

Draft Briefing paper: Local authority regulation of the private rented sector in England

SCC Scrutiny Inquiry

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Introduction

Private rented housing in England is subject to an extensive regulatory framework which governs, amongst other things, the landlord-tenant tenancy agreement (security of tenure, rent, repair etc.), the building that is subject to the tenancy (housing safety standards), deposit protection, as well as the professional intermediaries involved in creating the tenancy (estate agents). This framework is underpinned by over 30 pieces of housing legislation which in some cases can be traced back to the late 19th and early 20th century. The legal rules contained in this legislation are complex, voluminous yet neither comprehensive nor coherent, and difficult to locate. These characteristics, in themselves, are likely to operate as barriers to access to justice and have been recognised as an impediment to local authority enforcement work.¹ These difficulties are compounded by the fact that tenancy terms do not necessarily state the correct legal position of the parties to the agreement, a tendency for strenuous litigation in connection with rights as well as some judicial suspicion of rights leading to ‘windfall gains’ to unmeritorious tenants and as such it is reasonable to conclude that the law does not work well for many of the stakeholders in the sector. In this introductory briefing paper, we provide a brief explanation of the law and policy underpinning the regulation of the private rented sector. We begin by giving an overview of the current regulatory context, which we refer to as ‘regulated deregulation’. We then set out the regulatory role of local authorities in relation to private rented housing and identify some barriers and drivers of enforcement and some examples of good enforcement practice. We conclude the paper with a list of the major statutes underpinning regulation of the private rented sector and a bibliography.

1 Current regulatory context

1.1 Regulated deregulation

We use the term ‘regulated deregulation’ to describe the current regulatory approach that applies to private rented housing in England because it effectively captures the piecemeal, frequently incoherent and often contradictory development of renting law during the past four decades.

The ‘deregulation’ aspect of this term refers to the deregulation of the individual tenancy agreement by the Housing Act 1988. For much of the 20th century, renting laws, such as the Rent Act 1977, restricted the amount of rent a landlord could charge and provided tenants with security of tenure by placing significant procedural and substantive restrictions on the landlord’s ability to recover possession. The Conservative governments of 1979 – 1997 initiated a sustained period of deregulation in order to create a market in rented housing that would facilitate labour mobility. The Housing Act 1988 was the centrepiece of this programme and it effectively removed rent regulations from all new tenancies and greatly facilitated the landlord’s right to regain possession by introducing a ‘no fault’ ground for possession under section 21.

The ‘regulated’ aspect of the term captures how despite subsequent UK governments accepting the marketized private tenancy regime of the Housing Act 1988, they have nonetheless introduced rafts of legislation that have greatly expanded the regulatory framework governing the private rented sector. This began with Labour (1997-2010) which sought to make rented housing safer and to ‘modernize’ the management of housing conditions. The Housing Act 2004 introduced a risk-based approach to local authority intervention in housing conditions via the Housing Health and Safety Rating System (HHSRS) and a system of licensing primarily targeting large Houses in Multiple Occupation which presented the greatest risks to occupiers. Selective and additional licensing was

¹ <https://www.gov.uk/government/publications/local-authority-enforcement-in-the-private-rented-sector-headline-report/local-authority-enforcement-in-the-private-rented-sector-headline-report>

also available to local authorities when required to tackle housing problems. The Housing Act 2004 includes provisions to protect tenancy deposits and enable tenants and local authorities to apply for Rent Repayment Orders (RROs). The Act also provided for Empty Dwelling Management Orders, interim and final management orders and overcrowding notices. The Act provides the statutory basis for the main local authority powers in connection with the private rented sector.

The various Conservative administrations since 2010 have continued with the approach of regulated deregulation. The Deregulation Act of 2015 banned retaliatory evictions, evictions which are in response to a tenant complaining about housing conditions. However, very tight requirements have meant that the legislation is not very effective. The Housing and Planning Act 2016 introduced banning orders, the database of rogue landlords and property agents and extended the availability of RROs to tenants by scrapping the requirement for a conviction. Following the terrible loss of life at Grenfell Tower Theresa May's administration passed the Home (Fitness for Human Habitation) Act 2018 which introduced an implied covenant into a tenancy agreement that the property will be fit for human habitation. That administration also introduced the Tenants Fees Act 2019, which banned unfair letting fees and limited deposits, and committed to abolishing 'no fault' evictions under section 21 because of concern over its 'unethical' use for retaliatory evictions. This commitment was progressed by the Renters (Reform) Bill 2023 which can also be understood as part of regulated deregulation. It leaves intact the marketized system and the removal of section 21 is to be balanced by proposed increases in grounds of eviction and the promise of much faster eviction process.

1.2 Snapshot of the private rented sector in England

The piecemeal development of regulated deregulation is closely linked to the rapid 'revival' of the private rented sector. Over the past two decades, the sector has doubled in size across the UK. It now is estimated to house 4.6 million people, 19% of households in England. The revival of private renting reflects a range of demand and supply factors.²

Demand for rented housing has been driven largely by the growing unaffordability of owner occupation and with persistent undersupply of social housing. As more households have been channelled towards private renting, the nature of the sector has changed. There have been significant increases in households with children – accounting for 30% of households, and the sector provides housing for increasing numbers of lower income households. This has been facilitated by state housing policy which has encouraged local authorities to treat private rented housing as a source of *de facto* social housing. Finally, more households have settled into the sector for the longer term – in 2022, private renters had lived in their home for 4.4 years on average.³ At the time of the publication of the White Paper in 2022, the Department for Levelling Up, Housing, & Communities (DLUHC) prepared diagrams which are replicated below, which give an indication of who lives in the private rented sector and under what constraints.⁴ This is of course a national picture and the profile of private renting in Southampton may be quite different.

² https://housingevidence.ac.uk/wp-content/uploads/2019/07/TDS-Overview-paper_final.pdf pp 5-7.

³ <https://www.gov.uk/government/statistics/english-housing-survey-2021-to-2022-private-rented-sector/english-housing-survey-2021-to-2022-private-rented-sector>

⁴ <https://www.gov.uk/government/publications/a-fairer-private-rented-sector/a-fairer-private-rented-sector>

Comfortable Renters

44% approx 1.94 million households

Few financial or other limitations on choice of housing. Unlikely to have low income and relatively unlikely to have children or be in ill-health. Majority in managerial or professional occupations and/or educated to degree level.



1 in 4 expect to remain in PRS



71% expect to buy their own home

36% of those who expect to buy expect to do so within 2 years

Families Getting By

17% approx 759,000 households

Not necessarily low income but spend high proportion of income on rent and unlikely to have savings. Most likely to be couples with dependent children.



34% report difficulty paying the rent



1 in 7 living in overcrowded accommodation.

37% have had problems with damp / condensation

Low Income Savers

16% approx 726,000 households

On low incomes and spend high proportion of income on rent but have savings. One in five HRP*s under 25.

*HRP – Household Reference Person, the person in whose name the accommodation is rented



In PRS for relatively short time

15% renting for less than 12 months



54% expect to buy but generally not in the next 2 years

Struggling Families

11% approx 473,000 households

Very likely to be on low incomes, without savings and receive housing support. Nearly three in four are lone parents with dependent children.

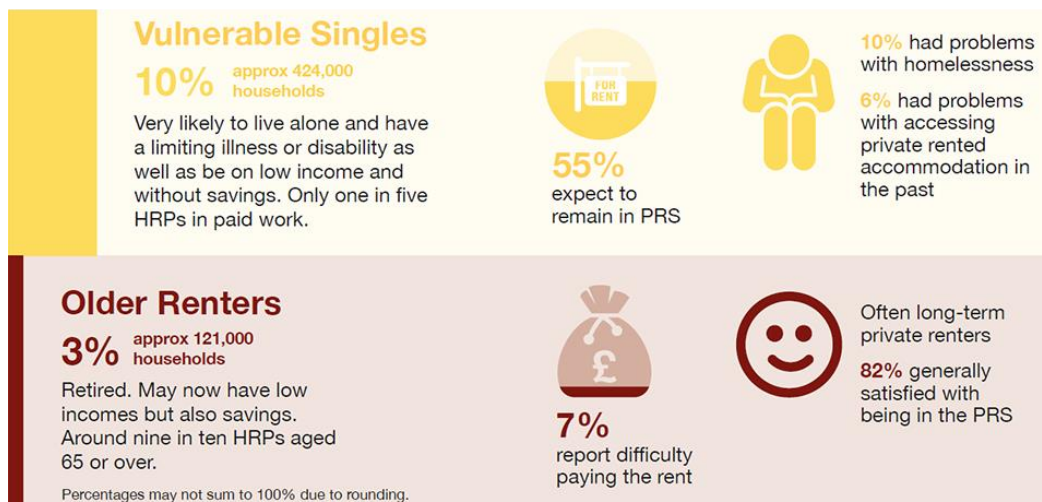


49% report difficulty paying the rent



27% households expect to move into social housing longer term

1 in 10 on the waiting list for social housing



The supply of private rented housing has been driven by the introduction of buy-to-let mortgages in the mid-1990s, which were made all the more attractive by tax reliefs, rent subsidies, and deregulation, which generated a flood of investment.⁵ Much of this investment has been driven by ‘small’ landlords – in 2021, 82% of landlords owned between one and four rental properties, representing 52% of tenancies.⁶ This has not necessarily increased the overall supply of housing in England and has often involved the purchase and conversion of ex-council homes or formerly owned properties into private rented accommodation.⁷

By deregulating rents and greatly facilitating landlords’ right to possession, the Housing Act 1988 helped to create investment conditions that were highly favourable for private landlords but in doing so, it has contributed to conditions of precarity for many tenants. Landlords can evict tenants without having to give a reason, and the prevalence of such ‘no fault’ evictions left around 29,000 households at risk of homelessness in 2019–20.⁸ On average, private renters spend 32% of their income on housing, more than those living in their own properties (18%) or in social housing (27%). There is evidence of acute inflation in private rents in recent years. The latest ONS data in May 2023 found that annual private rental prices increased by 4.6% in England in the 12 months to March 2023. Finally, there is clear evidence that housing conditions in the private rented sector are significantly worse than conditions in other tenures. Approximately 23%, or 990,000, private rented homes in England are estimated to fail the Decent Homes Standard, while 13% (589,000) have at least one category 1 hazard—this constitutes a serious threat to health and safety that landlords are legally obliged to address.⁹

⁵ https://housingevidence.ac.uk/wp-content/uploads/2019/07/TDS-Overview-paper_final.pdf pp 5-7.

⁶ [https://www.gov.uk/government/statistics/english-private-landlord-survey-2021-main-report/english-private-landlord-survey-2021-main-report--2#:~:text=43%25%20of%20landlords%20owned%20one,half%20\(48%25\)%20of%20tenancies](https://www.gov.uk/government/statistics/english-private-landlord-survey-2021-main-report/english-private-landlord-survey-2021-main-report--2#:~:text=43%25%20of%20landlords%20owned%20one,half%20(48%25)%20of%20tenancies)

⁷ <https://www.theguardian.com/housing-network/2016/feb/10/right-to-buy-ex-council-homes-rental>

⁸ <https://committees.parliament.uk/publications/9608/documents/163793/default/> p 8

⁹ <https://committees.parliament.uk/publications/9608/documents/163793/default/> p 8

1.3 The Renters (Reform) Bill

There have been growing demands for the strengthening of protections against eviction and the introduction of rent controls across the UK.¹⁰ In 2023, the Scottish Government committed to introducing a permanent national system of rent controls, while the Welsh government are considering the introduction of rent controls. While there have been calls by local authorities, such as Bristol City Council's Living Rent Commission for rent controls in England, this has been ruled out by the present government. However, the progression of the Renters Reform Bill reflects an acceptance by successive governments that significant reform of the tenancy agreement is necessary. Policy makers have expressed concerns at how no-fault evictions have been used to bring about retaliatory evictions.¹¹ The push behind reform also reflects the understanding that private tenants deserve a better deal than they are getting at present especially considering that private rented housing is the most expensive, insecure and unsafe form of housing in England.¹² As affordability deteriorates, and becomes more visible and tenant organising by Acorn, Generation Rent and others increases, it is likely that demands for rent control will grow.¹³

2 Local authorities and the regulation of private rented housing

2.1 The regulatory role of local authorities

Local authorities have long had an important regulatory function in relation to private rented housing. The basis of this regulatory function is set out in legislation which places duties on local authorities to keep housing conditions under review and identify action, to take enforcement action if a category 1 hazard to the occupier's safety is identified in rented housing, to inspect and prepare proposals relating to overcrowding, and to have due regard to the need to promote equality and respect human rights. To fulfil these duties, legislation provides local authorities with a wide range of enforcement powers. These include formal or "deterrence-focused" regulation (e.g. inspections, issuing fines, banning orders etc) but also a broader range of approaches that can help to achieve compliance (licencing and data gathering, advice, support and working with tenant organisations).

2.2 Local authority enforcement powers

(a) Gathering information, powers of entry and inspection

Local authorities have various powers to require landlords to provide information about their property. They retain broad powers under the Housing Act 1985 and Housing Act 2004 to enter and inspect housing in order to assess housing safety, identify hazards to occupiers safety, and assess whether housing is overcrowded.

(b) Informal actions

Local authorities have a range of informal enforcement actions to bring about compliance including advice, warnings, negotiating agreements, placing conditions with licences and serving informal notices. The decision to take informal action is appropriate where it is likely that it will achieve compliance and the consequences of non-compliance do not pose a risk to the occupier.

¹⁰ <https://www.bristolonecity.com/one-city-bristol-living-rent-commission/>

¹¹ <https://www.local.gov.uk/parliament/briefings-and-responses/renters-reform-bill-second-reading-house-commons-23-october-2023>

¹² See Helen Carr et al 'Introducing Precarisation: Contemporary Understandings of Law and the Insecure Home' in H Carr et al (eds) *Law and the Precarious Home* (Oxford: Hart, 2020) pp 10-11.

¹³ Mark Jordan, 'Contesting Housing Inequality: Housing Rights and Social Movements' (2023) *Modern Law Review*.

(c) Statutory notices

Upon identifying a lack of compliance by the landlord, local authorities may serve a statutory notice to require the landlord to take certain actions to bring about compliance. There are a wide range of notices and these include an improvement notice, hazard awareness notice, prohibition order and overcrowding notices. These notices are mainly governed by the Housing Act 2004 and the decision to issue statutory notice will likely be taken in light of the risk that non-compliance could be potentially serious to health and safety of the public, the fact that the landlord shows awareness of their statutory requirements but fails to adhere to those requirements, and there is a need for deterrence and punishment.

(d) Civil penalty notices (CPN)

Local authorities may impose a civil penalty of up to £30,000 as an alternative to prosecution for a number of offences including failing to comply with an improvement or overcrowding notice, offences relating to HMO licencing, breach of a banning order and providing a property to someone who does not have a 'right to rent' in the UK. To serve a CPN, local authorities must follow formal notice requirements and be confident that if the landlord were prosecuted in magistrates court, there would be a realistic prospect of conviction. Income raised from CPNs can be retained by the local authority provided it is to be used for further enforcement in the private rented sector.

(e) Criminal penalties

There are various enforcement actions which local authorities can take where there is evidence that landlords have committed a criminal offence. A simple caution can be used for first time, 'low' level offences, where the public interest does not require prosecution. However, the local authority must first try to establish the views of the victim. If the landlord fails to accept a simple caution, the local authority is able to instigate prosecution proceedings. Local authorities can seek prosecution where an offence has been committed and prosecution is warranted by the gravity of the offence, the seriousness of harm involved, the general record and approach of offender, whether there have been repeated breaches including a failure to comply with legal notice/caution/civil penalty notice. This process is highly expensive, subject to delays and there are problems with sentencing.

(f) Rent Repayment orders

Local authorities can apply to the First Tier-Tribunal for a rent repayment order (RRO) where the landlord/agent has committed a particular offence including unlawful eviction or harassment, using or threatening violence for securing entry into premises, failure to comply with an improvement notice, failure to comply with a prohibition order, a breach of licencing/HMO regulations, failure to comply with overcrowding notices or fire safety regulations (HMOs only), breach of gas safety regulations, breach of right to rent provisions (criminal prosecutions only) and requiring a 'relevant person' to make a prohibited payment (criminal offence only). It is not necessary that the landlord/agent has been convicted, but a tribunal must be satisfied beyond reasonable doubt (the criminal standard of proof) that one of these offences has been committed. A RRO will require the landlord to repay up to a maximum of 12 months' rent or housing benefit or housing costs element of universal credit paid in respect of a tenancy or licence. The local authority can use a rent repayment order to reclaim housing benefit and use this for further enforcement activity.

(g) Banning orders

A local authority may apply for a banning order where a landlord or estate agent has been convicted of committing a certain offence including unlawful eviction or harassment, using or threatening

violence for securing entry into premises, failure to comply with an improvement notice, failure to comply with a prohibition order, a breach of licencing/HMO regulations, failure to comply with overcrowding notices or fire safety regulations (HMOs only), breach of gas safety regulations, breach of right to rent provisions (criminal prosecutions only) and requiring a 'relevant person' to make a prohibited payment (criminal offence only). The effect of a banning order is that the landlord is banned for a minimum period of 12 months from letting housing in England, engaging in letting agency work or property management work. The decision to apply for a banning order should reflect the seriousness of the offence, whether there are previous convictions, the harm to tenant and whether punishment is proportionate and would act as a deterrence.

(h) Database of Rogue Landlords and Property Agents

The Database of Rogue Landlords and Property Agents was established in 2018. Local authorities are obliged to make an entry recording key details about the relevant landlord or agent where it has obtained a banning order against that landlord or agent.¹⁴ Local authorities have a discretion to make an entry where a landlord or agent is not subject to a banning order but has previously committed been convicted of at least one banning offence or has committed two or more banning order offences within a 12 month period for which they have received civil penalties.¹⁵

(i) Licencing of rented housing

Mandatory HMO licencing

The Housing Act 2004 requires the mandatory licencing of certain houses in multiple occupation (HMOs) i.e. where the HMO is occupied by five or more persons living in two or more separate households. Certain conditions must be attached to all HMO licences, and these include requirements that each occupant must be provided with a written statement of the terms of their occupancy as well as requirements relating to gas safety, fire safety, carbon monoxide alarms and minimum size requirements for rooms used as 'sleeping accommodation'. Local authorities can attach further conditions to a HMO licence in order to ensure that HMOs are of an appropriate standard and fit for purposes, in light the households or persons in occupation, address anti-social behaviour, and prevent overcrowding. In deciding whether to grant or refuse an application the local authority must assess the suitability of the property to serve as an HMO and the suitability of the landlord and licence holder of the property. Operating without a HMO licence or breaching the HMO conditions is an offence.

Selective licencing

Local authorities may introduce a selective licencing scheme to include private rented housing not covered by mandatory licencing under the Housing Act 2004 e.g. all private rented housing in a whole district.¹⁶ This can be introduced where the local authority believes that an area is one experiencing: low housing demand (or is likely to become such an area), a significant and persistent problem caused by anti-social behaviour, poor housing conditions, high levels of migration, high level of deprivation and high levels of crime. The local housing authority may only make a designation if the area has a high proportion of housing in the private rented sector. Local authorities must ensure selective licencing is consistent with its housing strategy and should be

¹⁴ Housing and Planning Act 2016, s.29.

¹⁵ <https://www.gov.uk/government/publications/database-of-rogue-landlords-and-property-agents-under-the-housing-and-planning-act-2016>

¹⁶ <https://www.gov.uk/government/publications/selective-licencing-in-the-private-rented-sector-a-guide-for-local-authorities/selective-licencing-in-the-private-rented-sector-a-guide-for-local-authorities>

based on consultation with those likely to be affected. The decision to designate an area as subject to selective licensing must be approved by the Secretary of State, should the scheme affect more than 20% of privately rented homes in the local authority area or of the geographical area. As with mandatory licencing, local authorities can attach further conditions to a licence in order to ensure that licenced properties are of an appropriate standard and fit for purposes e.g. meet the decent homes standard.

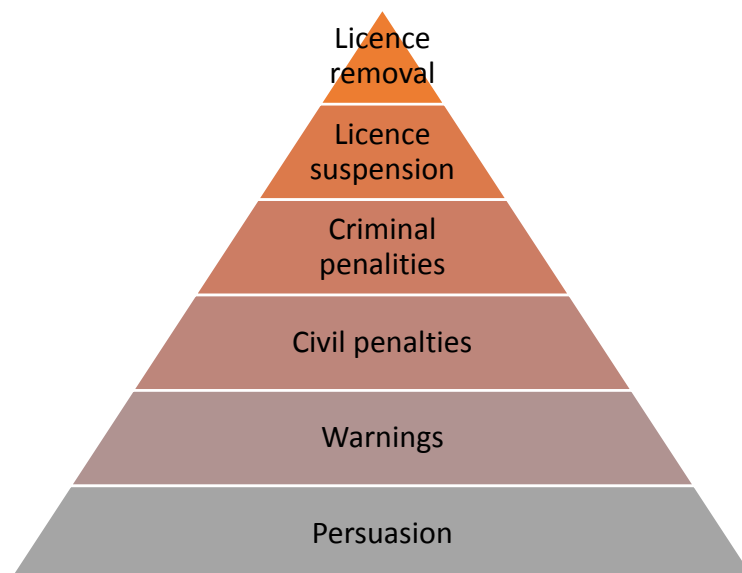
3 Conclusion: What does good enforcement practice look like?

3.1 Proactive responsive regulation

There is wide recognition that the private rented sector should be fairer, more secure and should offer higher quality and safer housing to tenants. While the Renters (Reform) Bill may help to deliver this change, debates over national reform should not distract from the significant role which local authorities can play in securing a better private rented sector for tenants. This paper has set out that local authorities have duties to assess housing conditions and have extensive, enforcement powers that can be used to tackle poor conditions in the sector. Despite these extensive powers, many local authorities are not proactive in regulating the sector but rather operate a 'reactive' enforcement service that responds to individual complaints. A problem with this approach is that that private tenants, particularly vulnerable tenants, can be fearful of reprisals or eviction and have limited understanding of their rights, and so may not report issues.

However, there is also evidence that some local authorities are adopting proactively enforcement approaches involving selective licencing and the full use of enforcement powers to tackle substandard housing. A recent report by the UK Collaborative Centre for Housing Evidence has argued one example of good proactive practice is a responsive regulatory approach (see diagram below).¹⁷

Figure 1 Pyramid of responsive regulation - Harris, Marsh and Cowan (2020)



In this model, local authorities employ advice, support and assistance as strategies of first choice and this is where most action will take place. Should the landlord fail to comply then the local authority response escalates to more formal action, higher up the pyramid. Although some local authorities

¹⁷ https://housingevidence.ac.uk/wp-content/uploads/2020/08/200803-Compliance_Practice_Briefing.pdf

employ this model, it does not often form an explicit part of the enforcement policy. This can undermine the consistency, fairness, and transparency of enforcement actions, particularly in decisions over escalation and de-escalation which are sometimes left to the discretion of the individual housing officer. Adopting this approach as an explicit part of the enforcement policy also provides a further means of demonstrating that a local authority's enforcement practice aligns with the regulators code.

3.2 Barriers and drivers of enforcement

A recent DHLUC report (2022) identified the following barriers to, and drivers of, good local authority enforcement practice in the private rented sector.¹⁸

Capacity of local enforcement teams

There is evidence of a clear correlation between those local authorities working proactively, making use of the range enforcement tools and powers, and those with larger teams. Furthermore, a boost to enforcement capacity was found to have demonstrable results in increasing proactive enforcement and preventative initiatives. Some local authorities have increased enforcement team capacity through part time secondments from trading standards and tenancy management, or established new teams by accessing government funding for rogue landlord teams and also by employing consultants to carry out discrete tasks.

Experience and expertise of enforcement teams

Local authorities that were most proactive in enforcement had teams comprised of highly experienced and qualified staff. These teams tended to be multi-disciplinary, including staff from other departments (trading standards, tenancy relations, legal) and that this enhanced the technical expertise overall.

Political will, strategic commitment, and related support of legal teams

There is evidence of a clear correlation between local authorities with strategic or political commitment to improving private rented sector conditions through enforcement action, and those more operationally proactive. Support of senior managers and legal departments was found to be crucial. In these local authorities, there tended to be an explicit strategic commitment to tackling problems in the private rented sector in the corporate strategy, and there was recognition of the importance of the link between strategic commitment and operational capacity.

Issues relating to the legal framework

The number and range of laws that enforcement officers must understand and navigate is a major barrier to enforcement. The sheer volume and complexity of laws meant that enforcement teams require a high level of legal competence and breadth of knowledge and need to be supported by legal departments to interpret and apply the relevant legislation. There are also clear limitations that undermine the effectiveness of the enforcement tools for tenancy relations offences. In particular, local authorities have the power but not a statutory duty to take action for tenancy relations offences and this means pursuing such cases is often not prioritised teams. In addition, currently the

¹⁸ <https://www.gov.uk/government/publications/local-authority-enforcement-in-the-private-rented-sector-headline-report/local-authority-enforcement-in-the-private-rented-sector-headline-report>

only enforcement option for tenancy relations offences is prosecution because CPNs cannot be served for such offences. The Renters (Reform) Bill contains a provision to change this.¹⁹

Difficulties gathering evidence to support enforcement

Perhaps the most significant barrier to effective enforcement is the lack of meaningful data about the private rented sector. This reflects the general lack of comprehensive data and knowledge about the sector in England. It can often be challenging to establish the identity of landlords, particularly in the rent-to-rent market. Gathering evidence that meets the criminal standards of proof is resource intensive and these difficulties are compounded by the fact that tenants are often reluctant to complain, provide statements or attend court. While selective licencing schemes can play a vital role in developing more data, this gap would be most effectively filled by the introduction of a mandatory register of all landlords, an initiative which is only in the gift of central government.

Nevertheless, some local authorities have employed creative approaches to developing better data on private renting. In one case, *'NHS hospital admissions data and Indices of Multiple Deprivation data were mapped onto the housing conditions survey to gain a general idea of where the best and worst quality housing and the tenants most in need of support were located.'* This data was then used to target enforcement activity and welfare support for tenants.²⁰

¹⁹ <https://www.local.gov.uk/parliament/briefings-and-responses/renters-reform-bill-second-reading-house-commons-23-october-2023>

²⁰ https://housingevidence.ac.uk/wp-content/uploads/2020/08/200803-Compliance_Practice_Briefing.pdf

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Data Protection Act 2018

Legislative and Regulatory Reform Act 2006

Equality Act 2010

Code for Crown Prosecutors 2013

The Anti-social Behaviour, Crime and Policing Act 2014

Regulators' Code 2014

Building Act 1984

Caravan Sites and Control of Development Act 1960

Caravan Sites Act 1968

Energy Act 2013

Enterprise and Regulatory Reform Act 2013

Environmental Protection Act 1990

Rent Act 1977

Protection from Eviction Act 1977

Criminal Law Act 1977

Housing Act 1985

Landlord and Tenant Act 1985

Housing Act 1988

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