs 5.58-61). Once the tenancy has been ended the landlord can apply to the court to recover possession from any occupiers as trespassers of land (paragraph 5.59).
- 5.14 The situation is somewhat different where the original tenancy was assured, because although the tenancy will not be assured if the property is not the tenant's only or principal home, assured status will be restored if the tenant returns to live there. There is no irrecoverable loss of status as with secure tenancies. This means that service of notice to quit on the tenant may not in the event prove a successful prelude to possession proceedings. In these circumstances the landlord is advised to use the ordinary statutory procedure (paragraph 5.22).
- 5.15 For the status of any housing benefit claim made by the unlawful sub-tenants (see paragraph 5.71).

<sup>14</sup> *Governors of Peabody Donation Fund v Higgins* [1983] 1 WLR 1091

## What is the status of the tenant who has unlawfully sublet the dwelling?

- 5.16 They remain a tenant until such time as they leave the property or are evicted as a result of possession proceedings. However, if they are no longer in occupation then they may lose their secure, introductory, assured or demoted status making possession easier to obtain (paragraphs 5.58-61).
- 5.17 A tenant who has lost their secure, introductory, assured or, demoted status will be a common law tenant. A common law periodic tenancy can be terminated by service of a valid notice to quit (paragraphs 5.63-65). Once the tenancy has been terminated the landlord can recover the land from any occupiers as trespassers (paragraph 5.59). The Protection from Eviction Act 1977 will apply in all cases of residential occupation, and so long as there are occupiers in the property it will be necessary to obtain a possession order from the court and enforce the order through the court bailiffs. It is only where a property is abandoned and empty that the landlord may retake possession by re-entry to and securing of the premises.

Section 6 Criminal Law Act 1977 makes it an offence for anyone, without lawful authority, to use violence to gain access to a property. However, it is only an offence if a) there is someone present at the property who is opposed to that access and b) the person using or threatening violence knows this to be the case. The fact that a person has any interest in or right to possession or occupation of any premises does not constitute lawful authority which permits the use or threat of violence. It is also irrelevant whether the violence is directed against the person or against the property or whether the entry is to gain possession of the property or for any other purpose. A person guilty under this provision could face a sentence of up to six months in prison, a fine up to a maximum of £5000 or both.

## Unlawful subletting

### Are there any circumstances where subletting is lawful?

#### *Taking in lodgers*

- 5.18 Both secure and assured tenants have the right to take in lodgers. In the case of secure tenancies the right is expressed in legislation<sup>15</sup>. In the case of assured tenants it is implied by common law (a lodger is a licensee and therefore the tenant does not part with possession).

#### *Subletting the whole premises*

- 5.19 If a secure or introductory tenant sublets the whole of the dwelling then they will lose their secure or introductory status<sup>16</sup>. It does not matter whether the tenant remains in occupation; once they sublet the whole of the premises secure status will be lost and cannot be regained even if the sub-tenancy is subsequently ended<sup>17</sup>.

<sup>15</sup> s93(1)(a) Housing Act 1985

<sup>16</sup> s93(2) Housing Act 1985, s124(2) Housing Act 1996

<sup>17</sup> s93(2) Housing Act 1985

- 5.20 In the case of assured tenancies subletting does not necessarily end assured status but (as will almost always be the case) assured status is lost for so long as the dwelling is no longer the tenant's only or principal home<sup>18</sup>.
- 5.21 If secure, introductory or assured status is lost the tenant only remains in possession as a common law tenant. The loss is permanent for a secure or introductory tenant and the landlord will be able to end the tenancy by serving a notice to quit (paragraph 5.59). Any sub-tenants and other occupiers are likely to be evicted either through enforcement of the possession order against the tenant, or through separate proceedings against them as trespassers.
- 5.22 However, an assured tenant who sublets the whole premises but who returns to occupy the dwelling as their only or principal home will regain their assured status. A notice to quit is not effective against an assured tenant; the procedure under the Housing Act 1988 must be followed instead and possession claimed under the statutory ground for breach of the tenancy agreement<sup>19</sup> (paragraph 5.62).

### ***Subletting part of the premises: secure tenancies***

- 5.23 A secure tenant has the right to sublet part of the premises with the landlord's written consent. Consent cannot be unreasonably withheld. The burden of proof as to whether any consent has been unreasonably withheld lies with the landlord<sup>20</sup>.
- 5.24 If a secure tenant sublets part of the premises without the landlord's written consent then they will have breached a term of their tenancy agreement<sup>21</sup> which will allow possession proceedings to be started<sup>22</sup>.

### ***Subletting part of the premises: introductory tenancies***

- 5.25 Under the Housing Act 1996 there is no general prohibition against subletting an introductory tenancy. So unless there is an express term in the tenancy agreement an introductory tenant is free to sublet any part of the premises as they wish. Landlords are therefore advised to include an express term in the written agreement. Breach of the agreement would enable the landlord to use the ordinary introductory procedure to obtain possession. An express written term could either prohibit subletting altogether or permit subletting provided consent is obtained. If the agreement allows subletting provided the landlord's consent is obtained, then consent cannot be unreasonably refused<sup>23</sup>.

<sup>18</sup> s1(1)(b) Housing Act 1988

<sup>19</sup> Schedule 2 Ground 12, Housing Act 1988

<sup>20</sup> s93(1)(b), s94(2) Housing Act 1985

<sup>21</sup> s93(1) Housing Act 1985

<sup>22</sup> s84, Schedule 2 Ground 1, Housing Act 1985

<sup>23</sup> s19 Landlord and Tenant Act 1927

**Subletting part of the premises: assured and assured shorthold tenancies**

- 5.26 It is an implied term of any periodic assured tenancy (including a shorthold) that the tenant cannot sublet part of (or the whole of) the premises without the landlord's consent – although there is no requirement for consent to be given in writing. The landlord has the right to withhold consent for any reason he/she wishes<sup>24</sup>. However, if the tenancy agreement has a specific clause which allows subletting or prohibits it then that term will prevail<sup>25</sup>. If the agreement allows subletting if consent is obtained then consent cannot be unreasonably refused<sup>26</sup>.
- 5.27 If an assured tenant sublets part of the premises without the landlord's consent in breach of any express or implied term then possession proceedings can be started<sup>27</sup>.

## Unauthorised assignments

**What is the status of the occupiers when a tenancy is assigned without the landlord's consent?**

- 5.28 Assignment is the formal legal transfer of the letting agreement from one tenant to another, so actual instances of unauthorised assignment are likely to be rare. The effect of a valid assignment is that, broadly, the new tenant takes on the rights and responsibilities of the previous tenant – although these rules are complex and will vary according to the date of the tenancy and whether the breach occurred pre or post transfer. Mutual exchanges are a type of assignment which are dealt with in paragraphs 5.35-39).

**Secure and introductory tenancies**

- 5.29 In the case of secure and introductory tenancies, the right for the landlord and tenant is governed and constrained by the relevant Housing Act to the circumstances set out in paragraph 5.30.
- 5.30 Regardless of any term in the agreement, secure and introductory tenancies are incapable of assignment<sup>28</sup> except in the following circumstances<sup>29</sup>:
- Mutual exchanges (secure tenancies only)
  - Assignment to a person who would be entitled to succeed (paragraphs 5.45-51)
  - Assignment of the tenancy by a court order in family proceedings (the same four types of proceedings are listed for both secure and introductory tenancies).

<sup>24</sup> s15(1),(2) Housing Act 1988

<sup>25</sup> s15(3)(a) Housing Act 1988

<sup>26</sup> s19 Landlord and Tenant Act 1927

<sup>27</sup> s8, Schedule 2, Ground 12, Housing Act 1988

<sup>28</sup> s91(1) Housing Act 1985; s134(1) Housing Act 1996

<sup>29</sup> s91(3) Housing Act 1985; s134(2) Housing Act 1996

- 5.31 In any other case the assignment will be of no effect. If, as is likely, the tenant is no longer in occupation they will lose their secure or introductory status and so all of the occupiers will be vulnerable to possession (paragraphs 5.58-61). The fact that the tenancy is no longer secure does not alter the position that the assignment is invalid<sup>30</sup>.
- 5.32 Assignment to a person entitled to succeed is not an absolute right and can be excluded by the agreement. If the agreement is silent the tenant is entitled to assign the tenancy without the landlord's consent under common law rules. If the agreement requires the landlord's consent then consent cannot be unreasonably withheld<sup>31</sup>.
- 5.33 If the agreement prohibits assignment, or if it requires the landlord's consent but consent has not been obtained, the landlord can start possession proceedings against the tenant for breach of the agreement<sup>32</sup>. If the tenant is no longer in occupation they will lose their secure or introductory status, and will be vulnerable to possession proceedings following service of notice to quit provided the landlord follows the right procedure (paragraphs 5.58-61).

### **Assured and assured shorthold tenancies**

- 5.34 The law (including any legal references) is the same as for unauthorised sub-tenancies (see paragraphs 5.20, 5.26-27).

## Unauthorised exchanges

### **What is the status of the occupiers where the tenant undergoes a mutual exchange without the landlords consent (exchange being a form of assignment)?**

#### ***Introductory tenancies***

- 5.35 An introductory tenancy cannot be assigned (including assignment by way of exchange) so any purported exchange will be treated as an invalid assignment (paragraphs 5.30-31).

#### ***Secure tenancies***

- 5.36 A secure tenant has the right to exchange with any other secure tenant or with an assured tenant of a social landlord registered with the TSA. This right can only be exercised with the written consent of the landlords involved<sup>33</sup>. The right takes the form of an implied term in the tenancy agreement<sup>34</sup>. Special provisions apply as to the consent, which can only be validly withheld if one of the grounds set out in Schedule

<sup>30</sup> s95 Housing Act 1985

<sup>31</sup> s19 Landlord and Tenant Act 1927

<sup>32</sup> Schedule 2, Ground 1, Housing Act 1985

<sup>33</sup> s92(2) Housing Act 1985

<sup>34</sup> s92(1) Housing Act 1985

3 of the Act applies. The landlord can only legitimately refuse consent if within 42 days of the tenant's application they provide the tenant with a notice specifying the ground and details why it applies in their case. The main grounds on which consent can be refused include<sup>35</sup>:

- There is a court order requiring the tenant to give up possession or proceedings for possession have been started
- A possession order or Housing Act 1996 injunction is in place on the grounds of anti-social behaviour, including a suspended order
- The dwelling is not suitable for the needs of the proposed tenant (including, for example sheltered housing or housing otherwise designed for the needs of disabled people)
- The grant of the tenancy to the new tenant would conflict with the landlord's charitable objectives.

5.37 If the tenant goes ahead with the assignment without first obtaining the landlord's consent then the exchange will be treated as an invalid assignment (paragraphs 5.30-31).

5.38 If the tenant obtains the landlord's consent but the consent is procured by the tenant's fraud then the landlord can take action for possession on the basis that there has been a breach of the tenancy agreement<sup>36</sup>. See paragraphs 5.20, 5.26-27 and 5.62 for breach of tenancy agreement.

### ***Assured tenants***

5.39 If there is provision in the tenancy agreement regarding assignment of an assured tenancy (including a shorthold tenancy) then this will take effect whether it is outright permission, outright prohibition, or allows assignment with the landlord's consent<sup>37</sup>. Guidance issued by the Housing Corporation says that social landlords should include a term allowing assignment by way of exchange. If the agreement is silent as to the matter then a term is implied that the tenant cannot assign the tenancy without the landlord's consent and there is requirement that the landlord's refusal to grant consent must be reasonable<sup>38</sup>.

## Wrongly claimed succession

5.40 In this section "tenant" (paragraphs 5.41-57) means the original tenant who has died. "Occupier" means the person in occupation claiming to be a successor.

<sup>35</sup> Schedule 3 Housing Act 1985

<sup>36</sup> Sanctuary Housing Association v Baker (No. 2) (1999) 31 HLR 746

<sup>37</sup> S15(3) Housing Act 1988

<sup>38</sup> S15(1),(2) Housing Act 1988 and s19 Landlord and Tenant Act 1927

## Can the landlord recover possession from someone who is an unauthorised successor?

5.41 Succession takes place automatically under the provisions of the relevant Act where all the conditions are satisfied, and does not require the consent or authorisation by the landlord. However, as these conditions include residence requirements, the landlord may not accept that these have been fulfilled. In practice, it can be difficult to disprove the occupier's claim to have lived with the tenant prior to their death. This is an example of where regular tenancy audits can prove their worth. The landlord should ask the occupier to produce evidence of their occupation (e.g. bank statements, and driving documents such as a licence and insurance).

5.42 Whether or not evidence of qualification can be obtained, the landlord should always check the occupier's claimed succession right. There are two aspects to this:

- The occupier is a person who is entitled to succeed (i.e. the right kind of relationship to the tenant, and the right period of residence); and
- Whether any succession rights have already been exhausted. For both assured and secure tenancies, where the tenant was himself/herself a successor then no further successions can take place<sup>39</sup>.

5.43 See paragraphs 5.45-51 for secure tenancies and paragraphs 5.52-57 for assured tenancies.

5.44 Assuming the evidence can be obtained that the occupier is not entitled to succeed, the procedure is that the landlord should terminate the deceased tenant's tenancy and then seek possession against the occupiers as trespassers (paras 5.58-61).

### **Secure tenancies**

5.45 A person will be qualified to succeed if he/she is<sup>40</sup>:

- The deceased tenant's spouse or civil partner; or
- Some other member of the tenant's family who has lived with the tenant throughout the 12 month period prior to their death.

5.46 Note that only a spouse or civil partner is entitled to succeed without having served the 12 month qualifying period. A person who was living with the tenant as their partner but who was not married or a registered civil partner can only qualify as family member.

<sup>39</sup> s87,88(1),89(2)(a) Housing Act 1985; s17(1)(c),(2) Housing Act 1988

<sup>40</sup> s87 Housing Act 1985



5.47 A person will be “another family member” if they<sup>41</sup>:

- Lived with the former tenant as their husband/wife /civil partner; or
- Are the former tenant’s: parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece.

5.48 In deciding whether a person is the former tenant’s parent etc: a relationship by marriage or civil partnership is treated as a relationship by blood; a relationship by half blood is treated as a relationship by whole blood; a step child is treated as child, and an illegitimate child is treated as the legitimate child of his/her mother and reputed father<sup>42</sup>.

5.49 If the tenant was himself/herself a successor then no one else will be entitled to succeed. Where, in the case of joint tenants (including couples), the tenancy transfers by survivorship to the sole remaining tenant, the survivor will be a successor<sup>43</sup>. For example, in the case of husband and wife joint tenants, if one member dies the other will be a successor. If the deceased spouse was a sole tenant, then the surviving spouse will succeed to the tenancy so long as he or she was living in the property as their only or principal home at the date of the tenant’s death, and deceased spouse was not a successor in the first place. Landlords should be aware that where a would-be successor is not eligible to succeed, terminating the original tenancy and granting a new one to the survivor will generate fresh succession rights (but see para 5.50). If the deceased tenant’s spouse was not a joint tenant the tenancy should be assigned. Except where outlined below (para 5.50) assignments also count as a succession.

5.50 Where there is an assignment by mutual exchange, the incoming tenant does not count as a successor in their new home unless he/she was a successor in relation to their previous tenancy – i.e. the status of the outgoing tenant is not relevant<sup>44</sup>. On the other hand, the status of the outgoing tenant is important where a tenancy is assigned by a court in family proceedings. The incoming tenant will count as a successor if the outgoing tenant was a successor<sup>45</sup>. These situations demonstrate the need for accurate record keeping following an exchange or assignment by the court.

5.51 Where the landlord recovers possession from a successor on the grounds of under-occupation and within six months grants a new tenancy, that person will remain a successor unless their new tenancy agreement states otherwise<sup>46</sup>.

<sup>41</sup> s113(1) Housing Act 1985

<sup>42</sup> s113(2) Housing Act 1985

<sup>43</sup> s88(1)(b) Housing Act 1985

<sup>44</sup> s88(3) Housing Act 1985

<sup>45</sup> s88(2) Housing Act 1985

<sup>46</sup> s88(4), Schedule 2, Ground 16 Housing Act 1985

### **Assured tenancies**

5.52 It is a general principle of assured tenancies that, subject to the statutory rules in the Housing Act 1988, the landlord and tenant are free to negotiate the terms of the agreement. Therefore the landlord may grant enhanced succession rights through the letting agreement. Some landlords draft their agreements so that their tenants enjoy the same succession rights as secure tenants. However, any term which excludes or diminishes the statutory succession rights will be invalid.

5.53 Statutory succession only applies where the tenant was a sole tenant, and he/she was not a successor<sup>47</sup>. However, the survivor of a joint assured tenancy is entitled to the tenancy by the common law principle of survivorship and that surviving tenant will count as a successor, so no further succession is possible.

5.54 The occupier will be entitled to succeed only if<sup>48</sup>.

- The sole tenant dies; and
- The tenant was the occupier's spouse or civil partner; and
- Immediately before the tenant's death they lived in the tenant's dwelling as their only or principal home (but not necessarily with the tenant); and
- The tenant was not himself/herself a successor.

5.55 Spouse or civil partner includes a person who was living with the tenant as their husband/wife/civil partner<sup>49</sup>.

5.56 The tenant will be a successor (and so the succession rights will be exhausted) if the tenancy was transferred to him/her<sup>50</sup>:

- As a result of a will or intestacy
- As a survivor (of a joint tenancy)
- As result of a previous statutory succession.

5.57 Unlike secure tenancies, once a person is a successor they will remain a successor even if they are granted a new tenancy of the same dwelling or substantially the same dwelling since the succession took place<sup>51</sup>.

<sup>47</sup> s17(1)(a),(2)(b) Housing Act 1988

<sup>48</sup> s17(1) Housing Act 1988

<sup>49</sup> s17(4) Housing Act 1988

<sup>50</sup> s17(2),(3) Housing Act 1988

<sup>51</sup> s17(2),(3) Housing Act 1988

## Recovering possession

### What is the most effective procedure for recovering possession against unauthorised occupiers or where the tenant is living elsewhere?

- 5.58 Although the Housing Acts 1985 & 1988 provide specific grounds for possession that deal with some of the main abuses, the grounds can only be used where they apply – i.e. where the tenancy is secure or assured (or introductory or demoted).
- 5.59 In any case of unauthorised occupation where the tenant no longer occupies the dwelling as their only or principal home, they will not be entitled to Housing Act protection (para 5.60). If Housing Act protection is lost then the tenant will only have a common law tenancy, and so long as this is the case the landlord can recover possession by serving an ordinary notice to quit<sup>52</sup> and issuing proceedings against the occupiers as trespassers. The clear advantage of using this procedure is that, unlike using the statutory grounds, the landlord does not have to prove that it is reasonable to grant possession so the tenant cannot argue that their personal circumstances (age, disability, conduct etc) provide them with a defence. However, while loss of statutory protection is permanent in the case of secure tenancies, it is only provisional with regard to assured tenancies. Assured status will be regained if the tenant moves back once again and occupies the dwelling as their only or principal home.
- 5.60 Secure, introductory or assured status (including demoted status under local authority or housing association landlords) will be lost in any case where:
- He/she is the sole tenant but no longer occupies the dwelling as their only or principal home or
  - The dwelling was let on a joint tenancy and none of the joint tenants occupy the dwelling as their only or principal home<sup>53</sup>.
- 5.61 In assured tenancy cases the tenant may claim that they are still in possession or have resumed their occupation. However, if they continue to maintain a second home then they will not regain their protected status unless they can show that their tenancy is their principal home.

<sup>52</sup> A notice to quit will only terminate a periodic tenancy, if, unusually, the tenancy is let on a fixed term the landlord will need to use the forfeiture procedure: s146 Law of Property Act 1925.

<sup>53</sup> s81 Housing Act 1985 (*secure tenancy*); s124(2) Housing Act 1996, s81 Housing Act 1985 (*introductory tenancy*); s143A(3) Housing Act 1996, s81 Housing Act 1985 (*demoted secure tenancy*); s1(1)(b) Housing Act 1988 (*assured tenancy*); s1(1)(b), s19A and 20B Housing Act 1988 (*assured shorthold tenancy and demoted assured shorthold*)

5.62 The circumstances in which the landlord may need to use the ordinary possession procedures (claiming one of the statutory grounds) will be limited but will include cases where:

- The tenant remains in occupation
- The tenant has remained in occupation and the landlord only granted the tenancy as a result of the tenant's false statement (in which case the landlord should use the appropriate ground for this)<sup>54</sup>
- The tenant has sublet only part of the dwelling but did not obtain the landlords consent (paragraph 5.25).

### **What constitutes a valid notice to quit and correct service?**

5.63 A common law periodic tenancy will be terminated by the service of a notice to quit. To be valid the notice must state the date when it expires. The time between the date of service and the date it takes effect must be at least four weeks or the length of the rental period whichever is longer<sup>55</sup>.

5.64 The notice must also be in writing and contain certain prescribed information<sup>56</sup> (which can be found here [http://www.opsi.gov.uk/si/si1988/Uksi\\_19882201\\_en\\_2.htm](http://www.opsi.gov.uk/si/si1988/Uksi_19882201_en_2.htm)). The notice must be served to coincide with the beginning or end of the of the tenancy period. It is good practice for the notice to include a saving clause<sup>57</sup> after the expiry date in case the timing can be shown to be defective. However, relying on default wording can cause problems, and landlords should be very careful to ensure that the period is correct.

5.65 The landlord must prove that any notice left at the premises came to the attention of the tenant<sup>58</sup> so personal service on the tenant is to be advised. However, the tenancy agreement may provide that the Law of Property Act 1925 s196 applies. In this case, service will be valid if it is left at, or sent by recorded delivery to, the tenant's last known place of residence or business.

### **Warning note: Accepting payment from unauthorised occupiers**

5.66 Exceptional care should be taken around accepting payment from unauthorised occupants. The acceptance of money can create a licence or tenancy, and landlords should regularly check for discrepancies between tenancy names and the names of persons from whom standing order and direct debit payments are received.

<sup>54</sup> Schedule 2 Ground 5 Housing Act 1985 (*secure tenancy*); schedule 2 Ground 17 Housing Act 1988 (*assured tenancy*)

<sup>55</sup> s5 Protection From Eviction Act 1977

<sup>56</sup> SI 1988 No. 2201

<sup>57</sup> The usual formula is to include the phrase '*or at the end of the period of your tenancy which will end next after expiration of four weeks from the service of this notice upon you*'.

<sup>58</sup> *Wandsworth LBC v Atwell* (1995) 27 HLR 536

5.67 In situations where it may be appropriate for the landlord to accept monies from an unauthorised occupier or squatter the landlord should issue a letter confirming that any monies accepted will be 'use and occupation charges' only and set up a sundry debt account to ensure payment is not credited to the rent account.

### **How should a notice be served when the tenant has died (succession cases)?**

5.68 Where protected status has been lost because of the tenant's death and no one else is entitled to succeed, the tenancy can be terminated by a notice to quit by serving it on the relevant person as follows:

- If the tenant has left a will by serving notice on the executors
- If the tenant dies intestate by serving notice on the Public Trustee and/or administrators. For detailed guidance on this procedure follow:  
[http://www.officialsolicitor.gov.uk/estates/pt\\_notices.htm](http://www.officialsolicitor.gov.uk/estates/pt_notices.htm).

## Housing benefit and unauthorised occupiers

### **Can tenant who is living elsewhere continue to claim housing benefit?**

5.69 A tenant who is no longer in living in the property will not be eligible for housing benefit on that home<sup>59</sup>. Some limited exceptions apply notably: full time students who live at their term time address and people fleeing violence from within the home who are, in certain circumstances, able to claim housing benefit on two homes (see *Guide to Housing Benefit and Council Tax Benefit 2009/10*<sup>60</sup> for details).

5.70 If the tenant failed to report that fact that they are living elsewhere knowing that this will affect the amount of their benefit, then they will have committed an offence (paragraph 5.77). Any overpaid housing benefit should normally be recovered directly from the tenant.

### **Can an unauthorised sub-tenant claim housing benefit?**

5.71 Although the tenant may be in breach of their tenancy agreement if they sublet the premises, the agreement will still be binding between the tenant and the sub-tenant<sup>61</sup> and so the sub-tenant will be able to claim housing benefit<sup>62</sup>. Once the tenant is evicted the sub-tenant will be able to claim housing benefit for any payments made for 'use and occupation' whilst the landlord applies to the court for possession<sup>63</sup>.

<sup>59</sup> Regulation 7(1) Housing Benefit Regulations 2006

<sup>60</sup> CIH/Shelter, 2009

<sup>61</sup> *Governors of Peabody Donation Fund v Higgins* [1983] 1 WLR 1091

<sup>62</sup> Regulation 8(1)(a) Housing Benefit Regulations 2006

<sup>63</sup> Regulation 11(1), 12(1) Housing Benefit Regulations 2006

### **If housing benefit has been overpaid can it be recovered from the landlord?**

5.72 Where the landlord is the local authority (including a local authority ALMO) the housing benefit department may seek to recover the overpaid benefit by applying a charge to the tenant's rent account. Although this is lawful (a rent account is simply a device for collecting money) it is poor practice because it will often result in the debt being written off and so have an adverse impact on other tenants. The authority should always attempt to pursue the tenant for recovery first, not least because it will provide a deterrent effect.

5.73 In any other case where housing benefit is paid by rent allowance then it cannot be recovered from the landlord unless it was paid to them. Even if it was paid to the landlord then it can normally only be recovered from them if it was caused by the misrepresentation by the landlord, or a failure by the landlord to disclose information. If the overpayment is caused by an error by the local authority or the Department for Work and Pensions, it can only be recovered from the landlord where they can reasonably be expected to realise they were being overpaid. In other circumstances it can be recovered from the claimant or the landlord if they are being paid directly<sup>64</sup>.

## False statements and criminal offences

5.74 There may be many instances where the tenant is involved in criminal activity either directly or indirectly in connection with unauthorised occupation or subletting. It is not within the scope of this guidance to set out the range of offences that might apply as these will vary according to the particular circumstances of the case. However, it does provide a brief outline of the statutory offences of making false statements to obtain a local authority tenancy and those related to housing benefit fraud which may be of use in cases of unauthorised occupation. Landlords should at least be aware of the potential benefits of pursuing criminal action (paragraph 5.9).

### **Making false statements to obtain local authority housing**

5.75 A person will commit an offence if he/she:

- Knowingly or recklessly makes a statement which is false in a material particular or knowingly withholds information when applying to join the local authority waiting list<sup>65</sup>, or
- Knowingly or recklessly makes a statement which is false in a material particular or knowingly withholds information when applying to the local authority as a homeless person<sup>66</sup>.

<sup>64</sup> Regulation 101 Housing Benefit Regulations 2006 and CH/2411/2006

<sup>65</sup> s171 Housing Act 1996

<sup>66</sup> s214 Housing Act 1996

5.76 Note that these offences can apply regardless of whether the applicant was granted a tenancy. However, the offence cannot be committed if the original application for housing was not made through the local authority (i.e. the waiting list, a local authority nomination or as a homeless person). For example, if the application was made directly to a housing association and was not included as a local authority nomination. A strict time limit of six months applies from the date of the commission of the offence or from when the matter of the complaint arose<sup>67</sup>. A prosecution cannot be pursued once the time limit has expired.

### **Housing benefit: failing to report a change of circumstances and false statements**

5.77 A person will commit an offence if:

- There has been a change of circumstances which he/she knows affects their entitlement to benefit and they have failed to notify the housing benefit department promptly of that change<sup>68</sup>, or
- For the purpose of obtaining benefit for himself/herself or another person, he/she makes a statement which he/she knows to be false or furnishes a document which he/she knows is false in a material particular<sup>69</sup>.

5.78 In any case where the failure to report a change or the making of the false statement can be proven to have been done dishonestly, a more serious offence will have been committed<sup>70</sup>.

<sup>67</sup> s127(2) Magistrates' Courts Act 1980

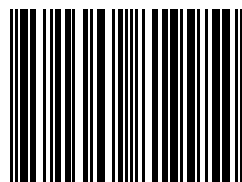
<sup>68</sup> s112(1A) Social Security Administration Act 1992

<sup>69</sup> s112(1) Social Security Administration Act 1992

<sup>70</sup> s111A Social Security Administration Act 1992

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