NHF Renters' Reform strategy: Proposal for providers of supported housing and temporary accommodation

Briefing and consultation for housing associations

June 2021

Summary

This briefing explores the implications of the proposed repeal of section 21 of the Housing Act 1988 for supported and temporary housing provision, and seeks feedback on a proposed way forward that will feed into our work with the government as it prepares its White Paper on Renting Reform.

- In 2019, the government announced plans to repeal section 21 of the Housing Act 1988. The government has now announced that it will be moving this forward through a white paper to be published in autumn 2021 and has made clear its determination to repeal section 21 and reform section 8 possession grounds.
- The effect of repealing section 21 is that landlords will only be able to end a tenancy if at least one ground for possession is verified in court. All assured tenancies, whether in the housing association sector or the private rented sector, will be 'lifetime'. The assured shorthold tenancy (AST) will cease to exist.
- Various types of supported housing and temporary accommodation currently use ASTs.
- The housing association sector is considering the potential impact of the repeal of section 21 for supported housing and temporary accommodation, the circumstances in which the continued availability of no-fault possession may be necessary or desirable, and the ways in which that could be made possible.
- The National Housing Federation (NHF) responded to the government's consultation on its plans for Renters' Reform. Based on member responses, the NHF has come up with a potential way forward that takes into account member needs and factors in the likely margins for manoeuvre with government.
- This paper explains the rationale behind the proposed way forward and seeks feedback on the updated proposal.
- The NHF will be making representations on general needs and longer-term housing separately.

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Introduction

In 2019, the government announced its intention to repeal section 21 of the Housing Act 1988. This is the provision that allows landlords to end ASTs by notice, without having to demonstrate possession grounds.

The government set out its plans in a consultation paper. The consultation paper made it clear that the government will repeal section 21, so it did not seek views on this principle. It did, however, raise several issues about the implications of repeal.

Although the decision to repeal section 21 arose from concerns relating to the private rented sector, it will also affect housing associations, who use ASTs in a range of circumstances. The National Housing Federation (NHF) responded to the original consultation based on feedback from its members on how the housing association sector would be affected by the repeal of section 21, and the circumstances in which the continued availability of no-fault possession may be necessary or desirable.

The government has repeatedly made it clear that it is committed to repealing section 21 and reforming section 8 possession grounds. One area that will be affected is supported housing and temporary accommodation, where ASTs are used in a number of cases. The NHF has therefore discussed with members potential ways forward for supported housing and temporary accommodation, and has made and continues to make representations to the government on the implications of the repeal of section 21. We have also discussed the issue with sector partners, such as Homeless Link and Supported Housing in Partnership (SHiP), who have made similar observations to the NHF.

Progress towards Renters' Reform was delayed by the coronavirus pandemic, during which government focused its efforts on measures to protect renters. However, through the Queen's Speech in May 2021, the government promised to publish its response to the 2019 consultation "later this year" and announced that a white paper would be published in the autumn that will set out proposals to "create a fairer private rented sector that works for both landlords and tenants". In communication around the white paper, the government confirmed that it remains committed to repealing section 21 of the Housing Act 1988 as well as reforming section 8 possession grounds, and that it will introduce legislation when parliamentary time allows. The government feels that "it is only right that this considers the impact of the pandemic

and is a balanced set of reforms for improving the private rented sector alongside reform of the possession grounds."[1]

We will be working with the government to make sure the range of members' views are represented as this develops, and feed into the white paper. This briefing document:

- sets out the government proposal's implications for housing associations (skip to)
- summarises the NHF's response to the original government consultation (skip to)
- gives an overview of how section 21 is currently used by housing associations providing supported housing and temporary accommodation (skip to)
- summarises our proposed course of action that has been seen by some members (skip to)
- summarises initial member feedback on the proposed course of action (skip to)
- sets out a new proposal based on feedback (skip to)
- raises other considerations (skip to)
- asks for feedback from members (skip to).

So that we can represent your views to government as it prepares the white paper, we are seeking feedback from our members. The questions are at the end of this document but are also included here for ease of reference:

1. **Do you support the revised wording of the proposed ground? If so, we will put this to government as our proposal for supported housing and temporary accommodation in discussions with them about the forthcoming white paper.**
2. **Do you feel a ground like our proposal on leases should be available in cases where the lease were entered into before the government announced its intention to repeal section 21?**
3. **Alternatively, do you feel a ground like our proposal on leases should be available to leases entered into before a certain date, to be defined by government?**

Please contact Suzannah Young, Policy Officer, at suzannah.young@housing.org.uk to share your answers to the above **by 19 July 2021.**

[1] See also https://www.gov.uk/government/publications/protecting-the-homeless-and-the-private-rented-sector-government-response-to-the-select-committee-report/protecting-the-homeless-and-the-private-rented-sector-government-response-to-the-select-committee-report

The end of section 21: implications for housing associations

The government's firm intention is to abolish section 21 notices, which will effectively do away with ASTs as a tenancy type.

The overall effect of repealing section 21 is that landlords will only be able to end an assured tenancy if at least one ground for possession is demonstrated in court (subject to the court's discretion if the ground is not mandatory). All assured tenancies, whether in the housing association sector or the private rented sector, will therefore be 'lifetime'. The AST, as a separate category, will cease to exist.

Various types of supported (as opposed to sheltered/retirement) housing and temporary accommodation use ASTs, and housing associations also use ASTs in a number of specialised forms of housing.

The removal of section 21 and ASTs could have the (unintended) consequence of destabilising supported housing provision and the wider use of granting forms of occupancy that will give rise to a licence rather than a tenancy, affording less security of tenure to service users.

NHF response to the government consultation

In its response to the 2019 consultation, based on member feedback, the NHF commended the government's aim of allowing landlords to manage their properties effectively while at the same time recognising that tenants need security in their homes, and agreed that the abolition of section 21 should extend to all users of the 1988 Act, including housing associations. The reasoning behind this was the importance of striking a balance between landlords and tenants in all sectors[2] and that, while this may present some operational issues for housing associations, it would be unacceptable for housing association tenants to have less statutory protection than private sector tenants.[3]

[2] The NHF's Together with Tenants initiative also seeks to build a stronger relationship between housing association landlords and residents through embedding a culture that values residents' voice and experience.

[3] This would also imply accepting the loss of probationary tenancies and fixed-term tenancies in general needs provision. We said more about fixed-term and probationary tenancies in our 2019 submission to the government consultation.

The NHF also signalled in its response that there are some forms of supported housing, along with certain other categories of specialised provision, where no-fault possession is legitimately required. It therefore proposed changes to the Housing Act to cover these special cases and urged the government to work with providers to identify and define cases where this is needed. We envisage that these cases will be exceptional and that the great majority of supported housing tenants will enjoy full security of tenure.

While the majority of housing association tenants have assured tenancies, the sector has used ASTs in a range of circumstances. It is important to recognise that housing associations (along with some other public-benefit landlords) deliver certain types of housing that are unlikely to be found in the private rented sector. These forms of housing include provision for very vulnerable persons requiring high levels of support or specially adapted properties; and for persons experiencing crisis and requiring emergency short-term accommodation or support. It has not previously been necessary to make special provision for these forms of housing because they have been able to make use of ASTs. Without ASTs, associations will find it more difficult, or impossible, to offer these forms of housing unless satisfactory alternative mechanisms are set up. In this paper, we set out proposals for achieving this.

How housing associations providing supported housing and temporary accommodation currently use ASTs

Housing associations meet the landlord condition in the 1988 Act and therefore use assured tenancies. In most cases, their assured tenancies are non-shorthold, which means the landlord can end them only by showing in court one of the grounds for possession listed in the 1988 Act, such as rent arrears or anti-social behaviour. However, housing associations, like any other landlord within the scope of the 1988 Act, are also legally free to use ASTs, allowing no-fault possession under section 21.

Housing associations may use ASTs, and no-fault possession, in some types of supported housing and temporary accommodation.

Providers of supported housing and temporary accommodation currently use ASTs because of the need to fit with commissioning cycles, and as a safeguard in situations where:

- support is decommissioned with little warning;
- the support is no longer needed;
- the tenant's support needs increase or decrease and the provision as funded is no longer appropriate;
- the housing or the stay is intended to be temporary.

Our members have stressed that most moves are planned/positive moves, but providers may need the fall-back of being able to seek possession by exception.

Commissioning cycles

Members have reported to us that they may use ASTs in (predominantly) one-bedroomed properties to end a tenancy when support commissioned by a local authority comes to an end. Often, the maximum time clients can receive commissioned support is up to 2 years. The expectation can be that tenancies will be brought to an end at the end of the commissioning period, whether or not tenants are moved on into other provision. (Otherwise the housing association will work with the relevant agencies to get a suitable outcome where move-on is deemed necessary).

The building may be used for other or recommissioned support. If it cannot be recommissioned, this supported housing provision will not be useable.

If tenancies continue but there is no support and there is not a managed move to another type of provision, the risk is that the tenancy breaks down in a chaotic way, that could be traumatic for the tenant and costly for the landlord.

Loss of support

Some supported housing relies on the delivery of support, either directly or by means of financial provision, by an external agency. If this is withdrawn, for reasons beyond the control of the housing association, the tenancy that depended on the support to be successful cannot be sustained and section 21 is used to end the tenancy.

Ending of need for specialist housing

A further case is where a specific type of housing is supplied in circumstances where the need for it may cease to apply at some future point. An example would be the letting of a property with adaptations that meet the mobility needs of one member of a couple. If the resident with mobility problems then moves out, the property will be

occupied by the former partner, who may have no need for the adaptations. In this situation, especially if the adapted property is urgently needed by someone else, the housing association may require possession even if the conduct of the tenancy has been immaculate. (Of course in this situation the housing association would normally offer an alternative. However, doing so gives rise only to a discretionary possession ground, and courts can be reluctant to use their discretion in such a case.)

Support needs increase or decrease and provision is no longer suitable

Some members have reported that the use of ASTs can help mitigate the risk of resident's care and support requirements changing and where either the commissioner or the service is not willing to meet the additional cost or the accommodation cannot reasonably be adapted to meet their needs. This can apply in services where the supported housing provision is longer-term. Landlords can be in a position where they are scrutinised for not being able to provide a higher level of support that is beyond the scope of what the supported housing is commissioned to do but unable to oblige the agency that is responsible in theory to provide support.

Alternatively, a tenant in a high support scheme may no longer require the high level of support provided but object to a move. Where they are living in a dispersed flat, this is less problematic but if they are living in a specialist building tied to an expensive support service then their landlord may need to terminate the tenancy to help ensure effective use of the facility.

Safety of other residents

There are some types of provision for people with very high support needs where the stay is intended to be long-term or indefinite, but where it may sometimes be necessary to evict the resident at very short notice for the protection of other residents. Currently, ASTs tend to be used in this situation because although the use of section 21 is not an ideal solution, it has the advantage of certainty and relative speed compared with section 8 possession action. Some providers have made use of injunctions but these can be difficult to obtain and enforce.

Temporary housing

There are also many cases where housing is intended to be temporary. This arises, for instance, where the housing association has only a lease of a property for a

certain number of years, at the end of which it must be restored to the freeholder with vacant possession. Another example would be property that is unavailable for permanent living because of 'planning blight' (e.g. it is in the path of HS2). In this situation, no-fault possession is unavoidable; the alternative would be to leave the property empty, and take it out of use for (supported) housing provision.

In supported housing, housing associations may use ASTs in schemes where the purpose of the service is short-term (some homelessness provision, domestic abuse refuges, etc.). Most moves will be planned/positive moves, but providers may need the fall-back of being able to seek possession by exception.

A note on temporary housing provided in furtherance of local authority homelessness duties

Temporary housing for homeless people, pending determination of their case by the local authority, is already excluded from statutory security by section 209(2) of the Housing Act 1996.[4]

Need for rapid possession

Some housing associations with schemes for very challenging client groups argue that it is important for the effective management of the scheme that no-fault possession be available, so that the landlord can, in the last resort, evict a tenant without having to demonstrate grounds. This may apply, in particular, to properties involving a substantial shared area.

A note on IHM/tenancy sustainment

It is necessary to recognise that some supported housing providers have had to try and sustain residents with support needs without access to formal support funding, and therefore the role of setups that can be called "support" but are not funded through "support funding" from external sources. This includes:

[4] https://www.legislation.gov.uk/ukpga/1996/52/section/209

- tenancy sustainment services that deliver support in general needs accommodation. This is not a commissioned service and is funded by the business.
- intensive housing management paid for through enhanced housing benefit.

Any legal changes we propose to government will need to be clear enough about this distinction to avoid confusion.

Some members felt that social landlords could increasingly find themselves having to self-fund support in future. Other members felt it was unlikely they would fund support in-house if external support funding was withdrawn for short-term services and would look at ending the service instead.

Proposing a new mandatory ground for possession

We think it is essential that no-fault possession be retained in a small number of instances, particularly to deal with the examples set out in the section on how housing associations providing supported housing and temporary accommodation currently use ASTs. We believe there are two ways of achieving this:

1. Exclude the tenancy from assured status, and therefore from statutory security, by adding it to the list of exclusions in Schedule 1 to the 1988 Act, meaning that it can be ended by simple notice to quit.
2. Add new mandatory grounds for possession to Schedule 2 to the 1988 Act.

If certain categories of tenancy are excluded from assured status, they will become so-called ‘bare’ or ‘contractual’ tenancies, which will mean they lose not only security of tenure but certain other statutory rights as well, such as that of challenging rent increases. They will, however, still be subject to the landlord’s repairing covenant and fitness duty, because these do not depend on assured status.

Social housing is regulated in a way the private sector is not. Regulated housing providers should provide the maximum level of security of tenure. This has recently been restated in the National Statement of Expectations and it is therefore unlikely that the government will accept representations that request the retention of ATSs for housing provided by social landlords or charitable bodies in a context where security of tenure will increase beyond this for private tenants.

Moreover, although supported housing can use ASTs, we have received responses from members who say that they rarely use section 21 notices. We have also heard from members who are keen to provide longer-term housing wherever possible to provide stability for their residents and help them rebuild their lives. This will therefore make it difficult to argue for the retention of ASTs in our dealings with government if the means to end them are rarely used. It is therefore useful to come up with an alternative to deal where it is essential to end a tenancy quickly.

We therefore think the better approach is to create one or more new mandatory grounds to be used in section 8 for assured tenancies as a means to maintain supported housing/independent living provision.

A feature common to many (but not all) of the cases cited above is that the housing is intended, from the outset, to be only of a temporary or short-term nature. It will have been made explicit that the tenancy is not intended to provide a secure long-term home. We therefore propose that a mandatory ground for possession should be available for these temporary tenancies – to allow the flexibility that favours the resident and their needs and landlords who depend on this flexibility to be able to provide supported housing. It would only be available if the landlord had served a statutory notice before the start of the tenancy to specify why the tenancy is temporary and the circumstances in which no-fault possession may be sought. These above checks have been suggested to protect the tenant.

This would cover housing where:

- the landlord holds the property under a superior lease requiring vacant possession on termination, possession was sought within a reasonable time of the expiry of the superior lease, and provided that the superior lease was either (a) granted by a non-profit landlord in furtherance of its charitable or public-benefit objects, or (b) granted before a set date; or
- the tenancy is granted because certain characteristics that are not necessarily permanent or long-term in nature apply to the tenant or a member of the tenant's household; or
- the property was being let on the basis that it is available only temporarily because it is due for demolition or change of use, subject to 'planning blight', etc.

Many of the above instances also cover circumstances where the tenant requires support in order to maintain the tenancy successfully and that support ends because of commissioning cycles or funder withdrawal, or that support becomes inappropriate because of the tenant's changing needs. Any of these circumstances mean that if

possession is not available to the landlord, the provision is not available for use as supported housing in the way it was intended, or cannot be recommissioned as supported housing, or the tenancy may break down in a way that is traumatic for the tenant and costly for the landlord. We feel that a mandatory ground should be available in order to safeguard the availability of supported housing and protect the interests of the tenant.

The intention is that possession would be mandatory if the ground were used, but that use of the ground would be at the landlord's discretion – as with other section 8 grounds used with assured tenancies. Prior notice is also required for the use of other grounds under section 8 and is retained in the government's proposed new grounds in the consultation on the Bill – so this would be in keeping with common practice. The intention would also be to use a minimum two-month notice period.

Deliberate narrow focus of the ground

We believe removing assured status from social housing tenants should be avoided wherever possible and would be politically unjustifiable where government is seeking to increase security of tenure for private tenants. We also feel the number of mandatory grounds should be kept to a minimum. We would also suggest that removing security of tenure to below the level in the private rented sector should not be used as a way to mitigate the shortcomings of statutory services, and that the answer to this should be social care reform and increased funding for social care, or potentially more robust agreements with adult social care. It can, however, be necessary to end a tenancy where a tenant no longer requires the support that is available in a specialist scheme but refuses to move on, therefore denying that supported housing provision to someone with a higher level of need. In this circumstance, it would be preferable that the landlord work with the original tenant to find a property more suited to their lower level of need.

We therefore recommend that the above approach be applied only to a limited number of special cases in which the housing in question can be narrowly and precisely defined. This ground would therefore be intended to be used in very specific circumstances and only where the letting were offered in furtherance of supported housing providers' charitable aims, so would not be for for-profit provision.

To guard against possible abuse, statute should put clear limits on the circumstances in which such a notice allowing use of this ground may be validly served: the general effect should be to confine its use to purposes that only social landlords and other public-benefit bodies are likely to pursue.

Omitting the denomination "Registered Provider of Social Housing"

The ground as it is currently worded does not make reference to Registered Providers of Social Housing. This is to protect the interests of unregistered housing associations as well as of other socially-minded landlords, such as charities, that let homes in furtherance of their aims. The types of property that might qualify for continued no-fault possession are unlikely to be let by rent-maximising, private landlords.

We propose to use the denomination "charities or community-benefit bodies", to prevent the ground being used by individual landlords or profit-making landlords – even if registered with the RSH – to safeguard tenants. Also, some of our members are not registered with the RSH and other charities that are not housing bodies but might have housing in furtherance of their objectives, or are managing agents, would be affected by this change.

We also propose that the tenancy should be granted in furtherance of the constitutional aims of this body, so it cannot be used for market rent properties even if owned by a social landlord.

It may be necessary to be even more specific about recognition by the local authority of the landlord as an approved supported housing provider. Thinking around this will likely be helped by the work of the MHCLG supported housing team on the exempt accommodation pilots. However, we suggest that tenure reform is not the best means to tackle poor quality supported housing.

Alternative tenure type

Some members have suggested that an alternative could be to propose a specific "supported housing tenancy" model, that could either be out of scope of the reforms and therefore still able to use ASTs, or could use a mandatory ground for possession that applies to all tenancies that are of this type, modelled on Ground 3, Out of season holiday lets, or perhaps on Grounds 4 and 5, Lets to students by educational institutions and Minister of religion respectively (although these are tenant types rather than tenancy types). The government consultation on the proposed Bill raised a number of tenancy types (e.g. holiday lets, work-related lets, agricultural worker lets) that could potentially be out of scope of the new legislation, so it could be

possible to suggest that supported housing should be out of scope of the reforms and therefore still be allowed to use ASTs.

However, these suggested alternatives may be challenging to develop in practice, as this would require a workable definition of "supported housing". This would need to take into account all the many different types of supported housing provision there is and the definition of "support" could prove problematic. There could be a high risk that the definition be too tight and therefore exclude some forms of supported housing provision or too broad and allow for unscrupulous use of the tenancy type. It would also need to be very carefully defined to avoid the pitfalls that have been found in exempt accommodation oversight based on the housing benefit regulations, which MHCLG is investigating through its supported housing pilots.

Suggesting this type of tenancy might also be difficult to justify politically as it would be a type of tenure with less security of tenure than the private rented sector.

Proposed new ground

This section includes the original proposed ground. Later on in this document (skip to section), we present the revised ground, based on member feedback, for final comment.

This ground applies to:

1. *a letting by a charity or a community benefit society;*
2. *granted in furtherance of the charitable or (as the case may be) community-benefit aims of that body;*
3. *where either (a) the purpose of granting the tenancy is explicitly limited to that of providing temporary accommodation; or (b) the tenant relies for the maintenance of the tenancy on support that is provided by or for the landlord by means of funding by an agency independent of the landlord and not subject to its influence or control, or is provided directly by such an agency, and the agency ceases to fund or provide the support; and*
4. *where written notice is given in the tenancy agreement, or in a separate document served on the tenant no later than the entering into of the tenancy agreement, that this ground might be used.*

Explanatory points:

- This is intended as a new ground for possession of an assured tenancy. It would be mandatory, not discretionary.

- It is envisaged that the ground would be used by social landlords in certain limited cases where it would not be practical or safe to provide the housing if no-fault possession were unavailable.
- The circumstances in which the ground may be used have been deliberately narrowly drawn. This is to ensure that the ground cannot be used for the benefit of for-profit landlords; also to ensure that tenants of non-profit social landlords do not become subject to no-fault possession except in very limited circumstances in which the housing could not otherwise be provided.
- To safeguard tenants, the ground may be used only by charities or community-benefit bodies. Both these categories are non-profit.
  The ground would not be available to individual landlords or to profit-making landlords (even if registered with the RSH).
- The ground would be available only if the letting were in furtherance of the landlord's charitable (or community-benefit) aims. It would not be available in housing provided by a charitable or community-benefit body on any other basis, e.g. as a 'de minimis' exception, or in furtherance of the landlord's investment power.
- The ground would be available only if the housing were explicitly temporary in nature, or if the maintenance of the tenancy relied on support either provided by, or funded by, a third party outside the landlord's control. The ground would not be available, even if the tenancy was provided by a charity or community-benefit society in furtherance of the relevant aims, unless these requirements were met. For instance, it would not normally be available in lettings to active elderly tenants, because these lettings are long-term rather than temporary, and their maintenance does not require any special support. Even if the maintenance of a tenancy depended upon support, the ground would not be available if the landlord provided the support from its own resources, or by means of funds from a separate entity over which the landlord exercised control (such as a subsidiary charitable trust).
- As a final safeguard, the tenant would have to be advised in writing, no later than the point of entering into the tenancy agreement, that this ground might be used.
- Please note that the current wording of the ground represents work in progress and it is expected that if a ground were created along these lines it might be differently expressed. The purpose of the wording above is to give an idea of the scope and purpose of the ground and how it might be set out in formal terms.

Initial member feedback

The above ground was sent for comment to a select group among our supported housing membership. Their feedback is below.

Support for use of the ground

There is support for a mitigation for the repeal of section 21 through this type of ground amongst these members. A summary of the reasons why is below:

- Need to mitigate the potential for landlords no longer being willing to provide supported housing because of the perceived higher risk if tenancies can't be ended;
- Tenure type to align with commissioning (for short-term support) (but wouldn't use licences);
- Need to make it clear that the accommodation and the services are temporary;
- Need to protect tenants and avoid *traumatic breakdown of tenancies without support;*
- Need to keep move-on and not 'silt up' provision;
- Need for flexibility to end the tenancy if the support is no longer needed or the person's needs increase and the funding is no longer at an appropriate level (but wouldn't use licences).
- Otherwise temporary housing cannot be offered, especially in cases where the landlord does not have long-term control of the property.

Support for narrow focus of the ground and landlord discretion to use the ground

Members support the narrow focus of the ground because:

- They have not needed to use section 21 notices in starter tenancies for housing for older people;
- Keeping it narrow would minimise the risk of misuse;
- It would still allow them to use Housing First provision where the housing is not linked to the support;
- They rarely have to evict people in their supported schemes but need a safeguard in specific circumstances.

Need for amendments

Members felt that the ground might need to be made more explicit on the following points:

- Serving notice is intended to allow the tenant to enter move-on accommodation, or "when the person is ready to move on";
- The ground is intended to end the tenancy if support is no longer needed or the person's support needs increase;
- What is meant by "temporary",
    - e.g. in the case of homelessness provision, if the temporary offer is pre-decision by the local authority of its responsibility or after pending a move at some point into permanent;
    - or, making it very explicit that the intention was that the accommodation would be temporary even if it becomes long-term because of a lack of move-on or support needs continuing (relevant mainly to commissioning and managing agent relationships with head landlords).
- The intention of the tenancy to be supported at the outset, irrespective of whether it has later become unsupported.
- "Support" is defined in that the tenancy is dependent on it – should this be even more explicit?
- Non-engagement / anti-social behaviour – see below.
- Suggesting that the criteria for use of the ground in contracted longer-term services be widened to allow for some scenarios.

Definition of "support"

Some members felt the ground needed to be more explicit as to whether the word "support" refers to the tenant's assessed support needs or to the support received or engaged with, and take into account the nuances of what types of support are delivered and the risks the sector takes on. The proposed ground has not attempted to define "support" in general, it has defined it through whether it is needed to allow the tenancy to be sustained, so this is support received. Which support is needed to sustain the tenancy could be demonstrated through a needs assessment.

In the case of the person's needs increasing to a level that would require intervention by adult social care, this could still be construed as support that is needed to sustain the tenancy as is currently included in the wording. The clause could therefore be

worded more broadly to account not just for withdrawal or the support or the support no longer being available, but for it its presence or absence *per se*. This type of wording could also therefore apply to the person's needs decreasing. To account for the need for adult social care intervention, the ground could also make reference to the support being needed for the person's safety and wellbeing, rather than just the maintenance of the tenancy.

Some members felt that in order to limit the proposed new ground for use by not-for-profit and charitable landlords, what constitutes "support" should be determined by reference to a recognition by the local authority of the landlord as an approved supported housing provider.

It should be borne in mind that the final definition and wording will be decided by government, and we are providing a suggestion.

Definition of "temporary"/"short-term"

Some members felt that if the ground references "temporary" accommodation, it would be sensible to define what is meant by "temporary" in terms of length of time:

- Is this the same definition used by local authorities when determining access to benefits?
- Are we referring to accommodation provided under the Housing Act 1996 s193(2) duty to secure accommodation for applicants who are homeless, eligible for assistance, have priority need and are not intentionally homeless (the main housing duty)?[5]
- Do we mean short-term/holiday lets (maximum 90-days in London, no specific limit elsewhere)?[6]
- If "temporary" were defined by case law, this could mean uncertainty for members as to whether they could rely on the ground:
    - e.g. tenancies granted on the understanding that the supported tenancy would be temporary but the tenant continues to need support, in arrangements where the housing association is cannot offer a lifetime tenancy (as the property is leased from a superior landlord).

[5] See https://www.gov.uk/guidance/homelessness-code-of-guidance-for-local-authorities/chapter-15-accommodation-duties-and-powers; https://www.legislation.gov.uk/ukpga/1996/52/section/193
[6] See https://commonslibrary.parliament.uk/research-briefings/cbp-8395/

- e.g. if a housing association served a notice under the new mandatory ground, the prescribed notice period and court timetable might mean the tenant is still in situ for several months and a judge might determine that the accommodation is no longer “temporary”, nullifying the notice.

Some members felt it was important to ensure that there was no timescale attached to the ending of the support contract and the validity of the proposed ground, e.g. if support funding ceased last year, they would still want to be able to use this ground to end the tenancy as it was originally intended to have support attached.

Non engagement/ASB

Some members have expressed a desire for flexibility to end a tenancy in the case of non-engagement with support/anti-social behaviour (but they wouldn’t use licences), to make it clear that the tenancy is intended to be temporary and dependent upon support, and so that the tenancy is available for someone who needs it and will engage. This is a minority view and some members expressed that they would prefer to use longer tenancies if possible and provide an additional level of tenancy security as a general rule, as well as a flexible approach to engagement, such as Housing First.

It could also be challenging for this to be part of a mandatory ground as it would require evidence that could not be construed as subjective and not allow criticism of the support provided as a reason for non-engagement. Providers would also have to prove that the support is a condition of the tenancy, rather than a condition on the person in order to justify using the person not engaging with support as a reason to end the tenancy. See the 1998 PCHA v Boateng case for more information.

Non-engagement could be suggested as discretionary grounds instead that would require evidence from the landlord or support provider. If this were suggested, members would potentially prefer the evidence not to be onerous. Onerous grounds could have a negative impact on supported housing supply because of the increased risk of providing it. Not wishing to affect supply by imposing overly onerous requirements is also the logic behind MHCLG’s National Statement of Expectations. However, there are already grounds in section 8 that relate to anti-social behaviour.[7]

[7] See https://www.gov.uk/government/publications/understanding-the-possession-action-process-guidance-for-landlords-and-tenants/understanding-the-possession-action-process-a-guide-for-private-landlords-in-england-and-wales#what-to-do-if-your-tenant-is-engaging-in-anti-social-behaviour

New proposal

Taking into account feedback from the membership, we propose to make a number of changes to the wording of the ground. The new proposal is below.

This ground applies to:

1. *a letting by a charity or a community benefit society;*
2. *granted in furtherance of the charitable or (as the case may be) community-benefit aims of that body;*
3. *where either (a) the purpose of granting the tenancy is from the outset explicitly limited to that of providing temporary accommodation (specifically defined); or (b) the tenancy is a designated short-term tenancy; or (c) the tenant relies for the successful maintenance of the tenancy or for their own safety and wellbeing on support that is provided by or for the landlord by means of funding by an agency independent of the landlord and not subject to its influence or control, or is provided directly by such an agency, and the agency ceases to fund or provide the support; or (d) the tenant relies for the successful maintenance of the tenancy or for their own safety and wellbeing on support and this support is no longer available; or (e) the support that is provided to the tenant is not in line with the tenant's needs; and*
4. *where written notice is given in the tenancy agreement, or in a separate document served on the tenant no later than the entering into of the tenancy agreement, that this ground might be used.*

Explanatory points:

- This is intended as a new ground for possession of an **assured tenancy.** It would be mandatory, not discretionary.
- It is envisaged that the ground would be used by social landlords in certain limited cases where it would not be practical to provide the housing if no-fault possession were unavailable.
- The circumstances in which this ground may be used have been deliberately narrowly drawn. This is to ensure that the ground cannot be used for the benefit of for-profit landlords; also to ensure that tenants of non-profit social landlords do not become subject to no-fault possession except in very limited circumstances in which the housing could not otherwise be provided.
- The ground is also intended to mitigate the potential negative impacts on supported housing supply.
- To safeguard tenants, the ground may be used only by charities or community-benefit bodies. Both these categories are non-profit.

The ground would not be available to individual landlords or to profit-making landlords (even if registered with the RSH).

- The ground would be available only of the letting was in furtherance of the landlord's charitable (or community-benefit) aims. It would not be available in housing provided by a charitable or community-benefit body on any other basis, e.g. as a 'de minimis' exception, or in furtherance of the landlord's investment power. The local authority may have a process for recognising landlords as approved supported housing providers.
- If the ground were to be used in respect of temporary accommodation, the accommodation should have been intended to be temporary from the outset, regardless of how long the tenancy has been in existence for. The meaning of "temporary" should be specified when the tenancy is drawn up.
- The word "support" refers to the support received or engaged with rather than the tenant's assessed support needs. How much and what type of support that is needed to maintain the tenancy can be evidenced with a needs assessment.
- As a final safeguard, the tenant would have to be advised in writing, no later than the point of entering into the tenancy agreement, that this ground might be used. As stated in the ground, written notice could be given in the tenancy agreement, or in a separate document.
- Please note that the current wording of the ground represents work in progress and it is expected that if a ground were created along these lines it might be differently expressed. The purpose of the wording above is to give an idea of the scope and purpose of the ground and how it might be set out in formal terms.

Other considerations

How long ASTs/section 21 can still be used for

Members have asked for assurances from government that section 21 will still be available for use to bring existing tenancies to an end and that there will be no time limit to this provision. There appears to be talk of a "transition period" in which section 21 notices could still be used to terminate existing tenancies but members have asked for assurance that this "transition period" would only end once all pre-existing ASTs have come to an end. If any "transition period" were a defined period of time and there were a requirement to advise the tenant before sign-up or within the tenancy agreement that the new mandatory ground may be used, this would preclude the new ground being a viable option for bringing older tenancies to an end.

Properties being used to provide housing which are held on a short lease

Members have raised the need for a way to end tenancies that are offered under existing leasing arrangements (main landlord leases property to other landlord or managing agent to provide support), where the terms of the lease require hand back with vacant possession, so that the tenancy can be ended if the lease comes to an end. In order to comply with this requirement, a housing association will let the premises on an AST so that section 21 may be used to terminate the tenancy as the end of the lease approaches. This is to ensure that the landlord is not in breach of lease obligations to a superior landlord. Otherwise, there could be legal conflicts, as providers cannot grant assured tenancies on properties they do not own and are let under short leases.

These types of arrangements are not specifically covered by the proposed amendments, although they would be covered so long as the properties were only intended for use with short-term lettings. Potentially problematic could be, for example, small supported living schemes. These have been let on ASTs but the properties provide supported living for people with learning difficulties and almost certainly would not be considered “temporary accommodation”.

It appears that the government’s intention is that existing ASTs could be ended in the usual way and so the legislation would still apply to existing tenancies under existing lease arrangements. However, it may be necessary to suggest another mandatory ground that would allow the end of an assured tenancy if a lease were to come to an end, if the government places a time limit on landlords being able to issue section 21 notices on pre-existing tenancies.

With regard to leases entered into by associations in the expectation that section 21 would be available, we feel it would be reasonable to seek a specific legislative exemption to allow no-fault eviction as the end of the lease approaches. **We welcome feedback on the idea that a ground like this should be available in cases where the lease were entered into before the government announced its intention to repeal section 21**, as parties would have entered in good faith into an agreement on the assumption that they would have been able to give vacant possession. **Another option is to allow a ground like this to be available to leases entered into before a certain date, to be defined by government.**

However, applying the same approach to new leases, as opposed to existing ones, raises more difficult issues. We do not support a blanket rule allowing no-fault possession near the end of a superior lease because this would open up a possible avoidance mechanism allowing continued access to no-fault eviction. Using the formula above (the lease was entered into before the government's announcement that it wished to repeal section 21 or before a certain date) would be a safeguard against potential loopholes.

Housing supply and support-funding cycles

In all cases, members feel there is a need to call for more social housing – so there is somewhere to move on to. Multi-year funding settlements would also allow for longer term support for people who need it (but would still necessitate a means of ending the tenancy).

Next steps

Please send feedback on the points below to suzannah.young@housing.org.uk by 19 July 2021.

1. **Do you support the revised wording of the proposed ground? If so, we will put this to government as our proposal for supported housing and temporary accommodation in discussions with them about the forthcoming white paper.**
2. **Do you feel a ground like our proposal on leases should be available in cases where the lease were entered into before the government announced its intention to repeal section 21?**
3. **Alternatively, do you feel a ground like our proposal on leases should be available to leases entered into before a certain date, to be defined by government?**

Thank you.