

This manual is a guide for landlords and agents with some experience. Although it will also be useful for the inexperienced, every reader should be aware that the laws and procedures applicable to housing are complex and this guide is not a substitute for taking professional advice from a suitably experienced person before making important decisions.

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3. Setting up a Tenancy

3.1 Types of Tenancies

A tenancy is a contract on mutually agreed terms between a landlord and a tenant. Landlords or prospective landlords should understand the various types of tenancies, which have different rights and obligations.

3.1.1 Assured and Assured Shorthold Tenancies

These types of tenancies are governed by the statutory code set up in the Housing Act 1988, which was amended slightly by the Housing Act 1996. The vast majority of tenancies today will be assured shorthold tenancies. Both assured and assured shorthold tenancies can charge a market rent for the property.

3.1.2 The Main Differences Between an Assured and an Assured Shorthold Tenancy

Assured Shorthold Tenancies

"Assured shorthold tenancies (ASTs) are now the "default" type of tenancy. If a property is let, and it does not fall into one of the exceptions outlined below, it will automatically be an AST. If a property is let without a written agreement, which is most unwise, then that too will be an AST.

An AST can be for any term (the rule requiring them to be for a minimum term of six months was abolished by the Housing Act 1996), although in fact the vast majority of tenancies are for terms of at least six months.

The main benefit of ASTs for landlords is that they can recover possession of the property without needing a reason, provided any fixed term has expired and the proper form of notice has been properly served. The notice is known as a section 21 notice, as the landlord's right to recover possession and the notice procedure is set out in section 21 of the Housing Act 1988. The notice must be served on the tenant at least two months before the landlord wants the tenancy to end. A notice issued on or before the end of the fixed term must last at least two months but may end on any given date. The notice must be in writing but does not have to be in a particular form.

Assured Tenancies

The non-shorthold version of the assured tenancy gives tenants long-term security of tenure, and tenants are entitled to stay in the property until either they choose to go, or the landlord can gain possession on one of the 17 grounds listed in Schedule 2 of the Housing Act 1988. Possession under the 'no fault' section 21 procedure is not available for assured tenancies.

Before 28 February 1997 assured tenancies were the 'default' type of tenancy, and some of the assured tenancies in existence today were created by mistake, through landlords not following the proper procedure required at that time, to create an assured shorthold tenancy. Landlords should seek advice if they are unsure which type of tenancy applies.

3.1.3 Choosing an Assured or an Assured Shorthold Tenancy

The vast majority of landlords will wish to create an assured shorthold tenancy. If the property is subject to a mortgage, most mortgage companies will also insist that all tenancies are assured shorthold tenancies. A landlord might consider letting a property under an assured (not shorthold) tenancy, where recovery of possession will not be required, and the landlord wishes the tenant to have security of tenure (for example a tenancy agreement with a family member or former employee).

Landlords should proceed with care and seek legal advice before agreeing an assured tenancy, as it will entail loss of the right to recover possession, perhaps during the landlord's lifetime, as these tenancies can be passed to spouses.

3.1.4 Setting up an Assured Tenancy

If a landlord wishes to create an assured tenancy, this can be done by giving notice to the tenant, clearly stating that the tenancy being created is an assured tenancy rather than an AST. There is no prescribed format for this. It is best done as part of the tenancy agreement, but can also be a separate form of notice, served either before or after the tenancy has been entered into.

3.1.5 Tenancies Which Cannot be Assured or Assured Shorthold Tenancies

In some circumstances the statutory codes set up by the Housing Act 1988 will not apply. The tenancy may be governed by some other Act of Parliament, or simply be subject to the agreed terms of the contract (usually called contractual tenancies) and/or the underlying 'common law'.

Tenancies excluded from being assured or assured shorthold tenancies include:

- where the tenancy began, or which was agreed, before 15 January 1989 (this will normally be governed by the provisions of the Rent Act 1977);
- where the property is not the only or principle home of the tenants;
- where the rent is more than £25,000 a year;
- where the rent is £250 or less a year (£1,000 or less in Greater London);
- a company let;
- the tenancy has been granted to a full time student by an educational body such as a university or college;
- a holiday let; or
- a letting by a resident landlord (i.e. where the landlord and tenant live in the same building as originally constructed, most commonly where landlord and tenant share some part of the accommodation, this is usually a licence/lodger situation not a tenancy).

In the circumstances set out above the tenancy will be governed by the contractual agreement or if there is no agreement, the common law. Note that the chief significance of a property not being an assured or an AST is that the procedures for recovery of possession are different.

3.1.6 Tenancies Which Can be Assured, but not Assured Shorthold, Tenancies

The following tenancies cannot be assured shorthold tenancies:

- those where there is an existing tenant with an assured tenancy. An existing assured tenancy cannot be converted into an AST, for example by issuing a new form of tenancy agreement. This applies whether or not the fixed term in the tenancy agreement has expired;
- an assured tenancy which the tenant has succeeded to on the death of the previous regulated (pre1989) tenant under the 'succession' rules;
- an assured tenancy following a secure tenancy as a result of

the transfer of the tenancy from a public sector landlord to a private landlord;

- an assured tenancy arising automatically when a long leasehold tenancy expires.

3.1.7 Fixed Term Tenancies

An assured or assured shorthold tenancy may be a fixed term tenancy, which lasts for a fixed number of weeks, months or years. The length of the fixed term will be set out in the tenancy agreement.

Most tenancies have a fixed term of either six months or a year, but the fixed term can be of any length although advice should be sought if agreeing a fixed term of more than three years as particular procedures apply. After a fixed term has expired it can be allowed to run on [see section 3.1.8 below] or a new fixed-term agreement can be entered into.

3.1.8 Periodic Tenancies

An assured or assured shorthold tenancy may be a periodic tenancy that runs indefinitely from one rent period to the next. (This is sometimes known as a rolling tenancy). There are two types of periodic tenancy. The contractual periodic tenancy is one that is periodic because the contract says it is periodic, typically because the initial letting was set up as a periodic tenancy. The second type is a statutory periodic tenancy and this exists because a fixed term tenancy has expired, the tenant has remained in the property and no new agreement has been set up.

Periodic tenancies can exist either from the start of the tenancy, or after the fixed term in a tenancy expires. The periods of the tenancy are defined by the rent payment periods. This is the period of time for which the tenant pays rent, typically a week or a month. If the tenant moves in on the 15th of the month and then pays the rent in advance on the 15th of each month, the periods will be the 15th of one month to the 14th of the next month.

It is important when setting up an AST that landlords clearly identify what dates the rent is payable, and whether rent is payable in advance (the norm) or in arrears (the exception). This clarity ensures that if a fixed term AST does roll over into a statutory periodic tenancy, both landlords and tenants know what the periods of the tenancy are, and can give the correct periods of notice.

If tenants remain after the fixed term they do not become 'squatters'. They do not acquire additional rights if they stay as a periodic tenant for a long time.

Notices to end a Periodic Tenancy must be given for at least two months, end on an end date of a period of the tenancy and specify that possession is required by virtue of Section 21 (4) of the 1988 Housing Act.

3.1.9 Initial Period of an Assured Shorthold Tenancy

An AST tenancy can be set up as a periodic tenancy from the outset, but more usually the landlord and the tenant will agree an initial fixed term. There is no minimum fixed term prescribed by law, but regardless of what the landlord and tenant agree, assured shorthold tenants have a right to stay in the premises for a minimum period of six months. Under the section 21 possession procedure, a judge cannot grant an order for possession to take effect during the first six months of an AST. This means that even if a fixed term of less than six months or a periodic tenancy is agreed from the outset, there is not a guaranteed right for the landlord to recover possession until the initial six months has expired. (If the initial term was less than 6 months there is no reason why proceedings for possession

cannot be commenced before the six months is up but the possession order will not take effect till the end of the six months).

Possession can also be sought during this initial period, or during a fixed term under some of the statutory grounds for possession in Schedule 2 of the Housing Act 1988. The most important of these is for non-payment of rent, but for more information on this see the separate section on possession claims [see *Chapter 5 on possession*].

These rules do not apply to non-Housing Act 1988 tenants (see the list in section 3.1.5 above).

Non-Housing Act 1988 tenants can be evicted at the end of a fixed term, by serving notice to quit to end a periodic tenancy, or for breach of tenancy (including non payment of rent), by applying to the court. Comparatively few tenancies are non-Housing Act 1988 tenancies and they can only be created in the special circumstances set out in 3.1.5 above.

3.1.10 Regulated Tenancies

Most lettings by private landlords which began before 15th January 1989 are regulated tenancies under the Rent Act 1977 unless the landlord and tenant live in the same house. Regulated tenants have greater security of tenure and are subject to rent control.

A tenant whose tenancy is regulated by the Rent Act 1977 is unlikely to be evicted unless significant rent arrears have been accumulated or the landlord is able to provide suitable alternative accommodation. More information can be found in the leaflet 'Regulated Tenancies' available from the CLG website at www.communities.gov.uk.

3.1.11 Licences

A licence is where someone is allowed to occupy property but does not have a tenancy. The 'licence' or permission of the owner prevents the occupier from being a trespasser. Some of the protective legislation for occupiers does not apply to licences.

The three main tests for a tenancy are:

1. exclusive possession;
2. a fixed or periodic term;
3. the payment of rent.

If these three factors are present, there will be a tenancy.

If the occupier does not have exclusive possession, i.e. they share, say, the bedroom, then they will only be a licensee. The essential difference between a tenant and a licensee will be having exclusive possession. A person who has exclusive possession of residential premises for a definite period is a tenant unless there are exceptional circumstances. The rules around how much of the property they have to have exclusive occupation of differ between Housing Act 1988 tenancies and non-Housing Act 1988 tenancies.

Other circumstances where a tenancy will not occur are 'serviced' accommodation where the landlord needs to have frequent access for cleaning and meals are provided, such as in a hotel, and where the occupier shares living accommodation with the landlord (here the occupier is normally referred to as a lodger).

Simply calling a document a licence does not mean that it is not a tenancy.

The Courts are careful to ensure that sham licences are not used to deprive an occupant of their rights as a tenant.

3.1.12 Subletting/Assigning Tenancies

A landlord who has taken care to select a tenant by proper referencing and verification of suitability is unlikely to allow that chosen tenant to sublet (assign or transfer the tenancy) to another, without the landlord's permission. In the past, tenancy agreements always tended to prohibit subletting or assignment.

Now, standard terms in residential tenancy agreements are subject to the Unfair Terms in Consumer Contracts Regulations 1999, administered by the Office of Fair Trading (OFT). The OFT has issued guidance to the effect that absolute prohibitions on assignment and subletting could be considered unfair and, therefore, void in terms of the Regulations.

Landlords wishing to retain a degree of control over assignment and subletting are advised to ensure that the tenancy agreement allows assignment or subletting only upon landlord's consent (which cannot, by law, be unreasonably withheld). Alternatively, the tenancy agreement should be framed in such a way as to allow the tenant to terminate it easily if they are unable to recommend to the landlord a suitable person to take over the tenancy.

Even if the tenancy agreement does not provide for it, it is suggested that the landlord should always agree to re-let the property to a suitable new tenant, allowing the original tenant to terminate their agreement early if they wish.

If the tenancy is a contractual periodic tenancy, or a statutory periodic tenancy that has arisen at the end of a fixed term, the tenant cannot by law give the tenancy or sublet to someone else unless the landlord agrees that he or she can. A periodic tenant can end their tenancy by serving notice to quit.

If the tenant has paid a premium for the property (a lump sum, possibly in addition to a small rental payment or a sum paid as a deposit which is greater than two month's rent), the tenant is able to sublet unless there is a term in the tenancy agreement preventing this.

3.1.13 Joint and Several Tenancies

Joint tenancies can be agreed with two or more people from the outset of the tenancy. Each can then be responsible jointly and severally (individually) for meeting the terms of the tenancy in full, including paying the rent. This is known as 'joint and several liability'. Joint and several liability only arises where it is agreed. If nothing is agreed they will simply be jointly liable.

For example, if a property is let jointly and severally to four tenants A, B, C and D for a monthly rent of £400 (with each agreeing to pay £100 each), and C decides to leave, they will all each still remain liable under the contract for all the rent. So C is still liable for rent even though s/he may not be living there, and A, B and D will each be liable to the landlord, for all the rent, including the £100 share from C. This situation will continue until either vacant possession is given back to the landlord or a new tenancy is signed, for example with A, B, D and perhaps E.

If one of the joint tenants wishes to vacate, it is best to regularise the situation as soon as possible by signing a new tenancy agreement with the remaining and new tenant(s), so long as any replacement tenants can be

referenced satisfactorily. A landlord should not allow the situation to drift. Instead, a proactive approach should be taken to ensure the remaining tenants sign a new tenancy agreement. Failure to do so could cause the landlord difficulties in repossessing the property. If the tenants provided a guarantee with the original tenancy, the landlord should ensure that a new guarantee is provided with any new tenancy, or that the old guarantee will apply to any new tenancy granted to the same tenant.

Technically a tenancy can only be in the names of four tenants, as in land law only four people can hold a legal interest in land. However, if there are more than four tenants who wish to share, the additional tenants will still be liable for the rent and everything else under the contract, and their co-tenants will be deemed to be holding the tenancy on trust for themselves and the others. Practically therefore the four name rule is not a problem.

3.1.14 Succession Rights and Rights of Survivorship

If a joint tenant dies, the remaining joint tenant(s) are entitled to remain in the property (having a right of survivorship). They become liable for the rent.

If a sole tenant dies, the right to succeed to the tenancy will depend on whether the tenant had a fixed term or periodic tenancy.

For fixed term tenancies where the term has not expired, the position is, in theory, that the executors will arrange for the tenancy to be passed-on to the person to whom it is left in the will (or whoever inherits it under the intestacy rules if there is no will). In practice, the executors will usually agree to surrender the property, and the landlord will agree to seek another tenant.

If a periodic tenancy, the tenant's spouse or a person who lived with the tenant as husband or wife, has an automatic right to succeed to a periodic assured tenancy unless the tenant who died had already succeeded to the tenancy. Only one succession is allowed. No one else in the family has an automatic right to succession (section 17 Housing Act 1988).

In a periodic assured tenancy, if someone is living in the property who does not have a right to succeed to the tenancy, the landlord can claim repossession under Ground seven, provided the proceedings for recovery of possession are commenced within a year of the death of the original tenant.

In a shorthold tenancy, the landlord is entitled to repossess the property at the end of any fixed term, or at the end of a period of a periodic tenancy, even if the tenant is entitled to succeed, provided that the landlord gives the proper form of two month's notice under Section 21.

3.2 Tenancy Agreements

3.2.1 Written Tenancy Agreements

Landlords should be aware of the benefits of written tenancy agreements and the procedures necessary for obtaining such an agreement. Although many short-term tenancies (three years or less) can be created without a written agreement, it is generally not advisable for landlords to allow occupation without first having secured a signed formal tenancy agreement.

3.2.2 Benefits of Written Tenancy Agreements

A written agreement is required by law for fixed-term tenancies of greater than three years, when the tenancy must be produced by deed, with signatures being witnessed. Even in tenancies of three years or less,

landlords are strongly advised to have a written tenancy agreement, which the tenants should sign before occupation. The benefits of having a written agreement are:

- it can prevent disputes later over what was agreed;
- if there is a dispute, it can help to resolve the dispute more quickly;
- a well drafted tenancy agreement will help protect the interests of all parties.

Landlords should note:

- after moving in, occupiers cannot be required to sign a tenancy agreement;
- it will be difficult to evict a tenant without a valid tenancy agreement;
- the accelerated procedure for recovery of possession [*see Chapter 5*] will not be available unless the tenancy and required notices can be evidenced from valid paperwork.

3.2.3 Tenant's Right to a Written Statement

A Housing Act 1988 tenant who does not have a written agreement has a right to ask for a written statement of any of the following main terms of the tenancy:

- the date the tenancy began;
- the amount of rent payable and the dates on which it should be paid;
- any rent review arrangements;
- the length of any fixed term which has been agreed.

The tenant must apply in writing to the landlord for this statement. The landlord must provide it within 28 days of receiving the tenant's written request. A landlord who fails to provide a statement of tenancy particulars without reasonable excuse, is committing a criminal offence and could be prosecuted and fined.

3.2.4 Implications of Oral Agreements

In law, a tenancy can be created by oral agreement. If a person occupies a property and pays rent, a tenancy will have been created even though there has been no written agreement.

A landlord cannot allow a tenant to live in a property "on approval", on the basis that a tenancy will be granted later. The tenancy will have been created by the initial acts of occupation and payment of rent.

A person exclusively occupying a property and paying rent will legally be regarded as a tenant and be entitled to all the statutory protections provided to tenants under the law.

3.2.5 Preparing a Written Agreement

Although landlords may draw up their own agreements, this is not advisable. Drafting tenancy agreements is a highly skilled job and landlords doing this without legal advice may find that they have actually made their

position worse in the very areas where they were seeking to protect their position.

It is far better to use one of the many excellent standard tenancy agreements which are available from landlord associations, law stationers, the larger general stationery stores, the many online services available for landlords, and some local authority housing advice centres. Landlords wishing to alter the terms of a standard agreement should seek specialist advice.

The preparation of a written agreement is the key opportunity for both landlord and tenant to agree the formal terms of their relationship. Both parties should have every opportunity to read and understand the terms of the tenancy which is being created before becoming bound by them.

Following changes to Stamp Duty in 2004, tenancy agreements no longer have to be stamped in order to be valid. The new Stamp Duty Land Tax may still be payable if they are of very high rent value. More details can be found in the Inland Revenue leaflet [Stamp Duty on Agreements Securing Short Tenancies](#) available from any Stamp Office. The Stamp Office Helpline can provide more advice on stamp duty on 0845 603 0135 and there are factsheets available on www.hmrc.gov.uk/so/index.htm.

It is best to have two copies of the tenancy agreement signed by both parties with each keeping their own copy.

If the tenant occupies the property immediately, the agreement does not need to be witnessed. If the tenant does not intend to occupy until a later date (for example students signing a tenancy agreement in June and taking occupation in September) it could be better to have the agreements formally drawn-up and independently witnessed. Landlords should seek advice on this (particularly if tenancy agreements are being created online) as the legalities of the situation are complex.

Both parties should be careful when completing the agreements. Make sure they are legible and that they can be read without difficulty in the event of a dispute. Landlords should provide a full, valid and current address in England or Wales. This could be the address of the landlord's agent or his registered business address. **If a landlord does not give an address, this might cause difficulties should any dispute arise.**

If no address for the landlord is given at all, apart from being bad practice, this will cause the landlord difficulties later if there is a need to evict a tenant for arrears of rent.

If a landlord does not disclose their identity and their place of abode or business address a tenant may make a written application to the person who either collects, receives rent or the agent. Failure to disclose is a criminal offence under the 1985 Landlord & Tenant Act.

3.2.6 Unfair Terms in Tenancy Agreements

There are now regulations to ensure that standard contracts between a consumer and a business are 'fair'.

These are the Unfair Terms in Consumer Contracts Regulations 1999. It has been confirmed that they apply to tenancy agreements. The Regulations are administered and enforced by the Office of Fair Trading who have issued guidance (most recently in September 2005) on the effect of the Regulations on tenancy agreements.

The Regulations do not cover the core terms of a contract (e.g. the rent and property details) except in so far as they require that the contract must be in plain English.

A standard term is unfair if it creates a significant imbalance between the parties' rights and obligations to the detriment of the consumer and it is contrary to the requirement of good faith. If a term is found to be unfair it will be void and not enforceable – but the rest of the contract will stand.

So far as tenancy agreements are concerned:

- any clauses which attempt to limit or exclude rights (e.g. legal rights) which tenants would otherwise have had, are likely to breach the regulations and be deemed unfair, unless there is a very good reason for them (which should be apparent from the agreement);
- clauses which impose any penalty or charge on a tenant must provide for or state that the charge should be both reasonable in amount and reasonably incurred;
- where a clause states that a tenant may only do something with the landlord's written consent, this should be followed by the words "(consent not to be unreasonably withheld)" or similar;
- any clauses which are difficult to understand, or which use legal terminology, or words which have a specific legal meaning which may not be understood by the ordinary person (such as 'indemnity' or 'jointly and severally liable'), will also be vulnerable to being found invalid under the regulations.

Here is an example of how this can work.

Many landlords would prefer to prohibit pets from their properties and would like a clause in the agreement saying this. However, if the clause just says, "The tenant is prohibited from keeping any pets whatsoever", this clause is likely to be void (ultimately only a court can decide what is or is not fair), and it will not stop the tenant from keeping pets if it is found unfair.

To make the clause more acceptable, it should say something like "The tenant is prohibited from keeping pets, save with the landlord's written permission which shall not be refused unreasonably".

A clause in this format is not saying a landlord has to give permission. There are many excellent reasons for refusing permission for pets - that they damage the property, that some people are allergic to them, or that the lease with the freeholder may also prohibit pets. If any of these reasons were given it would be difficult for the tenant to argue that the landlord was being unreasonable in refusing permission for a pet. The same words may be a fair term or an unfair term, depending on the context in which they are used.

It is easy to breach the regulations and render clauses invalid by inexpert adaptations. Professionally drafted tenancy agreements sold by reputable publishers and associations will normally have been drafted with these

regulations in mind. Note also, that from time to time new cases may be decided or new guidance issued by the OFT which will need to be reflected in the form of tenancy agreements.

Make sure that the agreements in use are the most recent versions and do not use old versions. See the Office of Fair Trading's website for [Guidance on Unfair Terms in Tenancy Agreements : www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/oft356.pdf](http://www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/oft356.pdf)

3.2.7 Making an Inventory/ Schedule of Condition

Having an inventory (sometimes also called a statement of condition) is essential if the property is let furnished, and a very good idea even if it is unfurnished. An accurate and current inventory will help to protect the position of both parties and can provide evidence to prove the condition of the property at the time it was let.

Care should be taken when preparing an inventory. Make a detailed list of all the belongings and furniture provided when a tenant first moves in. It is also essential to record the condition of such things as walls, doors, windows, and carpets etc. The inventory should be agreed with the tenant before they move in and a separate copy of the list held by each party. This should then be checked again at the time the tenant moves out, the inventory will only provide protection if it is thorough, detailed and agreed by both parties. If the inventory simply records "4 chairs", that says nothing about whether they match, or about their quality or condition. The condition of the furniture, including existing damage to the furniture and fittings, decorations and other contents should be noted on the inventory and agreed with the tenant.

Photographs are often a good idea, particularly with high value furnishings. The use of digital photographs is not always accepted by the courts as evidence so it is advisable to print the photographs and for both the landlord and tenant to sign and date the photographs as an accurate image. With some properties, landlords and agents are now also taking videos but this has more limited value in dispute resolution as they are much harder to work with.

A thorough and detailed inventory will help avoid disputes, particularly those involving the return of a deposit. It is advisable to keep all receipts and to make a record of the meter readings in the inventory. Remember that if there is a dispute over the condition of the property and this goes to court or a deposit scheme adjudicator, it will generally be for the landlord to prove the claim.

Taking an inventory is a long job and many landlords now use professional inventory clerks to do this for them. The advantage of this, if a dispute over the condition of the property ever happens, is that they will be able to give independent evidence to the Judge.

Inventory clerks can be found via the website of the Association of Independent Inventory Clerks at www.aiic.com

3.3 Deposits and Tenancy Deposit Schemes

Many landlords take a deposit from tenants to hold for the duration of the tenancy. When the tenant moves out this is returned to the tenant less any deductions permitted: normally for damage (in excess of fair wear and tear), additional cleaning and to cover any outstanding rent. Note that a deposit (or part of it) can only be withheld if it is stipulated within the contract what the deposit is being held against.

Because a small minority of landlords wrongly withheld or did not return deposits the Government, in the Housing Act 2004, introduced a statutory deposit protection scheme. This safeguards all deposits taken under an Assured Shorthold Tenancy after 6th April 2007. Deposits taken on other types of tenancies are not covered.

3.3.1 Requiring a Deposit

A landlord may require a deposit from a tenant before they move into the property. Landlords often feel that holding a deposit means a tenant is less likely to abandon a property and instead terminate the tenancy correctly. A deposit can also act as an incentive, particularly in shared tenancies, to ensure that the property is properly cleaned and cleared at the end of the tenancy. Deposits can also protect landlords against any unpaid rent at the end of the tenancy.

The amount of the deposit to be levied is part of negotiating a contract or agreement with the tenant. The amount of the deposit can vary significantly and depends on how much "risk" the landlord perceives they are carrying in letting out the property. Large deposits, however, can deter future tenants and there is considerable judgement to be exercised in setting a market friendly, but practical, deposit level.

3.3.2 Withholding Part of the Deposit

Deposits can cover:

- damaged items;
- outstanding debts attached to the property;
- failure of the tenant to carry out obligations set out in the tenancy agreement such as cleaning;
- non-payment of rent;
- other breaches of the tenancy.

In assessing any damage, allowance must be made for fair wear and tear, the cost of which is not deductible from the deposit. Fair wear and tear is paid for in the rent charged. Wear and tear arises from normal living in a property. Landlords should not expect to receive a property back in the same condition it was let at the start of the tenancy. Tenants should be expected to return the property in a clean and tidy condition.

The tenancy agreement should state clearly the circumstances under which part or all of the deposit may be withheld at the end of the tenancy. It should also state under which deposit protection scheme it will be held. This will indicate whether the scheme holds the money or whether the landlord/agent holds the money and it is insured by the scheme.

If the tenant cannot afford the deposit, the local authority's housing department or Housing Advice Centre may operate a rent or deposit guarantee scheme in the area, which would guarantee rent or the costs of damage for a specified period.

At the end of the tenancy the inventory should be checked and an assessment made of the condition of the property - the landlord should take into account reasonable wear and tear.

If a claim is going to be made from the deposit the landlord should account for this with invoices or receipts and promptly send the balance of the

3.3.3 Tenancy Deposit Protection (TDP) Schemes

deposit to the tenant.

The Housing Act 2004 introduced specific requirements that affect AST deposits taken after 6th April 2007. The requirements are likely to apply where a deposit was held before that date if a renewal tenancy agreement is given to the tenant after 7th April 2007. The requirements are that:

- a deposit must be dealt with in accordance with an authorised scheme from the moment of receipt;
- landlords must comply with the scheme's initial requirements within 14 days of receiving the deposit;
- landlords must give prescribed information within 14 days of receiving the deposit.

The schemes are of two types:

- custodial (where the scheme administrators hold the deposit and which is free of charge), or;
- insurance (where the landlord holds the deposit but has to pay an insurance premium).

The custodial scheme is open to all landlords and letting agents and is free to use (because it is funded from the interest the scheme operator makes on the deposits they hold). This scheme tends to be used by smaller landlords. Landlords and companies who are resident or registered abroad can only use this scheme.

Under the insurance schemes the deposit continues to be held by the landlord or agent but the money is insured, so that if the correct amount is not repaid by the landlord, the scheme can repay the money to the tenant and will recover it from the landlord. Landlords pay an insurance premium to join these schemes. If there are no deductions, tenants can often receive their deposits back more quickly under these schemes because the landlord/agent can simply pay it back (rather than waiting for the custodial scheme to refund the money).

It is for the landlord to decide under which scheme the deposit will be held, either the custodial or an insurance-based scheme. The prescribed information that landlords are required to provide to tenants, not less than 14 days after the taking of the deposit, includes giving the tenant (and anyone who paid the deposit on the tenant's behalf) details of the scheme under which the deposit will be held.

To avoid disputes about deposits having to go to court, all the schemes have an alternative dispute resolution (ADR) service which seeks to resolve disputes that have arisen, although the use of this is not compulsory and both landlords and tenants still have the option of going to Court (but they cannot do both).

If a landlord or agent takes a deposit but does not protect it in one of the statutory schemes, the tenant may seek an order from the court requiring the landlord either to pay the money into one of the schemes or to return it. At the same time, the court will order that the landlord pay the tenant a penalty of three times the amount of the deposit.

Landlords will not be able to use the section 21 procedure for obtaining possession of the property if the prescribed information has not been given or the deposit has not been protected.

3.3.4 TDP Scheme Providers

There are three schemes:

The custodial service is the Deposit Protection Service (Further details from www.depositprotection.com or telephone 0844 4727 000)

There are two insurance based schemes. The largest scheme is run by The Dispute Service (further details from www.thedisputeservice.co.uk or telephone 0845 226 7837). The scheme run by The Dispute Service is aimed principally at agents and now only accepts members of specified professional bodies.

The other scheme, called mydeposits, is a partnership between the National Landlords Association and Hamilton Fraser Insurance (further details from www.mydeposits.co.uk or telephone 0844 980 0290) My deposits is aimed principally at private landlords.

3.3.5 Relevant Person

Where a third party provides the deposit, i.e. money changes hands as opposed to the guarantee schemes listed below, then under the Housing Act 2004 that person is a Relevant Person and needs to have a copy of the prescribed information. This is very common in student letting where parents often provide the deposit and some local authorities will provide a physical monetary deposit rather than a guarantee. The Relevant Person should also get a copy of the tenancy agreement since if they do not know why their money may be withheld any such agreement may be unlawful.

3.3.6 Lead Tenant

The custodial scheme (DPS) and the mydeposits insured scheme both use a "Lead Tenant" system. This applies in any situation where more than one person has an interest in the deposit. This could be joint tenants, parents of students or local authorities providing an actual deposit. In setting up the Lead Tenant all parties with an interest in the deposit need to agree who that will be and then only that person will have authority to deal with the deposit at the end of the tenancy.

If a local authority had provided the deposit, the Lead Tenant may not be a tenant at all but the local authority whose money it remains.

3.4 Bond Guarantee Schemes

Landlords should be aware of the operation of bond guarantee schemes and their benefits.

There are various bond guarantee schemes operating across the country. These schemes generally replace the up-front cash deposit and instead guarantee to the landlord the cost of any damage to the property/rent arrears etc. If at the end of the tenancy the landlord finds that they need to make a claim they would do so via the bond bank. These types of scheme are generally only available to certain 'vulnerable' groups.

For landlords the schemes can:

- provide a guarantee against damage or rent arrears;
- provide assistance in getting housing benefit processed quickly;
- in certain circumstances the bond banks can help find tenants

- offer general advice on landlord and tenant matters.

The types of services offered may vary across the country and the local authority should have details of schemes operating within the locality.

Dealing appropriately with vulnerable groups can be challenging and rewarding. It is suggested that landlords wishing to deal with these groups should ensure they have the required confidence, skills and professionalism to do so.

3.5 Rent Setting

Landlord and tenant should mutually agree the initial rent. During the first six months of a tenancy, tenants have rights to refer the rent to the Rent Assessment Committee for review [*see appendix 2 - Rent Assessment Committees*] if they consider the rent to be above the market rent. This is, however, very rarely done.

The rent charged may include a sum to cover the cost of repairs, although these costs cannot be passed on to the tenant in the form of a separate service charge. In particular, a landlord cannot seek to pass on to the tenant the cost of any repairs which are their responsibility under section 11 of the Landlord and Tenant Act 1985 or under the regulations relating to gas safety or similar.

3.5.1 Setting the Rent

Before the tenancy begins, landlord and tenant should mutually agree the rent, including arrangements for when to pay and review it. The details of these matters should be included clearly in the tenancy agreement.

If the tenancy is for a fixed term, the rent given in the agreement will last for the whole of the fixed term unless there is a rent review clause.

3.5.2 Rent Book

A landlord is legally obliged to provide a rent book if the rent is payable on a weekly basis (failure to do so is a criminal offence). The rent book provided must, by law, contain certain information. Standard rent books for assured and assured shorthold tenancies can be obtained from law stationers and larger general stationers. However, the landlord should also keep a record of rent payments and provide receipts for rent paid (particularly for cash payments) for all tenancies to avoid any disagreements later.

3.6 Raising the Rent

There are three ways to review the rent in an assured shorthold tenancy:

- by way of a rent review clause in the tenancy agreement;
- by agreement with the tenant;
- by notice under section 13 of the Housing Act 1988 after the end of the fixed term or for an existing periodic tenancy.

Rent review clauses in the tenancy agreement

Normally, it is not possible to review the rent during the fixed term of the tenancy unless either there is a valid rent review clause, or the tenant agrees to the review. If the tenant agrees, this should be recorded (perhaps by seeking the tenant's signature of a new tenancy agreement). Any rent review clause which forms part of the landlord's standard terms must comply with the provisions of the Unfair Terms in Consumer Contracts Regulations and be fair. Standard clauses allowing the landlord to review (and particularly to increase) the rent as he sees fit are likely to be unenforceable.

Any increase upon a valid rent review is more likely to be enforceable if

it can be justified by a recognised/ established factor (such as significant improvements to the property or general cost increases reflected in the Retail Prices Index). When a fixed term assured shorthold tenancy expires - which includes a rent increase clause - it does not carry over when the tenancy becomes a statutory periodic tenancy'. Rent reviews for the statutory periodic tenancy will need to be either by agreement with the tenant, or using the procedure in section 13 of the Housing Act 1988, which requires a prescribed form of notice.

Rent increase by agreement

It is also possible to review the rent by seeking the tenant's signature to a document (such as a copy letter to the tenant proposing the new rent) which confirms agreement. Landlords wishing to do this are encouraged to speak to the tenant first to gauge whether or not they are content with the proposed new rent.

Once agreement has been reached, the landlord should send a formal duplicate letter proposing the new rent and asking the tenant to sign, date and return one copy to confirm their agreement. If the tenant fails to return the letter or fails to pay the new rent, then the rent will not have been validly reviewed. The review will be less susceptible to challenge if the landlord gives the tenant something in exchange for any increase in rent – for instance allowing the tenant to stay longer than would otherwise be the case, or improving the facilities or condition of the property. If this is to be the case, it should be recorded in a letter from the landlord to the tenant.

It is not possible to increase the rent unilaterally by simply sending a letter to the tenant telling them that their rent will be increased from a specific date. If the tenant agrees to this and starts paying the rent the increase is agreed but if the tenant does not agree they can refuse to pay the increase.

Rent increase by notice under section 13 of the Housing Act 1988

If the tenancy is an assured or assured shorthold tenancy the landlord can use a formal procedure in section 13 of the Housing Act 1988 to propose a rent increase. To do this a special form is needed, which is obtainable from law stationers, some landlord associations, and some of the online services for landlords on the internet.

The form must be completed in full, and served on the tenant. The current version of the form was issued in 2003 and has 17 notes attached to it for guidance. The notes are a part of the Prescribed Form and if they are not issued to the tenant a rent proposal may be struck out by the RPTS. It is advisable for a landlord to obtain professional advice before using the form for the first time. At least one month's notice must be given to the tenant. If the tenant does nothing during this period, then the rent increase will take effect.

It should be noted that the rent can only be increased by Section 13 after the fixed term has ended, and that this facility can only be used once every 12 months.

If the tenant feels the rent increase is too high then they can refer it to the Rent Assessment Committee for review. The application must be made no later than the last day of the notice period or it will be invalid and the increased rent will stand. If the rent is challenged the matter will be

considered by the Rent Assessment Committee who, if they consider the rent is not a market rent, will substitute what they consider is a market rent. This Rent Assessments Committee's view is not always in the tenant's favour and it is not unknown for them to consider that the proposed rent may be too low.

3.6.1 Rent Act (Regulated) Tenancies

Regulated tenancies are tenancies governed by the provisions of the Rent Act 1977. They will all have been created prior to 15th January 1989.

The Rent Act provides for the tenant (or the landlord) to apply to have a 'fair rent' registered for the property and once this has been done the fair rent is the only rent the landlord can charge.

These are rents fixed by the local office of the Rent Service.

The Rent Service does not take account of the impact of scarcity on the market value of rented accommodation. Contact details for the local Rent Service can be obtained from the Council's Housing Advice Service or the Valuation Office Agency website: www.voa.gov.uk/fair_rent/index.htm.

If a fair rent has been registered, a new registration cannot be made less than two years after the date the existing registration came into effect unless:

- landlord and tenant apply jointly. or
- there has been a change of circumstances, for example, major repairs, improvements or changes in the terms of the tenancy.

It is in the landlord's interest to apply promptly for rent increases every two years otherwise the rent charged might fall behind market rents because the amount of increase is capped under a complicated calculation set out under regulations - The Rent Acts (Maximum Fair Rent) Order 1999.

In the unlikely event that the rent has not already been registered a landlord can increase the rent if the tenancy agreement or contract allows for rent increases. If the agreement does not allow for increases in rent it can only be increased if:

- the landlord and tenant make a formal rent agreement which must follow special rules; or
- the Rent Officer registers a fair rent.

3.7 Housing Benefit

There are currently (2009) two systems of housing benefit in use. The old system, called Rent Allowance (RA), is being phased out and all new claims are now called Local Housing Allowance (LHA). Existing claims for RA will continue for the foreseeable future until there is a break in the claim. Many of the rules are similar but there are differences.

The main differences between the systems are that LHA is principally paid directly to tenants whereas RA can be paid to the landlord at the tenant's request. Also LHA makes no consideration of the size or value of a given property (removing the previous need for The Rent Service to visit the property). Where this manual talks about RA it refers only to the old system, where the manual refers to LHA it refers only to the new system and where the manual refers to housing benefit it generally refers to both systems.

Housing benefit is for people on low incomes, including unemployed people, who have to pay rent. The tenant has to complete an application form, which is available from the local authority, or in some areas application is initially by telephone to Jobcentre Plus.

3.7.1 Tenants Have to Provide Information and Proof of:

- their income, and any savings;
- their identity and sometimes details of their immigration status in the UK;
- the rent to be paid (usually a written tenancy agreement is sufficient); and
- name and address of the landlord/agent.

Most local authorities aim to process housing benefit claims within 14 days from receipt of all the appropriate documentation they have requested. They cannot pay a claim until they have all the information they need.

Regrettably, some local authorities fall short of the 14 day target, which can cause hardship and problems for both tenants and landlords. Sometimes delays occur if a tenant does not fully understand what is required. Some landlords are willing to help tenants with their applications, whilst others might form a view about a tenant's suitability if they are applying for housing benefit.

3.7.2 Conditions for Rent Allowance and Local Housing Allowance

As housing benefit is means tested, (dependent upon income and savings) some tenants may have to pay part of the rent themselves.

Some tenants, such as most full time students, some people only allowed to stay temporarily in the country, or people who have just arrived, will not be eligible to receive housing benefit. Usually housing benefit cannot be paid for a tenant who is a close relative of the landlord: the arrangement must be that of a genuine arms-length commercial transaction.

3.7.3 Setting the Rent

If the rent covers the cost of gas and electricity, Rent Allowance will be reduced so that the tenant must pay for these items. This also applies to water rates and any meals or other services the landlord may provide.

For Rent Allowance only, accommodation in the private rented sector where the tenant applies for Rent Allowance is valued by the Rent Service. If the rent is more than the Broad Market Rental Area (average) for similar size accommodation in the locality, Rent Allowance will not be able to pay the full rent. If the accommodation is larger than the tenant needs, for example if a couple rent a two bedroom flat, Rent Allowance will also not pay the full rent.

If a prospective tenant intends to claim Rent Allowance, both the landlord and the tenant can check whether the rent will be regarded as reasonable before any agreement is signed. Both need to complete a Pre-Tenancy Determination application form and send it or take it to the Housing Benefit Office covering the area in which the property is located. They will forward it to the Rent Service who will then value the property and send their decision to the landlord, the tenant and to the council. The target for a decision is seven working days.

With Local Housing Allowance the Broad Market Rental Areas are published

so it is fairly easy to find the basic amount paid within that area. The amounts are also available from the local authority. They will vary according to the locality.

For Local Housing Allowance if the contractual rent is more than £15 per week less than the Broad Market Rental Area for the size of property to which the tenant is entitled, then the surplus is capped to a maximum of £15 per week. This potentially allows a tenant to keep just over £60 a month if they choose a low cost property. In many areas the system is encouraging landlords to raise the rent to £15 below the Broad Market Rental Area, regardless of the condition or previous value. The £15 level will change from April 2010 and should be checked after that time.

Finally, there are different rules for single tenants aged under 25. Housing benefit will only pay an amount based on the average rent for a room in a shared house, even if the tenant is living in a self contained flat (this is called the single room rent). This does not apply to couples under 25 or families.

In any event, the agreed contractual rent is the rent due from the tenant, and any shortfall in housing benefit payments should also be collected. If there is likely to be a shortfall, it is advisable to check the tenant's ability to pay it before letting the property. Enforcing the terms of a contract is likely to be a fruitless endeavour where the tenant has no money.

3.7.4 Payments and Rent Arrears

Councils usually pay either by sending the tenant a cheque or crediting their bank account every two weeks (this is the norm for Local Housing Allowance) or by paying the landlord every four weeks in arrears (common for Rent Allowance but not allowed simply because the landlord wants it under Local Housing Allowance rules). Direct payment of Local Housing Allowance is still possible for vulnerable tenants and those owing at least eight weeks of rent. This may be by cheque on request; Many local authorities will pay by Bank Automated Clearing System (BACS) transfer.

Where a tenant is in receipt of housing benefit, and is more than eight weeks in arrears, the landlord can request the housing benefit be paid directly to the landlord instead of to the tenant. The local authority should be contacted to arrange this.

Note: the arrears need not have existed for a calendar eight weeks. For example, if the contract requires payments per calendar month in advance, if two consecutive payments were missed, there would be more than eight weeks arrears after one month and one day. It is possible for any surplus LHA to be used to pay off arrears, but if the tenant leaves the property and then arrears cannot be recovered from the LHA.

The local authority will do its best to advise landlords, who should note that all benefit claims are confidential. Information about a tenant's claim is unlikely to be exchanged with a landlord unless the tenant has given express written permission for this.

It is sometimes difficult to work out exactly what the situation is regarding the tenant's rent account if rent is payable monthly, but the benefit is paid out on a weekly basis. It is important to remember that the method of payment by the benefit office, and the assessment of benefit due, does not alter the tenant's contractual obligations."

It is a good idea to record the payments in the context of the rent payment

dates, as shown in the example below.

Here, the tenant has not been making up the shortfall and the arrears will soon reach a level to trigger eviction on the basis of serious rent arrears. A landlord wishing to proceed on this basis would have to provide the court with a schedule of arrears in this format. In this example, the rent is billed every month but a payment is received every four weeks for only four weeks' worth of rent. In this situation, there will be 12 monthly billing periods in the year but there will be 13 periods of four weeks. To avoid potential confusion, the rent may be billed to the tenant on an agreed weekly-based schedule (or fortnightly or four-weekly). Some landlords find that agreeing a four-weekly rent payment plan is easier to keep track of than a monthly one.

Table 1

Date	Rent due	Rent paid	Arrears
18/01/2010	£ 400.00	-	£ 400.00
15/02/2010	-	£ 300.00	£ 100.00
18/02/2010	£ 400.00	-	£ 500.00
15/03/2010	-	£ 300.00	£ 200.00
18/03/2010	£ 400.00	-	£ 600.00
12/04/2010	-	£ 300.00	£ 300.00
18/04/2010	£ 400.00	-	£ 700.00
10/05/2010	-	£ 300.00	£ 400.00
17/05/2010	£ 400.00	-	£ 800.00
07/06/2010	-	£ 300.00	£ 500.00
18/06/2010	£ 400.00	-	£ 900.00

3.8 Utilities

The tenancy agreement should indicate who is responsible for the payment of utility bills. Ordinarily the tenant should take over the account and put it in their own name, payment is then a matter between the tenant and utility company. Most utility companies will allow the landlord to notify them of the new tenant's details and some will actually pay the landlord for setting up the account with a particular supplier. A landlord can agree readings with an incoming tenant and should advise them which company or companies are supplying the fuel.

The utility companies might send someone to read the meter, or they might ask the landlord or the occupier to do this. It is suggested that the inventory agreed between landlord and tenant should include a note of all relevant meter readings at the date the tenant took over responsibility, together with a note of who took the readings. If fuel has been used during a void period, a landlord can agree to reimburse the tenant who may have to pay for it (if it is only a small amount) or pay the suppliers for the fuel used.

If the rent includes a charge for utilities (for example in the case of individually rented rooms, where there is no separate bill), it is suggested that landlords agree and set the rent at a level which reflects the cost. Landlords should not arbitrarily increase the rent just because the bills have gone up, but should follow the appropriate rules for rent increases. A contract term which provides for the rent to be increased to reflect increasing utility costs paid by the landlord will normally be considered fair under the regulations – provided the tenant is given reasonable notice of the increase and the opportunity to check the bills to verify that any

increase in rent accords with the increase in the utility costs.

If the landlord pays the utilities, and the tenant is receiving Rent Allowance, the payment they receive will be reduced by an amount to reflect this.

Tenants can choose their electricity/ gas supplier. Landlords might find it useful to include a clause in the contract requiring the tenant to advise if they change the supplier, and who the new supplier is. This helps landlords to know which company/ companies to contact at the end of the tenancy if there is a void period. It also means the landlord will be able to correctly advise a new incoming tenant as to which company/ companies provide the utilities.

In a climate of volatile, and mainly increasing energy costs, landlords should pay close attention to energy prices to ensure that the inclusive rent they agree with the tenant does not vary from prevailing costs. In order to keep running costs to a minimum landlords might make every effort to ensure that the properties they let are as energy efficient as possible and should consider implementing the recommendations which accompanied their Energy Performance Certificate. Even relatively simple measures such as fitting energy-saving light bulbs, thermostatic radiator valves, draft proofing windows, fitting better insulation, or installing double glazing can have a dramatic effect in reducing running costs.

Some of the measures attract benefits and grants, such as the Landlords' Energy Saving Allowance (see section 1.6.1 earlier).

The leaflet from the Energy Efficiency Partnership for Homes is also helpful and can be down loaded at www.eeph.org.uk/uploads/documents/partnership/4.%20LESA%20Information%20Sheet%20August%202008%20FINAL.pdf

3.9 Tenant References

Landlords should interview prospective tenants carefully, so as to assist in choosing one who will be trustworthy and reliable. Taking-up references from a prospective tenant's current or previous landlord, employer and bank, can help to inform the tenant selection process.

Some landlords might also use a tenant referencing service, which will make checks and enquiries of a prospective tenant on a landlord's behalf. Many companies provide services such as this. They can be found online or via insurers or landlord associations.

As part of the pre-tenancy referencing/ checks, it is suggested landlords ask the successful tenant to provide details of a close family member or friend who can be contacted in an emergency or if the tenant leaves without notice.

Many agents, and some landlords, ask tenants to pay the fee for using the referencing service. If this is the case, it should be made clear to the tenant that the fee will be non-refundable once the landlord has paid it to the referencing service. Many referencing services turn applications round in three days or so.

In some niche markets, such as letting to students, it is difficult to obtain references because this will be the first time that a tenant has lived away from home. To offset this risk, some landlords ask for guarantors where a parent or friend guarantees to meet the cost of unpaid rent and/or damage

up to a given threshold if this is not met by the tenant.

3.10 Unlawful Discrimination

There are legal obligations on landlords both in the public and private sector as service providers and employers, to take reasonable steps to ensure that people are not discriminated against directly or indirectly due to their race, colour, gender or disability. The specific legislation is as follows:

- Sex Discrimination Act 1975;
- Race Relations Act 1976;
- Disability Discrimination Act 1995;
- Equalities Act 2006.

Direct discrimination is defined as treating a person less favourably than another on the grounds of their race, gender or disability. In some cases, discrimination may occur where there has been a failure to comply with a statutory duty. In relation to disability, it should be noted that the statutory definition has been widened to include those with certain long-term medical conditions.

Indirect discrimination consists of applying a requirement or condition that, although applied equally to persons whether male or female, black or white, is such that a considerably smaller proportion of a particular racial or gender group can comply with it than others, and it cannot be shown to be 'justifiable'.

With regard to issues pertaining to disability, a similar requirement exists that landlords do not impose criteria that could be identified as 'unreasonable'.

The Equality and Human Rights Commission published a code of practice on racial equality in housing. The code is important because it is a statutory code, which has been approved by Parliament. This means that the courts will take into account the code's recommendations in legal cases. The code is in two main parts; the first explains what landlords need to know about discrimination; the second makes recommendations about how landlords can avoid being discriminatory.

To find out more about discrimination and guidance on avoiding discrimination go to: www.equalityhumanrights.com

The landlord should note that tenants should not be chosen on the basis of race, religion, marital status, disability or sexuality. If the landlord discriminates against any tenant on these grounds, the landlord could be prosecuted. If the landlord is letting rooms in the landlord's home, the landlord may specify the sex of prospective tenants. Age discrimination is prohibited in employment but is allowed in housing. In some cases, housing might have to be let to those over 55 in order to comply with planning requirements.