

Crawley Borough Council

**Report to Overview and Scrutiny Commission
22 November 2021**

**Report to Cabinet
24 November 2021**

Crawley Homes Rent Overcharge

Report of the Deputy Chief Executive, **DCE/11**

1. PURPOSE

- 1.1 In April 2021 the Council became aware of a historic overcharge of some Crawley Homes rents. Since that discovery the Council has worked at pace to develop solutions for what is a complex and significant issue, that allow for refunds to be provided. These solutions have been agreed and implemented under existing delegated powers. The purpose of the report therefore is to provide a formal public record and the reasons behind the rental overcharge; the actions being taken to rectify this and the associated financial impact; and ask that Full Council approve the necessary financial changes.

2. RECOMMENDATIONS

- 2.1 To the Overview & Scrutiny Commission:

That the Commission consider the report and decide what comments, if any, it wishes to submit to the Cabinet

- 2.2 The Cabinet is recommended to:

- a) Note and comment on the reasons behind, and the actions being taken to rectify, the rent overcharge
- b) Endorse that Full Council makes the necessary financial provision for both for the refund of rent and the lower income anticipated within the Housing Revenue Account in both the current and future years

- 2.3 Request Full Council to:

- a) Note and comment on the reasons behind, and the actions being taken to rectify, the rent overcharge
 - b) Agree the necessary financial provision for both for the refund of rent and the lower income anticipated within the Housing Revenue Account in both
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the current and future years. The cost in the current and future financial years will result in less resource to fund future housing.

- c) Note that the cost of the refunds made to tenants/DWP will impact in the current financial year the sum that will be transferred to the major repairs reserve for investment in future housing stock. This will be reported in the Quarter 3 Budget Monitoring Report

3. REASONS FOR THE RECOMMENDATIONS

- 3.1 In April 2021 the Council was contacted by the Regulator for Social Housing following a first mandatory data return about the setting of target rents. The Council was identified as an outlier in that its target rents were higher than the Government's formula rent and valuations suggested they should be.
 - 3.2 Forensic investigation identified that the issue dates back to changes to the Tenancy Agreement agreed in October 2013 and implemented in April 2014. One of the changes implemented was to move from charging rent based on a 48-week year to a 52-week year. Actual rents were changed but the target rents on the system were not. This has affected 2,259 tenancies, of which 1,757 are current tenancies.
 - 3.3 Existing tenancies were not affected by this change, and neither have new tenancies within properties built since April 2014. New tenancies since April 2014 within properties that pre-date April 2014 have consequently been overcharged in the region of 8%.
 - 3.4 Tenants have paid the rent they would have signed up to pay as part of their Tenancy Agreement, but that rent level was set higher than it ought to have been. Given that rents have been set as part of a valid Tenancy Agreement and that all subsequent actions have been taken in line with that Tenancy Agreement, the Council has acted legally throughout.
 - 3.5 The Leader and Cabinet Member were informed at the end of April 2021 and were clear that this needed to be resolved consistent with natural justice and transparency, and as quickly as possible. The Leader of the Opposition Group was also informed and agreed this needed to be resolved in a way that had the least possible impact on residents, and that wider communication should be at a time when the Council was ready to rectify the problem.
 - 3.6 Given the scale and complexity of the issue it has taken a number of months to put everything in place in order to proceed. All members and all affected tenants have been informed and from mid-November steps are being taken to reset the rents at the correct level and to refund all tenancies affected. These steps have been taken under existing delegated powers, but it is important that there is an official record of the steps being taken and the need
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to make the necessary financial adjustments.

4. BACKGROUND

Complexity & Scale

- 4.1 The number of tenancies affected has been significant. The following table sets out the key headlines:

Year	Current	Former	Total	HB	Evicted	NOSP	SPO
2014-15	203	137	340	299	7	9	3
2015-16	187	92	279	259	0	6	0
2016-17	258	92	350	300	2	14	1
2017-18	217	80	297	243	4	17	2
2018-19	251	53	304	201	1	15	0
2019-20	348	37	385	183	0	12	0
2020-21	259	11	270	92	0	0	0
2021-22	34	0	34	8	0	0	0
TOTALS	1,757	502	2,259	1,585	14	73	6

- 4.2 Within these numbers are a wide variety of circumstances. In total 16 different tenancy scenarios were identified that informed the design of the solution taken:
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Current or Former Accounts		Account rent payment type
1	Current	In receipt of Housing Benefit (HB) <u>currently</u> , either part or full.
2	Current	In receipt of HB historically and now cash receipting (and has never been in receipt of Universal Credit (UC) housing costs) In receipt of HB historically and now cash receipting (but in receipt of UC housing costs either full or part currently). In receipt of HB historically and now cash receipting (and has been in receipt of part UC housing costs at some point but not currently) In receipt of HB historically and now cash receipting (and has been in receipt of full UC housing costs at some point but not currently)
3	Current	In receipt of full HB historically, HB ceased at some point, and now rent is paid by APA in full. There is no gap between the HB payment and APA payment.
4	Current	In receipt of full HB historically, HB ceased at some point, and rent was paid by SO (possibly APA) and now rent is paid by APA in full. There is no gap between the HB payment and SO/APA payment.
5	Current	In receipt of full HB historically, HB ceased at some point, and rent was paid by cash receipting for a period and now rent is paid by APA in full.
6	Current	In receipt of part or variable HB historically, HB ceased at some point, and rent was paid by SO in part (possibly APA) and now rent is paid by APA in part (so basically no gap).
7	Current	In receipt of part or variable HB historically, HB ceased at some point, and now rent is paid in part by APA. There was a gap between when the HB stopped and when the APA payment started which was not covered by a SO payment.
8	Current	Never been in receipt of HB, always cash receipting. These accounts may have gone on to UC at any point since 2014 (few of these) or after June 2018 (many of these).
9	Former	In receipt of HB at tenancy termination, either part or full.
10	Former	In receipt of HB historically but was cash receipting at termination (and was never in receipt of UC housing costs). In receipt of HB historically but was cash receipting at termination (and was in receipt of UC housing costs either full or part at termination). In receipt of HB historically but was cash receipting at termination (and was in receipt of part UC housing costs at some point but not at termination). In receipt of HB historically but was cash receipting at termination (and was in receipt of full UC housing costs at some point but not at termination).
11	Former	In receipt of full HB historically, HB ceased at some point, and then rent was paid by APA in full. There is no gap between the HB payment and APA payment.
12	Former	In receipt of full HB historically, HB ceased at some point, and rent was paid by SO (possibly APA) and then rent was paid by APA in full. There is no gap between the HB payment and SO/APA payment.

13	Former	In receipt of full HB historically, HB ceased at some point, and rent was paid by cash receipting for a period and then rent was paid by APA in full at the termination date.
14	Former	In receipt of part or variable HB historically, HB ceased at some point, and rent was paid by SO in part (possibly APA) and at termination rent was paid by APA in part (so basically no gap).
15	Former	In receipt of part or variable HB historically, HB ceased at some point, and then rent was paid in part by APA until termination of tenancy. There was a gap between when the HB stopped and when the APA payment started which was not covered by a SO payment.
16	Former	Never been in receipt of HB, always cash receipting. These accounts may have gone on to UC at any point since 2014 (few of these) or after June 2018 (more of these).

- 4.3 This scale brings with it a level of complexity. Officers had to undertake analysis and rectification through the Council's software providers, often requiring bespoke script and creation of duplicate databases to test approaches and solutions. Doing so required significant time and planning for capacity that the Council was not always in control of. This was the only way to make sure this problem is not compounded by more errors.
- 4.4 Over 70% of these tenancies were in receipt of Housing Benefit. For each of the tenancies, the list produced by the housing system needed to be run through the Housing Benefit system. Similarly, this was not straightforward, requiring significant testing, reformatting and manual inputting to achieve. Through this work the Council now understands how much is owed to the tenant and how much to the Department for Work & Pensions (DWP).
- 4.5 Tenancies with residents in receipt of Universal Credit is more complex again as the Council does not administer this benefit. The calculations determining levels of Universal Credit are also more complex. Data sharing mechanisms have needed to be agreed to share 661 records that are UC claimants. UC have informed the Council that they will not be able to look at closed accounts. They are also unable to explore accounts prior to 6 June 2018. Tenants will therefore benefit from the full refund in those scenarios. Work continues with DWP to agree the optimal approach for live accounts.
- 4.6 The process for rectification is similarly complex:
- Regulations require a 28-day period prior to implementation of a change of rent. This applies to decreases as well as increases. Following legal advice, a decision has been taken to make the 28-day notice but to accept payment of the lower rent level ahead of the implementation date. This will reduce the gap between notification and resetting rent levels.
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- There is a 10-day notice period required prior to a change of Direct Debit. This is not moveable. The date chosen for implementation has been chosen to minimise the complications related to this requirement.
- Because Housing Benefit has been charged at an incorrect level, each account affected will need to be recalculated on the revised corrected rents. The tenant will be advised of their new entitlement. A full audit of all the charges will be logged and will be subject to external audit.
- It is not possible to simply refund all existing tenants at once. There is also a risk that in doing so automatically we will issue refunds contrary to what might be a resident's wishes. The solution is therefore to place the refund first on the rent account so that residents can see it is there, and then to have a further discussion about the refund arrangements. This will require some time to work through.
- Former tenants will need to be traced and contacted to determine their wishes and ensure bank details are correct. For some former tenancies there will be added complications, for example people having passed away or having separated, requiring a case-by-case approach.

Legal Position

- 4.7 Legal advice received is that the Council's unilateral mistake, which benefitted the Council, does not create a criminal offence. The tenancies affected commenced after April 2014 were subject to a Tenancy Agreement that both parties signed. The rent paid has been consistent with that Tenancy Agreement.
- 4.8 Local authorities have only been subject to the Rent Standard under the auspices of the Regulator for Social Housing since 1 April 2020. Strictly, it is the failure to comply with the Standard from that date that the Council needs to address. The Council's priority from a legal perspective must therefore be to satisfy the Regulator that it has addressed this issue adequately, and to obtain written confirmation of the same from the Regulator.
- 4.9 Although the Council may not have to repay the full amount legally, such is not consistent with the concept of natural justice, and it is not the position this Council is taking. It is important that the Council continues to act in line with the Tenancy Agreement/contract law when rectifying this situation to avoid the Council being subject to future legal challenge even if its intentions are good.
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Regulatory Considerations

- 4.10 Officers have been in regular contact with the Regulator for Social Housing who have informally supported the approach being taken by the Council. A key consideration was both the Council's work with DWP and the approach being taken towards tenants. A final report will need to be submitted setting out the final position reached. This will be a copy of the report that goes to Cabinet/Full Council (see Communications Plan). Once received the Regulator for Social Housing will make its formal determination.

Evictions & Possession Notices

- 4.11 As with the legal position set out above, advice received is that the Council has acted legally in enforcing the Tenancy Agreement and in the way it undertook possession proceedings. As a result, there is no risk in relation to any challenge for these actions. Any decision to offer recompense or compensation therefore would be because the Council believes it is the right thing to do, rather than something it must do.

5. DECISIONS TAKEN

- 5.1 The processes set out in Section 6 have been designed to ensure:

- Consistency with natural justice and transparency
- Minimum possible impact on tenants affected by ensuring that the rent and benefit solutions are aligned and as automated as possible
- Shortest possible turnaround time from the point of announcing this to minimise tenant uncertainty and angst, and also the added demand upon services therefore impacting on other functions
- Compliance with legal and regulatory expectations and guidance.

- 5.2 There are a number of further decisions that have been taken as part of finalising the process:

- **Refunds**

At the outset a decision was taken to provide a refund in full. There was no obligation to do so legally. The Council was outside of the regulatory framework until April 2020, and so would only have had to offer a refund to that date.

- **Compensation/Interest to Tenants**

Legal advice taken is against making pro-active payments of compensation. Doing so would create numerous legal, practical and resource issues. This is because the Council has acted both legally and properly through a valid Tenancy Agreement. Instead, the Council is (a) taking steps set out in this note to address the issue to the Regulator's

satisfaction; (b) dealing with any complaints individually, in accordance with the Council's internal complaints procedure; and (c) in the event of a subsequent complaint to the Ombudsman, rely upon the action the Council is now taking to dissuade the Ombudsman from proceeding further.

- **Eviction Cases & Possession Orders**

Again the Council has acted both legally and properly in relation to evictions and possession orders. The decisions taken are not at risk. The legal advice taken is to look at each case individually. Were the Council to decide to address an eviction case, it would offer the former tenant a tenancy of another property. This would need to be in accordance with the Council's Allocations Policy and the current policy contains sufficient discretion for this to happen.

Only 14 cases of eviction have taken place within the tenancies affected. Of these, five evictions had ASB as the primary cause. Of the nine rent arrears evictions, only in one case would the overcharge have made a material difference. None of the other cases are even marginal. This leaves just one case to address, and this will be undertaken in due course.

- **Refund to Rent Account first for current tenancies**

There have been two considerations here. The first is logistics and ensuring that the refund appears where tenants can see the amount as quickly as possible. The second is the Council needs to understand the wishes of the tenants in terms of how the amount is refunded, such as where there are more complex arrangements or changes in circumstances among tenants since the tenancy was created. The best solution is therefore to place the refund on the rent account first and then address the provision of any refund in due course.

- **Refund to former tenancies**

Refunds to former tenants will be more complicated and will therefore be addressed once we are on top of live tenancies. For instance, there are potential complications with some that may involve separations within a household, or tenants that have deceased, where the Council will need to take a case-by-case approach.

- **Consideration of rent arrears**

By paying the refund initially into the rent account, any arrears that might be owed will be automatically addressed. There may be challenge here where a tenant decides they wish for the full amount to be refunded into their bank account, however the Council would be reasonable in settling

the arrears first prior to any refund. This is also in the best interests of sustaining the tenancy.

- **Consideration of wider corporate debt**

A number of the tenancies will owe money to the Council in other areas of operation e.g., Council Tax debts. However the Council has taken the view that this must be kept separate to the issue of rent and will not take this into consideration.

6. PROCESS FOR RECTIFYING

6.1 The key steps and milestones have been and are as follows:

- Rent notification letters informing those tenants affected were sent on 3 November. Media briefings were provided on 4 November. This will be the first any tenants know that there is an issue with their rent. This letter fulfils the legal requirement to make a change in rent.
- A dedicated [webpage](#) also went live on 4 November providing a route for further information, frequently asked questions and a secure route for contact. The information available on the webpage will develop over time.
- Between 8 and 12 November corrections are being made (at the time of writing) to both the housing and Housing Benefit systems, and in so doing will determine new rent levels, the level of refunds due to the tenant, and the level of repayment back to the Department for Work & Pensions (DWP).
- The Council is also working with DWP on Universal Credit to automate this process as much as possible for the tenant. The Council does not have control of this and at the time of writing we await final information on the exact solution.
- Refund amounts will be placed on rent accounts by week commencing 15 November for most tenants.

6.2 Once this has been completed the process of arranging refunds, adjusting Direct Debits, resetting Tenancy Agreements and working with the tenants affected will begin. A further letter will be sent to all tenancies affected week commencing 15 November confirming:

- New weekly rent level and Housing Benefit entitlement
 - How much total credit overpayment has been applied, with a breakdown of how much of the overpayment was due to the DWP (for Housing Benefit)
 - An update regarding repayment of overpaid Universal Credit Housing Costs
 - Current balance of rent account – which may result in a possible refund
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- Details of how to request a refund of any balance owed
- 6.3 Housing Officers will then contact all tenancies requesting a refund to arrange this. It is estimated that it will take 4 weeks to complete for existing tenancies. This time would be a minimum given the likelihood of complications. To achieve this Housing Officers will prioritise this area of work over all tasks bar lettings, mutual exchanges and emergencies.
- 6.4 Further work will be required for former tenants, especially where we no longer have an address for them. There will also be additional complexities for some former tenancies, for example where someone has passed away or where there has been a change in household circumstances. It is therefore likely to take longer to process all refunds to former tenants. Current tenants will therefore be prioritised.
- 6.5 From a tenant perspective, this is how the refund will work for each cohort:
- All existing tenants will initially have the refund placed on their rent account, so that they can see that the refund has been made immediately. The tenant will then have the choice for that money to remain on the rent account or be transferred to their bank account
 - Former tenants will also be contacted in time, however, if we do not hold their move on address, or if they have moved on again since, work might be required to establish their whereabouts
 - Existing and former tenants who have not been on benefits throughout the period will receive the refund in full
 - Existing and former tenants who are, or who have been, on Housing Benefit will receive a refund based on the net amount after Housing Benefit is removed
 - Universal Credit claimants with closed accounts (that is have been on UC but are no longer) will not need to declare this to DWP
 - The situation for those with existing UC accounts is more complicated and is currently being worked on. Tenants will benefit from the full refund for the time prior to 6 June 2018 as the DWP system cannot see further back than that.
 - Tenants who have been recipients of both Housing Benefit and Universal Credit over time will have both of the above measures applied as appropriate.
 - Evicted tenants will be assessed on a case-by-case basis (see 5.2 above).
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7 IMPLICATIONS

Financial

- 7.1 During the week commencing 8 November the Council has been undertaking the adjustments on the housing and housing benefit systems. The total refund is expected to be in the region of £3.3m. From this amount around up to £1.7m is overpayment of Housing Benefit and will be repaid to DWP. At the time of writing the Council is unable to say with any accuracy the scale of refund to DWP for overpaid Universal Credit Housing Element.
- 7.2 Once the amounts due to DWP have been discounted, the remainder will be the total refund to current and former tenancies. The amount each tenant will receive will vary greatly depending upon the level of benefit support received towards the payment of rent, and the length of the tenancy.
- 7.3 In addition to the one-off refund, the resetting of the rents affected to a lower but correct level will reduced overall income to the Housing Revenue Account. At the time of writing the Council is not yet in a position to confirm the exact amount but based on earlier work it is estimated that the reduction in income will be in the region of £700-800k per year.
- 7.4 The cost of both the refund and the reduction in future income will be borne by the surplus within the Housing Revenue Account. These are the monies used to increase the housing stock within Crawley Homes. The impact will therefore be to reduce the future number of Crawley Homes properties that can be built or purchased. There will be no impact upon the services that tenants received.
- 7.5 There is currently no provision for these costs and so Full Council will be asked to agree the necessary financial provision for both for the refund of rent and the lower income anticipated within the Housing Revenue Account. This will result in lower income being transferred to the Major Repairs Reserve annually to provide new housing.

Legal

- 7.6 The legal implications are set out in paragraphs 4.7 to 4.11 and are taken account of fully within the decisions taken as set out in Section 5.

8 BACKGROUND PAPERS

None

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