



Unlawful subletting

Tom Symons

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First Floor, New City Court, 20 St Thomas Street, London, SE1 9RS

Summary

***'For every illegal tenancy, there is a homeless tenant or family who stands to lose out. This is because housing that should have been theirs is occupied illegally by someone else holding two or more tenancies. It also represents a waste of taxpayers' money.'*¹**

Steve Bundred, Chief Executive of the Audit Commission

There are intense demands on the availability of social housing in London and parts of the South East. Families in acute housing need are left to live in inadequate temporary accommodation because the mismatch between supply and demand is so great. Yet, it is a conservative estimate that 50,000 people hold unneeded social housing tenancies and choose to unlawfully sublet them for their own financial gain, depriving those in genuine need of desperately needed housing.²

In addition to restricting supply, unlawful subletting places strain on already stretched council budgets. The Audit Commission estimates that each unlawfully sublet property costs local authorities £75,000 over a three year period. The average annual cost of housing a family in temporary accommodation alone is £11,000.

Having been a concern at a local level for some time, the combined pressures of a national shortage of social housing, a need to address perceptions of unfairness in allocations policy and constrained public finances have brought unlawful subletting onto the political radar. The Government has recognised that this situation is intolerable and has made welcome steps to address the problem.

The 'National Crackdown', announced in July 2009 and launched formally in November 2009, provides much needed impetus and a higher profile for what is a frequently ignored or unacknowledged problem. The effort to reduce the number of unlawfully sublet properties has since been formally incorporated, via the 2009 Pre Budget Report, into the national effort to find £12bn of yearly efficiency savings in the public sector as a means of reducing the nation's structural deficit. However, the crackdown does not address many of the challenges that councils encounter when tackling unlawful subletting, such as

- difficulty in accessing information from other public sector agencies and companies
- legislation that can work in the favour of unlawful sub-letters
- public and institutional perceptions that it is not a serious offence

With the potential savings associated with successfully tackling subletting estimated at £2bn³, and the number of households on the social housing register close to the record

¹ Crispin Dowler, Audit Commission steps up action on fraud, Inside Housing 3rd August 2009
<http://www.insidehousing.co.uk/story.aspx?storycode=6505701>

² The Audit Commission, *Protecting the Public Purse* (2009)

³ Ibid

high at 1.76 million⁴, is this not the time to think more radically about how this problem might be tackled on a wider scale?

Currently the unlawful subletting of a social housing tenancy is a civil rather than a criminal offence. Our research has found that the majority of housing professionals who deal with unlawful subletting feel that it is currently not taken as seriously as other types of benefit fraud by both the public (63 per cent) and non-housing departments and other agencies (53 per cent). Furthermore, our research found that 92 per cent of housing professionals who completed our survey felt that it would help tackle unlawful subletting if it was placed on an equal footing with other types of benefit fraud.

In this paper we argue that the unlawful subletting of social housing should be a criminal offence on the grounds that it would:

- aid the sharing of information between council departments, agencies and housing associations to lead to higher property recovery rates
- enable more effective housing management interventions, such as the use of surveillance powers
- raise awareness of the negative consequences of the offence
- create a greater deterrence for people who unlawfully sublet
- reduce the proportion of cases in which expensive court processes are needed to recover unlawfully sublet properties

This paper also argues:

- for other legislative changes, to help social landlords recover more unoccupied properties
- that housing associations require greater financial incentives to tackle illegal subletting
- councils to assist private renters in finding out whether a property is being unlawfully sublet by creating a database of council properties that can and can't be sublet

The financial and societal costs of unlawful subletting, the overwhelming demand for social housing and unprecedented recessionary pressures make it essential that we rethink how the offence of unlawful subletting is perceived and treated by public sector agencies, the public and, crucially, the legal system. The recovery of higher levels of unlawfully sublet properties will help relieve pressure on local social housing demand and council budgets but it will only be possible to do this on the scale we need by making legislative amendments to make the abuse of a social housing tenancy a criminal offence.

The Government should take a more radical approach to the national crackdown on unlawful subletting by making it a criminal offence. A relatively simple legislative change would have profound implications and help councils to overcome many of the barriers - left unaddressed by the anti-fraud drive - currently in the way of recovering properties, as well as creating a stronger deterrence against the unlawful subletting of social housing.

⁴ CLG, *Local Authority Housing Statistics England 2008-09* (2009)

The problem and the cost of social housing fraud

Unlawful subletting refers to situation in which a tenant in social housing violates the conditions of their tenancy by renting their property out to individuals not permitted to live there by the conditions of tenancy. Other forms of social housing fraud include obtaining social housing by deception, 'key-selling', unauthorised assignment or the wrongful succession of tenancy. Implicitly, social housing fraud usually entails the possession of a social housing tenancy by an individual who is not entitled to it or who does not require it for their immediate housing needs.

Together these forms of social housing fraud bring large financial and social costs to bear on local authorities. The costs of social housing fraud are felt both locally and nationally, but it is at the local level that financial and social costs combine and the impact is hardest. It is a problem that places extra strain on already stretched budgets and reduces the ability of councils to allocate scarce social housing fairly and according to need.

Financial Costs

It is estimated that if all the illegally sublet properties in England were recovered and reallocated to families in temporary accommodation it would save the taxpayer £2bn a year.⁵ A conservative estimate by the Audit Commission places the cost of each illegally sub-let property, over a 3 year period, at £75,000.

The financial costs of unlawful subletting to local authorities are not immediately visible but can still be substantial. Because local authorities typically continue to receive rental payments from properties being unlawful sublet there is sometimes the erroneous perception that there is no financial cost to the council. Such a view fails to recognise a council's statutory duty to house homeless families who are in priority need. Housing is a finite resource and with 1.76 million households on the social housing waiting list it must be allocated in accordance with need. Unlawful subletters therefore deprive families in genuine need of housing from accessing housing. In the absence of available council or housing association properties, families in genuine need must be housed in temporary accommodation. Private leasing and bed and breakfast are the most common form of temporary accommodation, and it is estimated that the average nationwide cost per year of housing a single family in this way is £11,000.⁶

In 80 per cent of cases of unlawful subletting the sub-tenants would not qualify for a council or housing association home.⁷ and are therefore occupying housing that should rightly be allocated to other families or individuals who instead must be housed in more costly temporary accommodation.

Other costs arise where the sub-letter also claims housing and council tax benefits on the property they are not living in. The local authority must also commit resources to tackling unlawful subletting and pay legal fees where possession is sought via a court for

⁵ The Audit Commission, *Protecting the Public Purse* (2009) p. 17

⁶ *Ibid.*, p. 16

⁷ CLG, *Healey Calls Time on Tenancy Cheats* 20th November 2009

identified tenancy fraud. In some instances, unlawfully sublet properties are fraudulently purchased under the right-to-buy scheme, which wrongly entitles the purchaser to a discount on the property.

There is no commonly accepted calculation to assess the costs of unlawful subletting, but the various estimates available underline that it is a huge drain on council resources. The Audit Commission's conservative estimate is that over a three year period, unlawful subletting costs local authorities £75,000. Estimates from other London boroughs estimate the savings associated with recovering an unlawfully occupied property to be:⁸

- Newham - £55,617
- Lambeth Council - £38,000
- Camden Council - £26,000
- Brent Council - £60,000

These figures are based on the savings made from reallocating households from B&B accommodation and on the amount of discount saved on each property that would otherwise have been sold under the right to buy legislation to a person not entitled to the right to buy discount.⁹ The financial cost of unlawful subletting is ultimately borne by the public through higher taxation or reduced spend on other services. It is clear from these figures that the savings to the public purse or recovering unlawfully sublet properties are sizeable.

Unlawful Sub-letting – in numbers

Average cost per year of housing a family in temporary accommodation - £11,000

No. of families in temporary accommodation – 64,000

Estimated % of social housing in London that is illegally sub-let – between 2.5% - 5%

Estimated number of illegally sub-let properties nationally – 50,000

No. of families on the social housing waiting list – 1.76 million

Estimated cost of a sublet property over 3 years - £75,000¹⁰

Income per year of a sub-let property in London - £12-20,000

Cost of recovering an illegally sub-let property (estimate - minimum) - £4,000

Cost of building a new socially rented house - £67,000-100,000+¹¹

Estimated total saving of recovering all illegally sub-let properties and re-allocating to families in priority need - £2bn

Social costs

There are also wider societal costs. Illegal sub-letting reduces the already scarce supply of social housing. This prevents local authorities from allocating council housing to those

⁸ LB Southwark, *Unauthorised occupancy across the council's housing stock: An assessment of policy and practice. Report of the Housing Scrutiny Sub-Committee April 2007* (2007)

⁹ *Ibid*

¹⁰ Audit Commission – but find out where this is from

¹¹ eGov Monitor, *Healey: fairness and flexibility in housing allocations* 3rd August 2009
<http://www.egovmonitor.com/node/26784>

who are in priority need, many of whom must continue to live in inadequate or overcrowded temporary accommodation. Communities also suffer as the transient nature of sub-letting prevents both sub-tenants and those who are consequentially housed in temporary accommodation from establishing strong links with the community. There may be additional negative implications for the education of children of subtenants or families in temporary accommodation who have to move school frequently because of a lack of housing continuity.¹² Unlawful subletting can also increase the chances antisocial behaviour occurring or of the property being used for illegal activities, such as drug use or cultivation, sex trade and slavery, illegal immigration, financial or identity fraud.¹³

Prevalence

It is estimated that there are approximately 50,000 unlawfully sublet properties in England, though many commentators believe the problem to be far more pervasive.¹⁴ The problem of unlawful subletting is widely believed to be concentrated in areas of high housing demand such as London and some parts of the South East. Our research survey found support for this, with 63 per cent of respondents who reported that subletting was a problem in their area being from London or the South East. The problem is particularly acute in London, and it is in this region where demand for social housing is greatest, with 20 per cent of the 1.76 million households on the social housing waiting list living in London.¹⁵ The need is so great that 11.2 per cent of all households in London are in the queue for social housing, second only to Yorkshire and Humber and higher than the national average of 8 per cent. While not all of these households would qualify for social housing on the basis of priority need, these figures represent the scale of the demand that faces social housing in the areas of the country where subletting is the biggest problem.

Local Authority approaches to tackling unlawful subletting

In recognition of the high financial and social costs of unlawful subletting, some local authorities have developed highly sophisticated ways of combatting the problem. The approach taken by councils varies greatly, with some authorities including the detection and recovery of unlawfully sublet properties as part of the responsibilities of generic housing officers. Other authorities may transfer responsibility to a central benefits fraud team. An approach that has had considerable success for a number of local authorities is to delegate responsibility to a specialist Housing Investigations Team. The case-study below highlights some of the benefits of this approach.

Case study: Homes for Islington's Housing Investigation Team

Homes for Islington's Housing Investigation Team investigates all types of tenancy fraud - subletting, tenants' not residing in their properties as their only or principal home, tenancies obtained by deception, and fraudulent applications for succession, mutual exchange, assignments and Right to Buy.

Many referrals are received directly from HFI staff, tenants and others via a

¹² Ibid

¹³ CLG, *Tackling unlawful subletting and occupancy: good practice guide for social landlords* (2009) p. 10-11

¹⁴ Ibid

¹⁵ CLG, *Local Authority Housing Statistics England 2008-09* (2009)

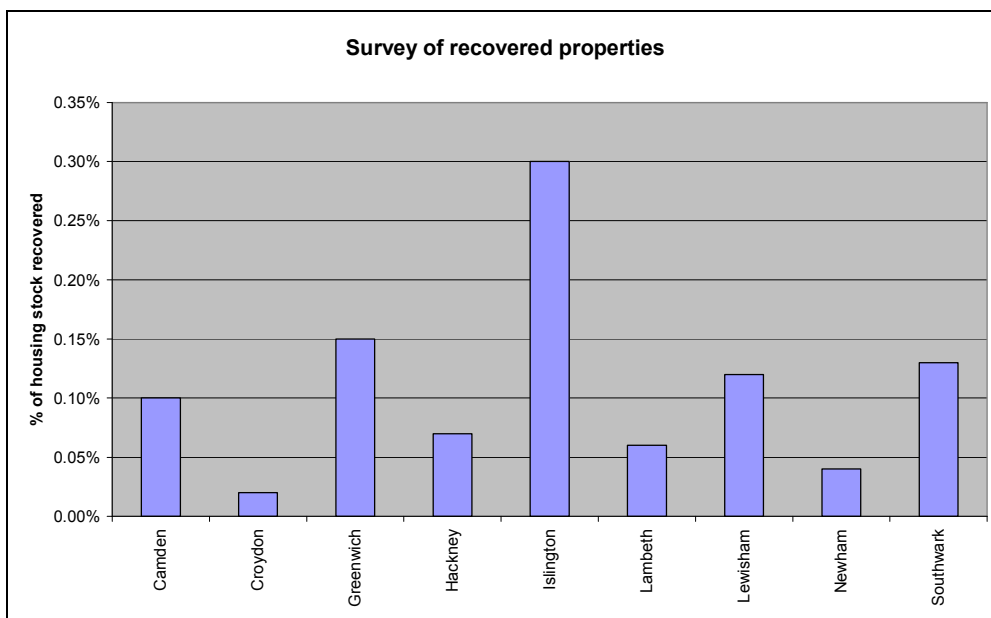
telephone hotline which is publicised throughout the borough. However, the team also works proactively to expose tenancy fraud, via a tenancy audit programme which audits 10% of the 20,000 tenanted properties managed annually, and as part of the National Fraud Initiative. The team also works closely with Islington's Gas Safety Team. In those cases where tenants cannot be located and contacted, and a court order has been obtained to force entry for annual gas safety checks, an investigator will attend to inspect the property and identify property abandonment and misuse.

Investigations are managed on a casework basis, with each investigator having responsibility for all aspects of their cases from initial investigation to serving notices, instructing legal representatives, preparing witness statements, attending court and presenting evidence. Where appropriate, investigators also negotiate with tenants and facilitate voluntary surrender of properties, in order to minimise legal costs.

The HIT has a good success rate of recovered properties, consistently recovering between 80 and 100 properties per year.

The graph below demonstrates that different approaches to tackling subletting can have markedly different results. This also highlights the challenge in hand. Islington is recognised as one of the highest performing councils in terms of tenancy fraud investigation and employs the vast majority of current best practice. Yet the estimated rate of unlawful subletting in London is 1 in 20 council properties, which would indicate that there is still scope to recover more properties but that the tools needed to do this are not currently available.

Figure – recovered properties as a percentage of total housing stock 2006/07¹⁶



¹⁶ LB Southwark, *Unauthorised occupancy across the council's housing stock: An assessment of policy and practice. Report of the Housing Scrutiny Sub-Committee April 2007* (2007)

It is clear that financial and social costs of tenancy fraud make the current prevalence of the offence unsustainably high. Efforts must be made at both national and local levels to recover more properties from tenancy fraud. In the next sections the recent progress made by the Government's National Crackdown is discussed, followed by an examination of the barriers that remain despite these positive first steps.

Recent progress – a National Crackdown

In July 2009 the Housing Minister John Healey announced a co-ordinated national crackdown on unlawful subletting. The crackdown is part of a wider consultation on guidance designed to improve the fairness and flexibility of social housing allocation.

The crackdown on unlawful subletting comprises three initiatives;

- A data sweep of housing and benefit records, conducted via the Audit Commission's National Fraud Initiative (NFI)
- New practical advice for councils and housing associations on the best way to catch tenancy cheats
- A £4 million fund to support local authorities in tackling unlawful subletting, distributed nationally. Inner London boroughs are expected to receive £50,000 each.

The NFI data sweep included paying for all RSLs with more than 1,000 properties to participate in the initiative. This is an essential part of successfully tackling unlawful subletting, as only 49 of the 1,700 housing associations in the UK have taken part in previous sweeps, which limits the potential of the exercise.¹⁷ This is perhaps partial explanation for why a previous NFI data sweep recovered just 75 properties.¹⁸ Initial findings indicate that the most recent data sweep has been successful in attracting the majority of the 15 largest housing associations in London and has revealed roughly 8,000 'leads' for local authorities to investigate.

The National Crackdown provides much needed attention and impetus to efforts to curb unlawful subletting. While in recent years central government departments have launched major campaigns and strategies to clamp down on benefits fraud, unlawful subletting has until now slipped below the radar, despite the equivalence in terms of cost of subletting and benefits fraud.

The Government estimates that the targeted anti-fraud drive could recover between 5,000-10,000 properties. Taking the Audit Commission estimate of the cost of unlawful subletting, this could save £750m over the next three years. However, whilst the crackdown is a welcome initiative that makes many positive steps, we should question whether it has merely directed money at a problem without engaging with a number of the legislative and cultural barriers that local authorities encounter on a day-to-day basis when tackling tenancy fraud. The Best Practice Guidance is a comprehensive collation of current best practice and a useful resource, particularly for councils that currently do not prioritise subletting, but may offer little new to many local authorities who already employ best practice but still have an uphill struggle to recover properties. In short, has the crackdown gone far enough to enable the Government to meet its ambitions to recover 10,000 properties and ease the pressure on council budgets and housing waiting lists?

¹⁷ BBC, Illegal landlords sub-letting social housing 22nd March 2009
<http://news.bbc.co.uk/1/hi/uk/7956258.stm>

¹⁸ Ibid

Remaining Barriers to the recovery of unlawfully sublet properties

The national crackdown has missed an opportunity to address a number of significant hurdles that are faced by local authorities when tackling unlawful subletting. The most prevalent problem is the extent to which local authorities can access information from other agencies. Other factors that are distinct problems in their own right also exist, and these can also compound the problems associated with the sharing of information.

The Data Protection Act (DPA)

Successfully recovering sub-let properties is dependent on the ability of a social landlord to assemble evidence demonstrating that the sub-tenant has not been living in the property that is being sub-let. In some instances this information can be obtained via social networking sites or through other informal means, but often the evidence required must be obtained through data held by other public sector agencies or private companies. Schools, GPs, Social Services, HMRC, DWP, utility companies, the DVLA and even credit reference agencies possess information that can add considerable if not decisive evidential weight to a case being made against a suspected sub-tenant. However, in some instances housing departments and social landlords find that the flow of vital information between them and other agencies is blocked by an unwillingness to stray into the grey areas of the Data Protection Act legislation for what is a civil offence.

The distinction between criminal and civil investigations makes a subtle but important difference to the chances of a request for information being responded to. Criminal procedures may request information under s.29 of the DPA, while civil procedures must use s.35. Theoretically there is little difference between these two sections, and the legislation itself doesn't give any more weight to the DPA exemption used for criminal fraud than that used for civil offences. However, a problem occurs because it is discretionary whether organisations give any information requested using this legislation. This means that an individual dealing with the request for information must make a judgement call about whether the exemption applies and it is reasonable to share personal and sensitive information. In many cases the vagaries of the legislation, and potential ramifications of sharing information incorrectly, can mean that organisations withhold information that would enable the successful recovery of a property.

The sharing of information may also be influenced by an individual authority's interpretation of the DPA legislation. The wording of s.35 allows information to be released "for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings)". Some authorities interpret this to mean that they can request information because it is likely, and sometimes dependent on the information they're requesting, that they will take legal proceedings. Conversely, some authorities take "prospective" to mean "upcoming", or even refuse to give information without a court order. In such instances, where obtaining the court order would be dependent on obtaining the information, a circular problem can develop that prevents the council from uncovering essential information. At the very least, greater clarity about the circumstances in which exemptions to the DPA apply are required.

The civil nature of the offence can also close off entirely the data held by some agencies. One respondent to our survey summarised the problem:

“<Investigators of housing fraud> have no legal gateway to the DWP, tax, utility companies, HMRC, DVLA etc, in the way that Housing Benefit & DWP investigators do. Lots of organisations are resistant to any request that is not criminal, usually because that is all they are used to dealing with.”¹⁹

There is clearly a major problem in the way that information is withheld from housing fraud investigations where it might not be for benefit fraud investigations. The two offences are comparable in terms of their financial and social costs and addressing the fact that they are legislatively distinct would enable local authorities greater access to information. .

Public and Internal perceptions

The prevalence of sub-letting, and the efforts to tackle it, are also negatively affected by perceptions throughout society and within public sector organisations that unlawful subletting is not a serious offence. In a survey of housing professionals completed for this research it was found that 68.75 per cent felt that subletting is not taken as seriously as other types of benefit fraud by the public. Perhaps more worryingly, 53.3 per cent reported that they do not feel it is taken as seriously by other departments and organisations that they work in partnership with. Of those respondents that felt it is not taken seriously by other organisations, 64.2 per cent reported that this hinders their approach to tackling unlawful subletting.

In recent years there has been a huge push at a national level to clamp down on benefits fraud. These campaigns have focussed on advertising the criminal nature of the offence and the harsh penalties associated with it. The campaign featured across multiple media channels and raised awareness of benefits fraud across the whole of society. The television license is another example of a ‘public sector fraud’ that has been subject to a national media campaign and threat of criminal conviction. Housing fraud is the last of the public sector frauds to be addressed. While the National Crackdown will gain some traction through the media coverage it has generated and the public awareness packs made available for councils to roll out, there remain crucial differences that leave housing fraud distinct from other types of fraud. The lack of a ‘blanket coverage’ media campaign across all media channels, and more importantly the lack of any punitive sanction for housing fraudsters, may mean there will still be no parity of esteem between unlawful subletting and other types of public sector fraud. We believe there is a strong argument to be made for a more radical measure to challenge this perception.

Lack of financial incentives for housing associations

Approximately half of all socially rented housing in England is managed by RSLs. However, RSLs do not have the same financial incentives to tackle social housing fraud as local authorities because they do not, through the absence of statutory housing duties, have to house families in temporary accommodation. Neither are RSL tenancies eligible for right-to-buy, so any costs associated with the fraudulent use of right-to-buy do not apply. In the vast majority of instances of unlawful subletting the rent is paid regularly

¹⁹ Survey respondent

and on time – if it's not the rent arrears recovery process will typically expose the subletting - and there are therefore very financial incentives for RSLs to tackle illegal subletting. When a property is recovered from an unlawful sub-letter, RSLs do not receive any of the savings from reduced temporary accommodation costs that local authority would but still incur the recovery costs such as void time and reallocation.

Because there are no financial incentives for RSLs to identify unlawful subletting it is likely that many do not put as many resources into tackling it as a local authority might. The result is that local authorities continue to incur costs that could be removed if the RSL was to have a more proactive approach to reducing unlawful subletting. In line with recent emphasis on considering the totality of public spend in a particular area and the linkages that exist between externalities and expenditures across seemingly separate areas, there should be greater efforts made to connect the public purse through greater joint working.

The case for making subletting a criminal offence

The two key problems local authorities encounter when tackling unlawful subletting – difficulty in sharing information and perceptions that it is not a serious offence - lead intuitively to the need for unlawful subletting to be elevated to a criminal (rather than civil) offence. Such a move would rightfully place tenancy fraud on an equal footing with other types of benefits fraud. It would also give local authorities greater scope to recover more properties, and reduce the amount of subletting that occurs in the first instance. Our survey found very strong support for such a recommendation, with 92 per cent of respondents stating that putting unlawful sub-letting on an equal footing with other types of benefit fraud would assist them in tackling the problem. Some of the benefits of making unlawful subletting a criminal offence are:

Ability to obtain information

A change of legal status would rectify many of the problems that local authorities and RSLs have in accessing vital information that can prove unlawful subletting is taking place. Many of the blockages to information sharing mentioned in the previous section derive from the distinction in legal terms between housing fraud and other types of fraud. A change in legal status would open up new flows of information between many organisations where currently attempts at information sharing by housing fraud investigators is a difficult and frequently futile process, such as the DWP, DVLA and Housing Benefit departments.

Raised profile and public awareness, increased deterrence

Making tenancy fraud an illegal act, if accompanied by a sufficiently broad public information campaign, would help to raise awareness of the seriousness of the offence. This would help to realign public and institutional perceptions so that tenancy fraud is viewed in the same way as benefits fraud. An understanding of the financial and social costs that arise from unlawful subletting could help to create a less apathetic public attitude towards subletting, even making individuals who are looking for privately rented accommodation more vigilant against the potential a property is being unlawfully sub-let.

Criminal sanctions would also create a far greater deterrent for individuals tempted to sub-let their properties. At present housing fraudsters have little to lose by being caught. In a worst-case scenario they may lose a tenancy on a property they are not using. The threat of a criminal conviction would be a far greater penalty and may help dissuade individuals tempted to use their social housing tenancy for financial gain.

The success of the campaign by the DWP to target individuals defrauding the benefits service is testament to the impact a high-profile and well coordinated approach can have. In 2008 a National Audit Commission report found that following the 'No Ifs, No Buts' advertising campaign and a new procedural approach to prosecutions the DWP had reduced the benefit fraud from an estimated £2bn in 2000/01 to £800m in 2006/07. The campaign made explicit the threat of criminal conviction for those found to be defrauding the benefits service. Whilst some aspects of the DWP's approach were identified as needing greater cost-efficiency, the report was praiseworthy of the campaign. The benefits of the advertising in creating a deterrent, though unquantifiable, were also acknowledged.

Similarly, the 1983 law change that made wearing seat belts compulsory is a good example of the widespread cultural impact that can be gained by legislative change and a national campaign. The importance of wearing a seatbelt has since been the subject of frequent public safety campaigns as part of a continued effort to change negative driving behaviours. The DfT estimates that wearing seatbelts save approximately 2,000 lives each year.

A similar shift in cultural attitudes could be achieved through the criminalisation of social housing fraud.

Ability to use surveillance to compile evidence of subletting

The Regulation of Investigatory Powers Act (RIPA, 2000) enables local authorities to use surveillance techniques for the prevention or detection of a crime and/or anti-social behaviour. Because tenancy fraud is not a criminal offence it is unlikely that the RIPA could be used to obtain evidence for a case being made against a suspected subletter. While not appropriate in all instances, the RIPA may be a very effective means of gathering evidence, particularly where evidence has not been forthcoming through information sharing. A 2009 NLGN publication 'Little Brother' found that 80% of respondents to a poll were favourable to the use of directed surveillance in their area, and the more concerned people are with an issue the more likely they are to think it is appropriate for a council to use surveillance as a means of dealing with the problem.²⁰ By making tenancy fraud a criminal offence the use surveillance would become another tool for local authorities to use when tackling subletting, expanding the scope of evidence collation against suspected subletters.

Reduced number of court cases

The threat of criminal conviction may also encourage unlawful subletters to voluntarily end their tenancy rather than force the council or RSL to take them to court to recover the property. At present there is little to lose for subletters from going to court, where they have a small chance they may retain the property. These processes are costly and time-consuming for local authorities. The potential for the proceedings to result in a criminal conviction may however help to reweight the decision of the sub-letter in favour of voluntarily ending their tenancy.

Options for making tenancy fraud a criminal offence

While there are a number of strong arguments in favour of making housing fraud a criminal offence, the issue is more complex than can be satisfied by such a straightforward legal change. The process of housing fraud investigation is determined by the fact it is a civil action and not criminal. Making unlawful subletting a criminal offence in an inappropriate way may in reality introduce new considerations for housing investigators to contend with.

²⁰ Nick Hope and James Hulme, *Little Brother* (NLGN, 2009)

A much higher standard of proof is required in criminal than in civil proceedings. A housing investigator currently only has to prove their case on a 'balance of probabilities'. A change to make housing fraud a criminal offence would require the investigator to establish guilt 'beyond all reasonable doubt'. This may mean investigators require far greater quantities and quality of evidence, over and above that which may become available by freeing up access to new informational sources.

Interviews must also be carried out under caution in a criminal investigation, whereas in civil proceedings that can be less formal, enabling a more flexible approach to investigation. A further disadvantage is that investigations of summary offences – the status subletting would be if it was prosecuted in a criminal court – must be carried out in under 6 months. This places a restrictive time-frame on the housing investigator and often investigations may take much longer, particularly where there is a change of subtenant.

Like all attempts at tackling fraud, the issue of unlawful subletting is highly complex and thought must be given to make sure that legislative change does not inadvertently hinder current practice. The DWP procedural changes that accompanied the recent campaigns is evidence of the need for a flexible approach that can react to this complexity. The new procedures set out various options for dealing with benefit fraudsters, in recognition of the fact that criminal proceedings would not be suitable in all instances.

We believe that the solution is to create a legislative setting in which subletting can be considered a criminal offence, but which does not necessarily oblige a local authority to pursue criminal remedies in every instance that subletting is identified. This would enable the problems of data sharing and public perception to be addressed, whilst also considering the complexity of the investigatory process.

One such method of achieving this balance would be to amend the the Housing Act (1996) so that tenancy fraud could be prosecuted for using the Fraud Act (2006) legislation. Currently the Fraud Act defines fraud as possible either through false representation, by failing to disclose information or by abuse of position. However, at present none of these categories could legitimately cover the act of unlawfully subletting a social tenancy. Through secondary legislation the act of fraud by failure to disclose information could be invoked to apply to tenancy fraud. Fraud by failure to disclose information is defined as:

The Fraud Act (2006)

3. Fraud by failing to disclose information

A person is in breach of this section if he—

- (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
- (b) intends, by failing to disclose the information—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

Using secondary legislation to make it a legal duty for holders of a social housing tenancy to declare to their landlords if they are no longer living at the property to which the tenancy applies would mean that tenancy fraud could be considered an act of fraud

by failure to disclose information. Clause 3(i) of the Fraud Act would ensure that the failure to disclose information would have to be coupled with an intention to make gain from the property. This would exclude tenants who have left their property unoccupied for short periods of time but have not sublet their property from being subject to criminal proceedings.

We believe that such an amendment to legislation would enable local authorities to overcome many of the barriers they currently face, without creating a more onerous investigatory process. With a general election approaching and housing gaining momentum in importance, particularly in terms of financial reform, there is a strong chance that whichever party wins will implement a new Housing Bill within the first year of a new government. This would be a timely opportunity to make the changes to legislation that would make subletting a criminal offence.

Additional ways to aid the recovery of more misused social housing tenancies

Housing Act Legislation

The work of Housing Investigation teams extends beyond unlawful subletting to cover the recovery of unoccupied accommodation. If amending the Housing Act it would also help councils recover more properties if other legislative tweaks could be made at the same time. Though leaving a social housing tenancy unoccupied is a less malign form of tenancy abuse, it is still costly to local authorities who are not able to use such properties to house those in genuine need.

A section of the Housing Act 1985 that specifies the conditions of a secure tenancy and subsequent case law can in some instances work against a local authority when they are trying to recover unoccupied or sublet properties. The Housing Act 1985 specifies that a secure tenancy can only be retained where the tenants occupy the premises as their only or principal home:

“The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home; or, where the tenancy is a joint tenancy, that each of the joint tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home.”

However, case law (Crawley BC vs Sawyer 1988) has found that a tenant can live away from a property and it still be considered their principal home as long as they can prove an ‘intention to return’, which can be proved via a physical sign of continued occupation, for instance furniture or possessions in the property. This means that tenants can live away from their property for extended periods of time, sometimes upwards of 10 years, but still claim it as their principal home through an ‘intention to return’, and therefore not breach the conditions of their secure tenancy.

We believe that the Housing Act (1985) should also be amended to state that an unoccupied property can only be considered a principal home for no longer than 1 year. This would prevent tenants from leaving their properties either unoccupied for longer than a year without obtaining written consent from their landlord. Any property discovered to be unoccupied for more than a year without a landlord’s consent, regardless of whether it is unlawfully sublet, could then be recovered.

Financial Incentives for Housing Associations

Local authorities should consider making financial incentives available to RSLs, or alternatively working more in partnership with local authorities, to help strengthen efforts to recover unlawfully sublet RSL properties. Because local authorities will ultimately make a saving on the recovery of such properties if they are used to house families in temporary accommodation, it may make sound financial sense for them to offer to pay for the recovery and other associated costs. An alternative currently being practiced by some local authorities and housing association partners, such as LB Southwark and Family Mosaic²¹, is for the council’s investigations team to investigate tenancy fraud in housing association properties. In exchange the housing association agrees to house

²¹ CLG, *Tackling unlawful subletting and occupancy: good practice guide for social landlords* (2009)

families currently in local authority temporary accommodation in recovered properties. Such measures may also help to strengthen links between local authorities and the RSL sector and aid the flow of information.

Shifting the onus onto private renters

An extension of criminalising subletting and an increased public awareness of the costs of this could be an increased onus on private renters to be more vigilant against the potential that the property they are or may be renting is being sublet. Currently many subtenants do not realise that they are living in a property being unlawfully sublet. Councils could make finding this out easier for private renters by making a database available on their websites of council properties that are eligible for private renting i.e. those that have been purchased under the right-to-buy scheme. This would enable private renters to establish quickly whether or not they may be living in or moving into a property that is not being let lawfully.

Conclusion

The National Crackdown on tenancy fraud is undoubtedly a step in the right direction. Having previously slipped under the national political radar and been excluded by campaigns to clamp down on other types of public sector fraud it is right that this is an issue that the centre is now taking seriously. However, there is huge scope to adopt a more radical approach and start addressing on a more fundamental level the major barriers that are faced by local authorities when tackling unlawful subletting.

The costs of unlawful subletting demands action that goes beyond a quick injection of impetus and seeks to effect legal change, as well as a major shift in societal attitudes towards tenancy fraud. The combination of deterrence, awareness and prioritisation that would result from the criminalisation of tenancy fraud would be a vital addition to efforts to ensure that social housing tenancies are not being abused. In this paper we hope to have made clear that the arguments behind such changes are compelling and urgent.

It is imperative that central government now makes the changes that will enable local authorities to galvanise their efforts and minimise the high social and financial costs of tenancy fraud.