



The practical implications of tenure reform

Chartered Institute
of Housing



The Chartered Institute of Housing

The Chartered Institute of Housing (CIH) is the professional body for people involved in housing and communities. We are a registered charity and not-for-profit organisation. We have a diverse and growing membership of over 22,000 people – both in the public and private sectors – living and working in over 20 countries on five continents across the world. We exist to maximise the contribution that housing professionals make to the wellbeing of communities. Our vision is to be the first point of contact for – and the credible voice of – anyone involved or interested in housing.

Chartered Institute of Housing
Octavia House, Westwood Way, Coventry, CV4 8JP
Tel: 024 7685 1700
Email: customer.services@cih.org
Website: www.cih.org

Authors: Debbie Lerner, Head of Practice, David Pipe, Policy and Practice Officer,
and Helen Tucker, Anthony Collins Solicitors
Checked for accuracy by: The Department for Communities and Local Government

© Copyright: Chartered Institute of Housing January 2012
Registered charity No. 244067/R

Cover photograph by istockphoto.com

Whilst all reasonable care and attention has been taken in compiling this publication, the authors and the publishers regret that they cannot assume responsibility for any error or omission that it contains. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without the prior error or omission of the publishers.

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 tenancies for a fixed term
- An affordable rent model which enables 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 properties. This increased rent will be used to fund new development.

These reforms are being implemented through the Localism Act and through changes to the regulatory standards framework. Some elements are still subject to minor change as the revised regulatory framework is the subject of an on-going consultation, until February 2012. Up-to-the-minute updates will be available via [Practice Online](#) – the online good practice resource for housing.

Timescales for reform

- **14 July 2011** – The Homes and Communities Agency (HCA) announced which providers received funding for new development under their Affordable Homes Programme. Housing associations who received funding were able to begin using fixed term tenancies, in conjunction with affordable rent, immediately
- **15 November 2011** – The Localism Act gained Royal Assent
- **21 November 2011** – The Tenant Services Authority (TSA), the current regulator of social housing in England, issued a draft [revised regulatory framework](#) for consultation.
- **January 2012** – Provisions in the Localism Act requiring local housing authorities to prepare and publish a tenancy strategy within 12 months are expected to come into force. This means local authorities will have a statutory duty to produce a strategy by January 2013. However, in practice these should be well developed by April 2012 so they can provide the strategic framework for landlords' tenancy policies
- **10 February 2012** – The TSA's consultation on its revised regulatory framework will close
- **March 2012** – The TSA is expected to publish its revised regulatory framework
- **April 2012** – The revised regulatory standards will come into effect and the main provisions of the Localism Act relating to tenure reform are expected to come into force. The effect of these changes will be that housing associations and local authority landlords will be able to offer fixed term tenancies both on social rent and affordable rent properties. They will be expected to develop and publish tenancy policies, setting out the types of tenancies that they will use and in what circumstances.

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, introductory and demoted 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'. The revised Tenancy standard will specify that providers are required to offer a tenancy for a minimum fixed term of 5 years, other than in exceptional circumstances where they may offer a minimum term of no less than 2 years. Any exceptional circumstances must be set out in the tenancy policy.

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

There is currently no effective legal mechanism for local authority landlords to grant fixed term tenancies. However, once the relevant provisions from the Localism Act have been brought into force (expected to be April 2012), a new type of tenancy called a **flexible tenancy** will be available and, following the changes to the regulatory framework outlined below, can be used by local authorities.

A flexible tenancy is a form of secure tenancy and generally, tenants with a flexible tenancy will have the same rights as other 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 are rent arrears or a breach of tenancy.

However, the tenancy agreement will determine whether tenants with a flexible tenancy have a right to improve their property; the statutory right to improve will not apply. Flexible tenants will not have a statutory right to be compensated for improvements.

All new secure tenancies (including flexible tenancies) will only have a statutory right of one succession to a spouse/partner and not also to other 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 tenants 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](#) made 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, following directions from the Department for Communities and Local Government (DCLG), the TSA's consultation on a revised regulatory framework proposes revisions to the 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 will be replaced with a requirement that providers '*grant tenancies which are compatible with the purpose of the accommodation, 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 10 February 2012) housing associations will also be able to offer fixed term tenancies to **any new tenants**, but only if they **choose** to do so. Tenancy policies will need to address these regulatory requirements and the circumstances when different types of tenancy will be used.

Housing associations do not need a new type of tenancy to grant fixed term tenancies. They may simply grant **fixed term assured shorthold tenancies**.

Remember, the tenancy agreement is the contract with the tenant and care needs to be taken that the appropriate terms and conditions are expressed in the agreement (and also reflect the tenancy policy).

Issues to be aware of in relation to fixed term assured shorthold tenancies

However, there are some important issues that housing associations need to be aware of in relation to fixed term assured shorthold tenancies:

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 which means that with a fixed term assured tenancy, the court may only make an order for possession on a particular ground if the tenancy terms expressly include that as a ground for possession. So, for example, for a landlord to be able to rely on ground 14 (anti-social behaviour), that ground needs to be expressly included in the tenancy agreement.

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

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 provision in the Localism Act will, when commenced, make it also available in respect of fixed term tenancies.

Rent increases

Section 13 Housing Act 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 landlord repairing obligation only presently covers tenancies for 7 years or less. The Localism Act 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

The Localism Act also provides that, in line with other tenancies granted by social landlords, tenancies for a fixed term of more than 3 years do not need to be executed by deed and tenancies for a fixed term of more than 7 years do not need to be registered at the Land Registry (these exceptions do not apply to long tenancies and shared ownership leases).

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 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 relevant sections of the Localism Act come into force (for local authorities) and a revised Tenancy standard comes into effect (for all social landlords). These are both expected to be from April 2012.

From 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 an agreement with the HCA or the Greater London Authority.

This has been summarised by the DCLG:

'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:

	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 – fixed term assured shorthold tenancy let at social rent
Affordable rent	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 – fixed term assured shorthold tenancy let at affordable rent

Important note in relation to tenancies let at an affordable rent

Remember that affordable rent can only be 'rebased' once a tenancy comes to an end and a new tenancy is issued (either to the same or a different tenant). So whilst a periodic assured tenancy, rather than a fixed term assured shorthold tenancy, may be used, in those circumstances the rent could not be rebased unless the tenant moves to another property.

Tenancy strategies and tenancy policies

Tenancy strategies

Section 150 of the Localism Act places a statutory duty on local housing authorities to prepare and publish a tenancy strategy.

There is no prescription on content or format but it must set out the matters to which registered providers in the area are to have regard to when formulating their tenancy policies

The strategy must summarise those policies or explain where they may be found and local authorities will also be required to send a copy of the draft strategy to every private registered provider in the area and give them an opportunity to comment on it. Authorities in London must also consult the Mayor of London.

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

Tenancy policies

The draft revised Tenancy standard, out for consultation until 10 February 2012, 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 and to tackle tenancy fraud.

These must set out:

- The type 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 tenancies of a particular type
- Any exceptional circumstances in which they will grant fixed term tenancies for a term of less than five years in general needs housing following any probationary period

- The circumstances in which they may or may not grant another tenancy on the expiry of the fixed term, in the same property or in a different property
- The way in which a tenant or a prospective tenant may appeal against or complain about the length of fixed term tenancy offered and the type of tenancy offered, and against a decision not to grant another tenancy on the expiry of the 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 on finding alternative accommodation in the event that they decide not to grant another tenancy
- Their policy on granting discretionary succession rights, taking account of the needs of vulnerable household members.

CIH is publishing' guidance on [How to develop your tenancy policy](#).

Use of starter tenancies, introductory tenancies and demoted 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 revised Tenancy standard makes it clear that a fixed term tenancy can be preceded by a probationary period. In addition it 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 tenancy. Once the probationary period is complete a new fixed term assured shorthold tenancy should be issued for the fixed term.

Housing associations – demoted tenancies

If a fixed term assured shorthold tenancy is demoted and the demotion period proves successful in changing behaviour, then a periodic assured tenancy (not another fixed term assured shorthold tenancy) will arise automatically at the end of the demotion period.

If another fixed term assured shorthold tenancy is required, the landlord must serve a notice on the tenant prior to the end of the demotion period, informing them that the new tenancy is to be a fixed term tenancy and specifying the length of the fixed term and other express terms of the tenancy.

Local authorities – introductory tenancies

The Localism Act amends the Housing Act 1996 to allow introductory tenancies to become flexible tenancies at the end of the introductory period.

A written notice must be served before the introductory tenancy is granted making it clear that a flexible tenancy will be granted at the end of the introductory period and setting out the length of the fixed term and other express terms of the tenancy.

Local authorities – demoted tenancies

If a flexible tenancy is demoted, and the demotion period completed successfully, the demoted tenancy will automatically become a secure tenancy, not a flexible tenancy.

If a flexible tenancy is required, the landlord must serve a notice on the tenant prior to the end of the demotion period, informing them that the tenancy is to be a fixed term tenancy and specifying the length of the fixed term and other express terms of the tenancy.

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 as a direct result of the government's tenure reforms. However, the government has announced that it is their intention to reform the Right to Buy by increasing the discounts available and ring-fencing the money raised from sales to help fund new development. More information is available on this on [our website](#).

The Right to Buy will extend to flexible tenancies subject to the current qualifying criteria.

Housing associations – Right to Acquire

The Localism Act extends the Right to Acquire to tenants with an assured shorthold tenancy, subject to the usual qualifying criteria.

Secondary legislation will be made shortly which sets out regulations excluding certain types of assured shorthold tenancy from the Right to Acquire. The intention is that the following will be excluded:

- Tenancies with a fixed term of less than two years
- Intermediate rent properties
- Mortgage rescue properties.

The Right to Acquire will not extend to existing assured shorthold tenancies granted before April 2012.

Succession and fixed term tenancies

Housing associations – assured shorthold tenancies

There are no statutory succession rights for fixed term tenancies until the provisions of the Localism Act come into force in April 2012. Until then the statutory succession rights for a spouse/partner in section 17 of the Housing Act 1988 only apply to periodic tenancies.

The Localism Act amends section 17 so that the succession rights in the amended section will apply regardless of whether the tenancy is periodic or fixed term.

As some housing associations may already be issuing fixed term tenancies, as part of an agreement with the HCA, they may wish to add this as a contractual right in their tenancy agreement initially until the revisions come into force.

Local authorities – secure and flexible tenancies

The Localism Act reduces automatic statutory rights of succession for all new secure tenancies (including flexible tenancies).

From April 2012, there will only be a statutory right of one succession to a spouse or partner. There will be no statutory right of succession for other family members.

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

No changes are being made to secure tenancies which begin before April 2012.

Transfers, mutual exchanges and fixed term tenancies

Transfers

The TSA's draft revised Tenancy standard states that tenants with an existing social tenancy on the day the main tenure reform provisions in the Localism Act come into force (expected to be April 2012) must be given '*a tenancy with no less security where they choose to move to another social rented home*'.

If the Tenancy standard is implemented in its current form, this will mean that existing tenants' security of tenure will be protected should they transfer to another social rented home. However, please note that this does not apply to tenants granted a traditional 'lifetime' tenancy after the relevant section of the Localism Act comes into force.

Furthermore, the standard also says that *'this requirement does not apply where tenants **choose** to move to accommodation let on Affordable Rent terms'*. In those circumstances an existing tenant, with an assured or secure tenancy, could be offered a fixed term tenancy.

However, where tenants are **required** to move to a property on Affordable Rent terms, for example as a result of a demolition, landlords will be required to provide another tenancy with no less security.

Mutual exchanges

Mutual exchanges between tenants of social landlords 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 provisions in the Localism Act cover those circumstances where:

- At least one of the tenants who wishes to transfer has a secure or assured tenancy, which began before the relevant sections of the Localism Act came into force (this is expected to be April 2012), and
- At least one of the tenants has a flexible tenancy or a fixed term assured shorthold tenancy.

Such exchanges must be done by surrender and then granting of new tenancies. The new landlord must grant the tenant(s) whose secure or assured tenancy predated the coming into force of the Localism Act either:

- A secure (not flexible) tenancy, (if they are a local authority) or
- An assured (not assured shorthold) tenancy (if they are a housing association).

Existing tenants will therefore retain similar security of tenure to that of their original tenancy.

Secondary legislation will shortly be made which will set out that these provisions will not apply where an existing secure or assured tenant chooses to exchange with:

- Someone with a fixed term tenancy of less than two years
- Someone with a tenancy at an affordable rent, intermediate rent, mortgage rescue properties and shared ownership leases.

A landlord can still refuse an exchange of this nature. The grounds on which they may do so are in Schedule 14 to the Localism Act. 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 can be proved. The grounds for possession remain the same as for secure tenancies.

Housing associations may apply for a court order if the grounds for possession can be proved, 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 authority flexible tenancies

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

Housing associations – fixed term assured shorthold tenancies

There is no similar statutory provision for tenants to end a fixed term assured shorthold tenancy 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. A contractual provision can be written into the tenancy agreement however.

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 another tenancy would or would not be given at the end of a fixed term.

Where another tenancy is not being offered, there is also a requirement that the provider offers 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.

Local authority flexible tenancies

The procedure for local authorities who decide not to grant another tenancy at the end of the fixed term is set out in the Localism Act. A 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 grant another tenancy was otherwise 'wrong in law'.

There are 3 conditions to get a court order to terminate the tenancy:

1. The fixed term has ended
2. The tenant has been given no less than six months notice in writing
 - a. Stating that the landlord does not propose to grant another tenancy on the expiry of the fixed term
 - b. Giving the reasons why
 - c. Informing the tenant of their right to request a review and the timescale for this
3. The tenant has been given no less than two month's notice in writing stating that the landlord requires possession of the dwelling house.

If the tenant refuses to vacate the property possession proceedings should be taken.

Review of the decision to end the flexible tenancy

Secondary legislation will be made shortly which will set out the procedure for a review of decisions relating to flexible tenancies. Regulations will be modelled very closely on those for introductory tenancies and will include a requirement to seek review in writing.

It is intended that secondary legislation will require that the tenant request a review of the decision not to renew the tenancy in writing within 21 days of the first notice. The tenant would be entitled to request an oral hearing and the review would have to be conducted by someone senior to the maker of the original decision and not involved in that decision.

Note that the review must be carried out, where requested by the tenant, by the landlord before possession proceedings are issued.

Housing associations

Where a housing association proposes not to grant another tenancy at the end of the fixed term, the Localism Act 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 Act for housing association tenants at the end of a fixed term. However, the draft revised Tenancy standard requires that an appeal or complaints procedure is available, so should be given and set up in the same way as for local authorities.

Possibility of challenge

The *Pinnock* and *Powell, Hall & Frisby* Supreme Court judgements clarified that tenants of public bodies may mount a Human Rights challenge where the landlord had an unqualified right of possession in domestic law.

Whilst these cases applied specifically to local authorities, housing associations are likely to be considered, particularly in light of the earlier *Weaver* case, to be performing public functions in these circumstances and would therefore also 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* and subsequent *Powell, Hall & Frisby* judgements make 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 grant another tenancy. The Localism Act establishes a process for internal reviews for tenants of local authorities. Housing associations should develop a robust review procedure based on their existing complaints or starter tenancy review 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, looking later at similar issues, will find the process followed was proportionate.