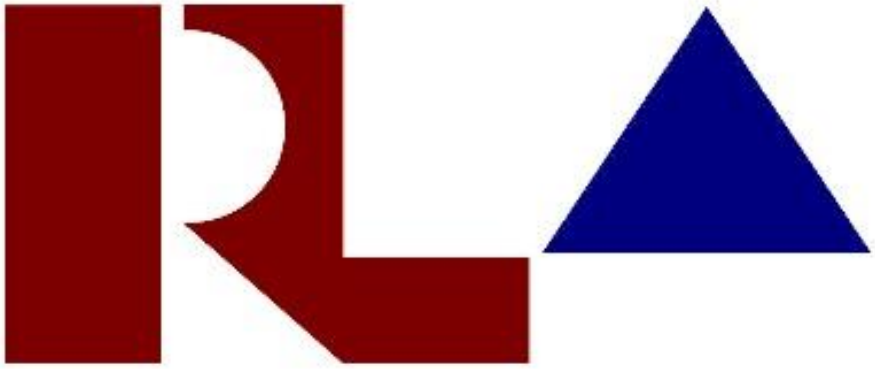

RESIDENTIAL LANDLORDS
ASSOCIATION

RESPONSE TO

TACKLING ROGUE LANDLORDS AND IMPROVING THE PRIVATE RENTAL SECTOR

About the RLA

The RLA represents over 20,000 landlords across England & Wales. Primarily our members are landlords in their own right but a number are managing and letting agents, some of whom are also landlords. Our members operate in all sub-sectors of the Private Rented Sector (PRS). Properties are rented out to families, working people, young professionals, the elderly, students and benefit claimants.

General

The RLA welcomes this consultation. It is important to look at those things which already work well within the sector and also to use targeted changes to adjust those policy ideas or pieces of legislation which are not working as intended. The RLA is pleased that the government is taking a practical approach by looking at key areas in which improvement can be made rather than trying to replace or overhaul current mechanisms which often work well.

The RLA is confused by the statement in the introduction that new powers have been introduced to make the eviction process more straightforward in relation to persistent late payment of rent. The RLA is unaware of any such measure and would be pleased to hear further details of this change.

Section 1: Tackling the Worst Offenders

Q. What has been the impact (if any) of removing an upper limit on potential fines for certain housing offences?

The fine powers for failure to licence HMOs, breach of HMO licence terms and breach of statutory notices under the HHSRS are now unlimited and so they have the potential to reflect the gravity of the situation. However, their effect is yet to be seen. The new fines only take effect for offences committed after they came into force, that is, after March 2015. Local authorities have up to 6 months to commence prosecutions for HMO and HHSRS offences under s127, Magistrates Courts Act. They habitually wait close to this maximum period before commencing a prosecution to allow themselves the maximum time to gather evidence. Accordingly, there are almost no active prosecutions at this time which allow use of the higher fine powers. Therefore, any suggestion that these powers need further enhancement is premature.

In fact, fines under the previous regime rarely engage the landlord's ability to pay. This is because the fines are usually at levels where ability to pay exists given that most landlords are making a profit. Magistrates have shown themselves prepared to issue fines which will have the practical effect of making the landlord sell the property in order to pay the fine. This occurred in *London Borough of Camden v Gethin* in which the conviction and fine were appealed to the Crown Court. The Crown Court upheld the conviction and increased the fine saying that it was perfectly in order to set the fine at a level which might force the landlord to sell the property in question.

Q. Should we consider setting minimum fines for repeat housing offences which have aggravating features? If so, what would be an appropriate level? Are there alternative approaches?

Currently there are no specific sentencing guidelines, beyond consideration of turnover and ability to pay, for housing offences. As a result magistrates will usually look at the maximum fine for the specific offence, consider the seriousness of the offence before them, and set a percentage of the maximum based on their perception of seriousness as against a putative worst case scenario. Ability to pay is usually a secondary consideration which may have the effect of limiting the maximum sum payable, but it is more likely to be engaged where there are multiple offences and the total fine for all of them is likely to be a substantial burden.

The examples of very low fines cited are more a reflection of sentencing inconsistency by lay benches with little experience of this area.

If this is an area in which intervention is considered necessary it would be most effectively dealt with by giving specific guidance as regards sentencing for housing offences. This would likely result in more consistent sentencing and could include a requirement to sentence more harshly for multiple offences.

It should not be forgotten that Rent Repayment Orders (RROs) create a further penalty for HMO licensing offences. In the case of *Parker v Waller* the Upper Tribunal made clear that this was an additional penalty and gave clear guidance on how it should be applied. This process essentially acts to eliminate any profit a landlord may accrue as a result of his criminality.

Q. How should we deal with offences committed by a company if the offence was the result of a deliberate act or omission by an officer or officers of that company?

In relation to companies, there is already a power under the Housing Act 2004 for local authorities to prosecute managers and directors of companies where the company has committed an offence and it is linked to the negligence or actions of that person. These powers are used already and local authorities frequently prosecute individuals alongside companies. Therefore, there seems little need for further action. If intervention is deemed necessary then the best solution would be to provide further guidance to local authorities on prosecuting individuals alongside companies. Such guidance is provided by the Health and Safety Executive for its prosecuting officers and could be adapted for this purpose.

Blacklisting and Banning Rogue Landlords

Q. Do you agree that data held by the Tenancy Deposit schemes should be made available to local authorities?

We do not believe that provision of information from the tenancy deposit schemes will significantly improve the ability of local housing authorities to detect rental property. Some landlords do not take tenancy deposits precisely to avoid the schemes while others routinely ignore the requirement to register. The most serious offenders which these proposals seek to tackle are the most likely to avoid use of tenancy deposit protection schemes. Therefore provision of this data will add expense and complexity for local authorities without necessarily enabling detection of any additional landlords. It is for this reason that the RLA has consistently advocated for data to be obtained from tenants, who are far less motivated to avoid local authorities, to be the main providers of this information by way of data collection through council tax returns.

Q. Do you agree that there should be a blacklist of persistent rogue landlords and letting agents?

Local authorities have considerable powers to tackle rogue landlords and poor property. However, they are used in a limited set of cases. Our evidence is that relatively few landlords are prosecuted and that only a small number of notices requiring property improvement under the HHSRS are enforced. Effort should be focused on ensuring that the current powers are well understood and used before new ones are added.

The RLA agrees that persistent rogue landlords and letting agents should be prevented from dealing in property. However, it is not immediately clear that a blacklist significantly adds to existing powers. Local authorities can already apply the fit and proper person test locally to ensure that people who have convictions are not able to apply for licences. It seems that a blacklist is designed to stop persons moving from one local authority to another. The same function could be more effectively served by promoting sharing of prosecution information between local authorities. We understand that some London authorities are already doing this and their model could be extended nationally.

Q. Do you agree with the proposed reasons for placing someone on a blacklist and issuing a ban?

If a blacklist is to be created we are concerned to ensure that there is a proper mechanism for landlords and agents to see why they have been placed on the blacklist, to challenge that decision in appropriate cases without incurring undue cost, and to be removed from the blacklist after a period of time or if they undertake training or other actions which demonstrate an intention to change their ways.

Q. Do you think it should be at the court's discretion as to whether to include an offender on the blacklist or should this be mandatory?

The placing of a person or organisation on a blacklist should be a discretionary matter and should take account of the number of occurrences of an offence and its seriousness. In some cases local authorities start two separate prosecutions for two properties but which both arise from a landlord's innocent failure to understand or be aware of a licensing scheme in their area. If two prosecutions lead to automatic placement on a blacklist then a single failure to be aware of a new scheme could mean that a landlord with more than one property was then blacklisted.

Many local authorities already recognise this and do not automatically consider a landlord unfit if they have been prosecuted twice without reviewing the details and nature of the prosecution. Therefore placement on a blacklist should depend on the seriousness of the offence and should not be triggered automatically by second (or any specific number of) prosecutions. As many of the offences are strict liability and the issue of intent is not relevant then, were there to be an automatic placement after a set number of successful prosecutions, then these should have to occur within a specific time period.

Q. Do you agree with the penalties proposed for breaching a ban?

In relation to the Proceeds of Crime Act as a mechanism for action we would point out that the Court of Appeal held that in relation to HMO Licensing it was not possible to recover rent under the Proceeds of Crime Act as it was not the proceeds of a crime (*Sumal & Sons (Properties) Ltd v London Borough of Newham* [2012] EWCA Crim 1840). It is likely that a similar position would apply in relation to the proposed rent recovery here unless a specific ability to recover rent was created by statute.

Q. Should local authorities have the right to place the offender on the blacklist on any of the above grounds?

Local authorities should not be able to place a person on the blacklist if the Court has not itself decided to do so as this would make a nonsense of allowing any discretion by the Court in so doing. If the local authority became aware of information that was not available to a Court then it should be permitted to make an application, to the Court or the First Tier Tribunal, for placement of a landlord on a blacklist.

Q. If a local authority took over management of a property, how could we ensure that they did not incur a loss in managing the dwelling?

Local authorities already have considerable powers to take over management of property where the person has been convicted of an HMO licensing offence and there is no prospect of the property being licensed. When a property is taken over there is also a power to place a charge over the property to recover local authority costs (which can be enforced by way of a sale) and to distrain on any rent received. It is not clear what is proposed to be added over and above the existing powers. In practice the current power to take over management is used rarely by local authorities as they tend not to understand the power well and do not have the resources to deal with the management of property. There is no evidence to suggest that a new power to take over management of property of blacklisted landlords will be used any more enthusiastically. The transfer of management to a Registered Provider or appropriate agent could be considered.

Fit and Proper Person Test

Q. Should local authorities be required to refuse a licence to anyone who fails the fit and proper person test? If so, what impact is this likely to have on the number of licences granted?

The relevant local authority is already required to consider fitness when issuing a licence and is not permitted to grant a licence where the test is not reasonably satisfied. Imposing a further obligation on them to refuse a licence where the test is not met would not alter to the current situation.

Q. Should other criteria be added?

The current test is extremely wide in its ambit. Making the test more rigorous would risk excluding some cases where landlords or agents should be held to be unfit. The specific proposals in making the test more rigorous should already be incorporated. For example a local authority is required to consider whether management arrangements are suitable and the majority would consider that not having any office or representative in the UK is a sign of an unsuitable management arrangement. Equally a bankrupt or insolvent person is not permitted to enter into a contract and so cannot be a landlord in any event.

The primary problem at the moment is that the test is so wide in nature that many local authorities find it hard to understand and apply in practice. This leads to some cases being excluded where a finding of unfitness should probably be made and over-zealous application in other cases.

Adding an obligation on a local authority to carry out a DBS check would substantially increase the time and cost of processing checks. Some local authorities already have difficulty turning around applications in less than 4-6 months and adding a DBS check to that would increase the time taken substantially. The cost of the DBS check would also need to be passed to the landlord which would lead to a further increase in licence fees. This will impact on good landlords disproportionately as they will be obliged to pay for checks that will ultimately show nothing about them. The likelihood is that this further cost will be passed on in rents. There is little that could not be achieved by way of improved data sharing between local authorities. In addition, if a blacklist is to be introduced then there seems no need for a further DBS check unless it was to be required as a part of the process of being removed from the blacklist.

Previously draft guidance on the operation of the test was issued but it was never finalised. It is suggested that this guidance should be reconsidered, updated, and issued formally. This would have the effect of clarifying for local authorities and landlords how the test should be operated in practice and would lead to more effective use.

The RLA does not consider that a provisional licence is needed. It is already open to local authorities to grant shorter licences where they consider it appropriate and some authorities make use of this ability. We would suggest that guidance on this topic could be incorporated in the updated fit and proper person guidance referred to above to ensure that more local authorities make use of this power.

Section 2: Rent Repayment Orders

Q. Should we introduce Rent Repayment Orders for situations where a tenant has been illegally evicted or a landlord has failed to comply with a statutory notice? Should Rent Repayment Orders be introduced for any other situations?

The RLA agrees that incentives for landlords to break the law should be minimised and any circumstances where they make a profit by doing so is undesirable.

We do not see a requirement to add Rent Repayment Orders as a penalty to situations beyond those described.

Q. Should a Rent Repayment Order be limited to 12 months?

While there is undoubtedly an argument that Rent Repayment Orders should be extended beyond 12 months we do not consider it to be compelling. A Rent Repayment Order is a penalty, and a significant one. There must be some limits on its use. Extending them further than 12 months encourages local authorities to delay prosecution on the basis that they can apply for a Rent Repayment Order at a later date and potentially leaves landlords facing very large orders for several year's profits which they are unlikely to be able to pay. It should not be forgotten that an Order can be made in circumstances where a landlord has been careless rather than malicious and there is a limited power for the Tribunal to distinguish between the two cases. It is also additional in most cases to a fine and so there must be a balance between the recovery of unfairly derived profit and excessive penalisation. The current 12 month limit provides a sufficient balance in our view.

Q. Should issuing of a Rent Repayment Order be automatic?

There is a significant problem at the moment with local authorities applying for Rent Repayment Orders and seeking prosecution at the same time. This means that both local authority and landlord must deal with two simultaneous sets of proceedings and there is the possibility of inconsistency by having a different result in the Tribunal and the Magistrates Court. This has happened recently in the case of *Urban Lettings (London) Ltd v London Borough Of Haringey* [2015] UKUT 104 in which the First Tier Tribunal made a Rent Repayment Order which was confirmed on appeal on the basis that the offence had been committed while the Magistrates subsequently found that the landlord had a reasonable excuse and was therefore not guilty of the offence.

A process in which a prosecution was automatically transferred to the FTT for consideration of a Rent Repayment Order might help to alleviate this problem. However, to eliminate the issue there should only be a single route to obtaining an Order. There is no real need for a local authority to apply direct to the Tribunal for an Order, bypassing the process of prosecution and this undermines the proposals already set out for blacklisting. It also creates confusion in the Tribunal which is then asked to deal with a decision on a criminal matter to a criminal standard of proof which is an area in which it has limited experience. Removing the route for local authorities to apply direct to the Tribunal would level the playing field between local authorities and tenants, make the role of the Tribunal clearer and simpler, and reduce the possibility of inconsistency between decisions in the Tribunal and Magistrates Court.

However, the automatic issue of an Order should not usurp the key importance of the Tribunal in determining the proper amount of such an Order as this is an important mechanism in ensuring that the worst landlords are penalised while landlords who have made errors are not penalised excessively.

Civil Penalties

Q. What situations or contraventions should be covered by civil penalty?

The RLA supports introduction of a clearer penalty system operated by local authorities. Currently some authorities operate a scheme of fixed penalty notices but their powers to do so are not clear. A more structured system of penalties, possibly similar to that proposed for the new regulations for smoke detectors, would allow local authorities to retain fine income. This would help to fund enforcement by helping pay for employment of enforcement officers and would incentivise local authorities to use their powers more effectively.

The proposed situations for the issue of civil penalties are a sensible choice and these are supported by the RLA.

Q. Assuming civil penalties are introduced based on the suggested criteria, how frequently is such a power likely to be used? Are they likely to be a genuine deterrent?

Local Authorities do not prosecute very often. Those that already operate a penalty system appear to issue those penalties in many more cases and so they enforce

more effectively. We would hope that a penalty system would encourage local authorities to take action more regularly to discourage bad landlords.

Q. What would be an appropriate penalty? Should it be similar to the potential fine for not displaying letting agent fees (up to £5,000)?

The proposed level of £5,000 seems appropriate. In more serious cases the local authority would still be able to pursue a criminal sanction with an unlimited fine. In practice this would likely mean that only the most serious cases would be brought before the magistrates which would change the approach of magistrates to fining. This would therefore help tackle some of the concerns raised with inconsistent or excessively lenient fines.

Q. Should there be higher penalties for repeat offenders?

We do not believe that repeat offending should be dealt with by higher penalties. Repeat offending should be dealt with by full prosecution in the Magistrates Court in which an unlimited fine is available. This will lead to the Magistrates only being required to deal with the most serious offenders as discussed above.

Q. How should the appeals process work? For example, should there be a right of appeal to the First Tier Tribunal?

As with smoke detectors or penalty notices for failure to display agency fees there should be a right of appeal. It would be efficient to place this into the First Tier Tribunal which is already used to dealing with matters which fall under the Housing Act 2004.

Q. How would we ensure compliance and enforcement activity is concentrated on serious breaches rather than incentivising overzealous enforcement of low level breaches?

Many local authorities have enforcement policies relating to prosecution for housing offences. There should be a restriction on the use of civil penalties that they are only permissible where there is a clear written enforcement policy which sets out how they should be used and the circumstances in which a prosecution will be more

appropriate. This would increase clarity for landlords, ensure that local authorities comply with the Regulator's Code and will prevent enforcement for trivial matters. This could be usefully extended to other similar penalty situations arising under other legislation such as the new smoke detector regulations.

Section 3: Abandonment

Q. How widespread a problem is abandonment?

The RLA supports any change which makes dealing with abandoned property easier for landlords. Abandoned property is not overly common but it causes a great deal of uncertainty for landlords and leads to unnecessary claims for possession in the Courts due to uncertainty of the best way to proceed. The RLA receives approximately 5 enquiries on this issue to its member advice line each week.

Q. What costs does a landlord currently face when presented with an abandoned property?

Costs are incurred if landlords are forced to commence court proceedings against absent tenants to ensure that they will not later be accused of unlawful eviction. They are also often left with abandoned property which they are uncertain how to deal with and possessions that have to then be stored for a considerable period of time. Although these costs are recoverable from the tenant in principle they are not recoverable in practice as the tenant has disappeared. In addition abandoned property is usually linked with arrears of rent and while resolving the situation the landlord then incurs further losses while the property remains unlet to a rent-paying tenant.

Q. Does the lack of a courts process present too much uncertainty?

Abandoned property leaves landlords uncertain how to protect themselves effectively. Currently landlords can recover abandoned property as the criminal and civil penalties in the Housing Act 1988 and Protection From Eviction Act 1977 do not apply where a landlord has reasonable cause to believe that a property has been abandoned. However, landlords are not always clear what is reasonable and are not fully aware of this position. Therefore, a targeted intervention to clarify the reasonable situations in which a landlord could conclude that abandonment has occurred would be of value.

Q. How effective would the process described above be in tackling the issue?

The proposed structure is supported by the RLA in principle and we consider that it will provide a huge leap forward for landlords in dealing with this problem. We would propose that this should be set out as formal guidance. The relevant legislation could then be changed so that there would be a statutory presumption, which could be rebutted by evidence, that a landlord who had followed the guidance would be deemed to have carried out a lawful eviction. This would permit tenants to demonstrate that their landlord had acted incorrectly and would also not bind landlords to using the process laid out if there was other good reasons for them to believe the tenant had abandoned the property. We believe that a proper structure as set out above removes any uncertainty created by a lack of formal court process and fits well within the current system which allows landlords to recover possession if they have reasonable cause to believe that a property has been abandoned.

Q. What should the landlord do with the tenant's personal property?

In relation to tenant's possessions, landlords are currently bound by the Torts (Interference With Goods) Act. This requires them to store possessions for up to 3 months if they cannot obtain the tenant's consent to dispose of them. This involves landlords in significant time and cost to store property in a storage unit or the rental property itself. Those possessions are frequently never reclaimed by the tenant and the landlord then incurs further disposal costs. The RLA would favour an amendment to this Act to allow landlords to dispose of possessions on a shorter timescale where they had reasonable cause to believe that a tenant had abandoned the property or where the tenant had been evicted by Court Order.

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