



The practical implications of tenure reform

Chartered Institute
of Housing



The Chartered Institute of Housing

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The practical implications of tenure reform

This practice briefing sets out the implications of tenure reform for tenancy management.

The Government is introducing:

- The ability for housing associations and local authorities to offer fixed term tenancies
- An affordable rent model which will enable eligible housing providers (those with a delivery agreement with the Homes and Communities Agency) to set rent at up to 80% of local market rents, both on a proportion of their existing re-lets and on new build from July 2011 – this will be used to fund new development.

These reforms are being implemented through the Localism Bill and through changes to the regulatory standards framework. The practical implementation is subject to change as both are subject to amendment following Report stage in the House of Lords and consultation on the draft directions to the Social Housing Regulator (respectively). Up-to-the-minute updates will be available via [Practice Online](#) – the online good practice resource for housing.

Expected timescales for reform

- **July 2011** – The Homes and Communities Agency (HCA) announced which providers have received funding for new development under their Affordable Homes Programme. Housing associations who have received funding are able to begin using fixed term tenancies for affordable rent immediately
- **July 2011** – The Department for Communities and Local Government (DCLG) launched a consultation on new directions to the Tenant Services Authority (TSA). It includes proposals for changes to the Tenancy Standard which would allow all housing associations and local authority landlords to offer fixed term tenancies in the future
- **September 2011** – The government's consultation closes. Following this DCLG will instruct the TSA to make changes to their standards. The TSA will then carry out a further consultation on the detail of those changes
- **November 2011** – The Localism Bill is expected to gain Royal Assent
- **January 2012** – Localism Bill provisions requiring local housing authorities to prepare and publish a tenancy strategy within 12 months come into force. In practice these should be well developed by April 2012 so they can provide the strategic framework for landlords' tenancy policies
- **1 April 2012** – Revised regulatory standards come into effect and main tenure reform provisions of Localism Bill come into force. These changes are expected to allow housing associations and local authority landlords to offer fixed term tenancies both on social rent and affordable rent properties

- **From 1 April 2012** – Housing associations and stock-holding local authorities will be expected to develop and publish tenancy policies, and will not be able to grant fixed term tenancies on general needs, social rent properties until they do so.

This practice briefing covers:

- Fixed term tenancies
- The relationship between fixed term tenancies and affordable rent
- Tenancy strategies and tenancy policies
- Use of starter tenancies or introductory tenancies
- The Right to Buy/Right to Acquire and fixed term tenancies
- Succession and fixed term tenancies
- Transfers, mutual exchanges and fixed term tenancies
- Ending a fixed term tenancy
- Possibility of challenge.

Fixed term tenancies

The term 'fixed term tenancies' is used to apply to all tenancies that are offered for a specified period of time, as opposed to traditional 'lifetime tenancies'. Following a revision to the draft Directions to the Social Housing Regulator consultation issued by the Housing Minister on 28 July, providers will be required to offer fixed term tenancies for at least 5 years, except in exceptional circumstances. The exceptional circumstances where fixed term tenancies may be offered for less than 5 years, but no less than 2 years must be set out in the landlord's tenancy policy.

The [Directions to the Social Housing Regulator consultation](#) closes on 29 September.

As this section will explain, the exact form of tenancy used will vary depending on whether the provider offering it is a local authority or a housing association.

Local authorities

Following the commencement of the Localism Bill (expected to be April 2012) a new type of tenancy called a flexible tenancy will be available to local authorities. Flexible tenancies will be for a fixed term with similar rights to secure tenancies during the fixed term.

Generally, tenants on a flexible tenancy will have the same rights as secure tenants (as set out in Housing Act 1985), including the Right to Buy after a qualifying period, and the Right to Repair. The same grounds for possession will all be available and could be used during the fixed term, for example if there were rent arrears or a breach of tenancy.

Flexible tenants will not however have a statutory right to improve their properties or be compensated for those improvements. All new secure and flexible tenancies will only have a statutory right of succession to a spouse/partner and not also to family members. Existing tenants' right to succession will not be affected. These changes are set out in more detail later in this briefing (see page 11).

When flexible tenancies are available they will only be used where local authorities **choose** to do so. They will also only be available to **new tenants**. The rights of existing secure and introductory tenancies are unchanged.

Housing associations

Currently housing associations cannot generally offer fixed term tenancies at a social rent as regulation requires that they *'offer and issue the most secure form of tenancy compatible with the purpose of the housing and the sustainability of the community'*. This effectively requires providers to grant 'lifetime tenancies' to the vast majority of new tenants in general needs, social rent housing.

However, [a revision to the Tenancy Standard](#) in April 2011 enables housing associations to offer fixed term tenancies at an affordable rent as part of a contract with the HCA to deliver new homes under the Affordable Homes Programme.

Furthermore, the [Directions to the Social Housing Regulator Consultation](#) issued by DCLG in July 2011 contains a provision to make changes to the current Tenancy Standard removing the requirement that providers offer the most secure form of tenure compatible with the purpose of the housing and the sustainability of the community.

It is proposed that this be replaced with a requirement to *'offer and issue tenancies which are compatible with the purpose of the housing, the needs of individual households, the sustainability of the community and the efficient use of their housing stock'*.

If approved in this format (the consultation closes on 29 September 2011) housing associations will also be able to offer fixed term tenancies to **any new** tenants, but only if they **choose** to do so. It is anticipated that tenancy policies will need to address these regulatory requirements and the circumstances when different types of tenancy are most likely to be used.

Whilst there will be a new type of tenancy for local authorities, called a flexible tenancy, there is no need to create a new type of tenancy for housing associations. Instead they will be able to offer assured shorthold tenancies for a fixed term. Strictly speaking, they could also offer fixed term assured tenancies, but these would become periodic assured tenancies with the usual protections at the end of the fixed term so this is not recommended.

There are some particular issues that housing associations need to be aware of when offering an assured shorthold fixed term tenancy:

Grounds for possession

The tenancy terms themselves have to reflect the grounds for possession. There is a specific statutory provision in section 7 of the Housing Act 1988 that only allows possession on a fixed term assured tenancy to be ordered on a certain ground if the tenancy terms expressly refer to that ground. So, for example, for a landlord to be able to rely on ground 14 (anti-social behaviour), that ground needs to be included in the tenancy agreement.

Housing associations using assured shorthold fixed term tenancies need to be aware of this and to ensure that they include all of the relevant grounds for possession in their tenancy agreements.

As it stands currently, certain grounds for possession are not available at all. These are mandatory grounds 1, 3, 4, 5 and 6 and discretionary grounds 9 and 16. Ground 9, the suitable alternative accommodation ground, is probably the most significant loss.

Mandatory ground 7, death of a tenant, is also currently only applicable for a periodic tenancy but via an amendment to the Localism Bill, the Act will be amended to make it also available in respect of fixed term tenancies.

Rent increases

Section 13 HA 1988 rent increases only relate to assured **periodic** tenancies. All rent increases in a fixed term tenancy would therefore need to be set out in a rent increase contractual provision in the tenancy agreement and not through Section 13.

Repairing obligations

The implied repairing obligations only presently cover tenancies for 7 years or less. The Localism Bill extends the obligation to secure or assured tenancies for 7 years or more if granted by a social landlord (excluding shared ownership leases).

Administrative and legal issues relating to fixed term tenancies

At present, there are administrative issues in relation to fixed term tenancies. If they have a fixed term of 3 years or more, they need to be signed as a Deed. This means more practical arrangements need to be made, such as for witnesses on sign up. If they are longer than a 7 year fixed term then they also need to be registered at the Land Registry for which a fee is presently payable of £50 per registration – together with onerous obligations around plans and certain clauses to be included.

Amendments were made to the Localism Bill at Lords Committee on 20 July to remove these requirements and administrative hurdles.

The relationship between fixed term tenancies and affordable rent

Housing associations and local authorities are able to agree with the HCA to convert a proportion of their re-lets to 'affordable rent' to help fund the development of new homes. This is rent of up to 80% of market rent locally. The majority of the new homes built will also be let at affordable rent.

It is now known which landlords have been successful in their HCA bids, a [list of successful bidders](#) at is available on the HCA's website.

At present fixed term tenancies can only be used at an affordable rent as part of an agreement with the HCA to fund the development of new homes. Fixed term tenancies at a social rent cannot be used until the Localism Bill comes into force (for local authorities) and a revised Tenancy Standard comes into effect. These are both expected to be from 1 April 2012.

After April 2012, tenure and rent will become completely separate. Providers will be able to let properties on fixed term tenancies at their own discretion but will still only be able to let properties at **affordable rent** as part of a contract with the HCA.

This is summarised in the DCLG's consultation document on proposed directions to the regulator:

'The Government wants to give all registered providers much greater flexibility, enabling them to offer lifetime security where it is needed but also to set shorter terms for social rent as well as Affordable Rent properties where that makes more sense.'

There could therefore be a range of different housing 'products' in one area, depending on the type of landlord offering them and whether they have chosen to use the new flexibilities on tenure and/or rent:

From April 2012

	Traditional tenancy	Fixed term tenancy
Social rent	Local authority – secure tenancy let at social rent Housing association – assured periodic tenancy let at social rent	Local authority – flexible tenancy let at social rent Housing association – assured shorthold fixed term tenancy let at social rent
Affordable rent (only as part of an agreement with the HCA)	Local authority – secure tenancy let at affordable rent Housing association – assured periodic tenancy let at affordable rent	Local authority – flexible tenancy let at affordable rent Housing association – assured shorthold fixed term tenancy let at affordable rent

Tenancy strategies and tenancy policies

Tenancy strategies

The [Localism Bill](#) includes a requirement for local authorities to prepare and publish a tenancy strategy. In summary, these must:

- Describe the high level objectives ('matters') that providers operating in their area should 'have regard to' in their tenancy policies
- Signpost people to where the registered provider tenancy policies can be found, or summarise these
- Have been developed:
 - With consideration to the local allocations policy and homelessness strategy (both are intended to communicate how housing needs will be met, and are still statutory requirements)
 - In consultation with registered providers
- Be reviewed from time to time, with registered provider input.

CIH has published guidance on Managing the impact of housing reforms in your area: Working towards the tenancy strategy.

Tenancy policies

The DCLG [Direction to the Social Housing Regulator](#), issued July 2011 and out for consultation until 29 September 2011, sets out that housing associations and stock-holding local authorities must publish 'clear and accessible' policies which outline their approach to:

- Tenancy management, including interventions to sustain tenancies and prevent unnecessary evictions
- Tackling tenancy fraud
- Granting of discretionary succession rights

and set out:

- The kinds of tenancies they will grant
- Where they grant tenancies for a fixed term, the length of those terms
- The circumstances in which they will grant different kinds of tenancy
- Any exceptional circumstances in which they will grant tenancies for a term of less than five years in general needs housing following any probationary period
- The circumstances in which tenancies may or may not be reissued at the end of a fixed term in the same property or in a different property
- The way in which a tenant may appeal or complain about the length of fixed term offered and the type of tenancy offered and against a decision not to renew on expiry of a fixed term
- Their policy on taking into account the needs of those households who are vulnerable by reason of age, disability or illness, households with children, including through the provision of tenancies which provide a reasonable degree of stability
- The advice and assistance they will give to tenants in the event that they decide not to reissue a tenancy.

CIH will shortly be publishing guidance on developing your tenancy policy.

Use of starter tenancies or introductory tenancies

Starter/introductory tenancies will be available for providers offering fixed term tenancies, at both social and affordable rent.

Housing associations – starter tenancies

The draft DCLG Direction to the Regulator makes it clear that a fixed term tenancy can be preceded by a one year probationary period. In addition the Direction states that housing

associations can extend starter tenancies for up to 18 months in the same way as local authorities can with their introductory tenancies. The starter tenancy element should be a periodic assured shorthold. Once the probationary period is complete a new assured shorthold tenancy should be issued for the fixed term.

Housing associations – demoted tenancies

Housing Associations that demote an assured shorthold tenancy will need to offer a new assured shorthold tenancy, for a new fixed term, once the demotion period is successfully completed, in accordance with their tenancy policy.

Local authorities – introductory tenancies

The Localism Bill will amend s137A of the Housing Act 1996 which will allow for introductory tenancies to convert to a flexible tenancy at the end of the introductory period.

A written notice must be served before the introductory tenancy is granted making this clear and setting out what the length of the fixed term would be.

Local authorities – demoted tenancies

The Localism Bill will amend s143M of the Housing Act 1996 to introduce provisions that make clear that if a flexible tenancy is demoted, then if the demotion period is completed successfully, it will again become a flexible tenancy for a fixed term.

The Right to Buy/Right to Acquire and fixed term tenancies

Local authorities – Right to Buy

No changes are being made to the Right to Buy. The Right to Buy will extend to flexible tenancies subject to the current qualifying criteria

Housing associations – Right to Acquire

The Right to Acquire does not presently extend to assured shorthold tenancies but only to assured tenancies. However the Localism Bill proposes to extend it to assured shortholds, for a fixed term of 2 years or more which are granted by a housing association after the Localism Bill comes into force, subject to the current exceptions and qualifying criteria.

The Right to Acquire will not extend to existing assured shorthold tenancies granted before the Localism Bill comes into force.

Succession and fixed term tenancies

Housing associations – assured shorthold tenancies

There are no automatic succession rights for **fixed term** tenancies until the provisions of the Localism Bill come into force. The statutory succession rights for a spouse/partner in section 17 of the Housing Act only apply to **periodic** tenancies.

The Localism Bill is removing the word 'periodic' so the right will apply regardless of whether the tenancy is periodic or fixed term.

As the Localism Bill provisions are not likely to come into force until after some housing associations start to use fixed term tenancies, as part of a contract with the HCA, landlords may wish to add this as a contractual right in their tenancy agreement initially until the revisions come into force.

Local authorities – flexible tenancies

The Localism Bill reduces automatic statutory rights of succession for all new flexible and secure tenancies.

There will only be a statutory right of succession to a spouse or partner. There will be no right of succession for family members who had lived with the deceased tenant for 12 months prior to the tenant's death.

However, the Bill does for the first time give local authorities the power to grant additional succession rights if they so choose in their tenancy terms. Housing associations can and do already do this where they choose to.

As before, if the deceased tenant was already a successor then no further succession rights apply.

No changes are made to secure tenancies which began before the Localism Bill comes into force.

Transfers, mutual exchanges and fixed term tenancies

The Government's [impact assessment on the housing reforms](#) sets out the reasons behind the proposed changes to transfers and mutual exchanges.

Mutual exchanges between tenants of social landlords should presently take place via a deed of assignment where each tenant steps into the other's shoes and takes over the other tenant's tenancy type and terms. New tenancies are not signed.

New proposals are made in the Localism Bill. These cover circumstances where an existing secure or assured tenant (whose tenancy began before the Localism Bill came into force) wants to exchange with a flexible tenant or an assured shorthold tenant of a housing association. Such exchanges must be done by surrender and then granting of new tenancies.

If certain conditions are met then the landlords must grant any existing secure or assured tenant an assured (not shorthold) tenancy (if they are a housing association) or a secure tenancy, not a flexible tenancy (if the landlord is a local authority). Existing tenants' security of tenure will not be downgraded by an exchange as a result.

A landlord can refuse an exchange of this nature on any of the grounds set out in Schedule 14 of the Localism Bill (along the same lines as existing grounds for refusing mutual exchanges) and they have 42 days to make that decision.

Ending a fixed term tenancy

Landlords ending the tenancy during the fixed term

Local authorities may apply for a court order to end the tenancy if any of the grounds for possession are breached. The grounds for possession remain the same as for secure tenancies.

Similarly, housing associations may apply for a court order if the grounds for possession are breached, but note that the grounds for possession available for fixed term assured shorthold tenancies are limited (see page 6).

Tenants ending the tenancy during the fixed term

Local authorities – flexible tenancies

A tenant may give 4 weeks' notice in writing to end a flexible tenancy during the fixed term on a date specified during in the notice. The local authority can agree to dispense with written notice or agree to shorten the length of the notice. However, the tenancy will only be terminated, if on that date there is no outstanding arrears or other breach of tenancy.

Housing associations – fixed term assured shorthold

There is no similar provision for tenants to end a fixed term assured shorthold prior to the end of the fixed term. The ability for a tenant to serve a notice to end the tenancy applies to periodic assured shorthold tenancies only.

The principle of surrender does apply, but it must be agreed by both parties. Surrender can happen by operation of law, and can be express or implied. The landlord can accept the surrender by taking back the keys after the tenant has left. There does not always have to be express agreement.

Landlords ending the tenancy at the end of the fixed term

Whether a tenant will be able to remain in social housing at the end of the fixed term will depend on the provider's tenancy policy, which should set out the circumstances in which tenancies may or may not be renewed at the end of a fixed term.

Where a tenancy for a fixed term is not being renewed, there is also a requirement that the provider will offer advice and assistance to help the tenant find alternative housing. The nature of this support should also be set out in the provider's tenancy policy.

The procedure for local authorities who decide not to renew the tenancy at the end of the fixed term is set out in the Localism Bill.

They must serve notice on the tenant at least 6 months before the end of the fixed term. This notice must set out the reasons why another tenancy will not be granted and offer a right of review. They then need to also give not less than 2 months notice to the tenant before the end of the term. If the tenant refuses to vacate the property possession proceedings should be taken.

Where a housing association proposes not to renew a fixed term tenancy at the end of the term, the Localism Bill provides that the court may not grant possession unless the tenant has been given at least 6 months' notice in writing of the landlord's decision and how to obtain help and advice. This is in addition to the usual requirement for a section 21 notice.

No right of review is set out in the Localism Bill for housing association tenants at the end of a fixed term. However, it is referred to in the expected content of a tenancy policy, so should be given and set up in the same way as for local authorities.

Possibility of challenge

At the end of a local authority flexible tenancy or fixed term assured shorthold tenancy, the landlord will have an unqualified right of possession in domestic law. In respect to flexible tenancies, the Localism Bill states that the court can only refuse possession if the correct procedure has not been followed by the landlord or if the court is satisfied that the decision not to renew the tenancy was otherwise 'wrong in law'.

The court can then direct a further review by the landlord to take place.

However, in view of the *Pinnock and Powell, Hall & Frisby* Supreme Court cases, which clarified that tenants of public bodies may mount a Human Rights challenge where the landlord had an unqualified right of possession in domestic law, local authorities need to ensure that they are prepared for potential proportionality defences by tenants. Whilst these cases applied specifically to local authorities, housing associations should consider, particularly in the light of *Weaver*, whether they may be performing public functions in these circumstances and would therefore be susceptible to challenge under the Human Rights Act.

The Court only has to consider a Human Rights defence if this is raised by the tenant and as the *Pinnock* judgment makes clear, the threshold for such an argument being seriously arguable will be a high one. There will be a strong presumption that the landlord is justified in seeking possession.

To minimise the possibility of a successful proportionality challenge landlords should:

- Have a clear policy/procedure around renewal and the criteria to be applied
- Follow the policy/procedure carefully
- Offer an internal review process to review the decision not to renew a tenancy. The Localism Bill establishes a process for internal reviews for flexible tenants of local authorities. Housing associations should develop a robust review procedure based on their existing complaints procedure.

Of course, however robust a process is put in place, it cannot **prevent** Human Rights Act challenges being raised when possession proceedings are begun. Judicial review may also be threatened in relation to the internal review and/or an aspect of the tenancy policy before a landlord starts court possession proceedings.

However, the existence of an internal procedure that was carefully followed, where a tenant can challenge the facts being relied upon, address their personal circumstances and have the decision reviewed by a person senior to the original decision maker and in accordance with regulations, makes it much more likely that a court later looking at similar issues will find the process followed was proportionate.