



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 has introduced:

- 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 is to be used to fund new development.

These reforms are being implemented through the Localism Act and through changes to the regulatory standards framework.

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
- **January 2012** – Provisions in the Localism Act requiring local authorities to prepare and publish a tenancy strategy within 12 months came into force. This means local authorities have a statutory duty to produce a strategy by January 2013. However, in practice these should have been well developed by April 2012 to provide the strategic framework for landlords' tenancy policies
- **March 2012** – The Tenant Services Authority (TSA), then the regulator of social housing in England, published a revised regulatory framework, including an amended tenancy standard which allows for the use of fixed term tenancies
- **1 April 2012** – The revised regulatory standards came into effect and the main tenure reform provisions of the Localism Act came into force. The effect of these changes is to allow housing associations and local authority landlords to begin offering fixed term tenancies on social rent, as well as affordable rent properties. Providers are expected to develop and publish tenancy policies, setting out the types of tenancies that they will use and in what circumstances, and cannot begin issuing fixed term tenancies until they have done 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, 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 specifies 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 their tenancy policy.

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

Local authorities

The Localism Act created a new type of tenancy, which can be used by local authority landlords, called a **flexible tenancy**. The provisions creating flexible tenancies came into force on 1 April 2012.

A flexible tenancy is a form of secure tenancy and generally, tenants with a flexible tenancy 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 are all available and can be used during the fixed term, for example if there are rent arrears or a breach of tenancy.

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

From April 2012, all new secure tenancies (including flexible tenancies) only have a statutory right of one succession to a spouse/partner and not also to other family members. These changes are set out in more detail later in this briefing (see page 11).

Flexible tenancies are only used where local authorities **choose** to do so. They are also only available for **new tenants**. The rights of existing secure and introductory tenancies are unchanged.

When a local authority is offering a flexible tenancy, whether initially or at the end of an introductory or demoted tenancy, the Localism Act requires it to serve notice on the prospective tenant stating that it will be a flexible tenancy and what the length of the fixed term will be. A prospective tenant has a right of review of the decision about the length of the tenancy. The review must be requested in writing within 21 days of the tenant receiving the notice, or any longer period which the landlord will allow.

Housing associations

Following directions from the Department for Communities and Local Government (DCLG), the revised regulatory framework published by the TSA included revisions to the tenancy standard which removed the requirement that providers *'offer the most secure form of tenancy compatible with the purpose of the housing and the sustainability of the community'*. This had effectively required providers to grant 'lifetime tenancies' to the vast majority of tenants in general needs, social rent housing.

It has been replaced with a requirement that they offer 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'*.

This change enables housing associations 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, was previously only applicable for a periodic tenancy but provisions in the Localism Act now 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 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 previously only covered 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 now 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](#). Housing associations who were successful bidders have been able to offer fixed term tenancies since July 2011, but only on their affordable rent properties.

However since April 2012, tenure and rent have become completely separate. Providers are now able to let properties on fixed term tenancies at their own discretion but are still only 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 may therefore now 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 secure or assured, rather than a fixed term, tenancy may be used, in those circumstances the rent can 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 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 are also 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. London borough councils 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 revised tenancy standard 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 tackling 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 has recently published guidance on [How to develop your tenancy policy](#).

Use of starter tenancies, introductory tenancies and demoted tenancies

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

Housing associations – starter tenancies

The 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 can be either a periodic assured shorthold tenancy or a fixed term assured shorthold. Once the probationary period is complete a new fixed term assured shorthold tenancy should be issued for the fixed term.

Housing associations – demoted tenancies

Assured shorthold tenancies were not previously able to be demoted. However the Localism Act introduces demotion of a fixed term assured shorthold to a periodic assured shorthold.

The Act provides that 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 have been made to the Right to Buy as a direct result of the Government's tenure reforms. However, the Government have also introduced changes designed to reinvigorate 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 extends to flexible tenancies subject to the same qualifying criteria.

Housing associations – Right to Acquire

The Localism Act extended the Right to Acquire to tenants with a fixed term assured shorthold tenancy, subject to the usual qualifying criteria, and with the following exceptions:

- 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

The Localism Act amends section 17 of the Housing Act 1988 so that the succession rights in the amended section apply regardless of whether the tenancy is periodic or fixed term. In effect this ensures that housing association tenants with a fixed term tenancy have the same statutory succession rights as those with an assured tenancy.

New tenancy agreements will not in future be granted however where a contractual succession right is given in a tenancy. The tenancy will 'vest' i.e. transfer automatically to the person who the tenancy agreement says is qualified to succeed. This is a significant change to how contractual succession rights have operated with housing associations previously.

Local authorities – secure and flexible tenancies

The Localism Act reduces the automatic statutory rights of succession for all new secure tenancies (including flexible tenancies) from April 2012. There is now only a statutory right of succession to a spouse or partner. There is 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.

Those 'contractual' succession rights will not however require the grant of a new tenancy but the tenancy will automatically 'vest' i.e. transfer automatically to the person who the tenancy clause says is qualified to succeed.

The changes do not affect secure tenancies that began before April 2012.

Transfers, mutual exchanges and fixed term tenancies

Transfers

The revised tenancy standard states that tenants with an existing social tenancy on 1 April 2012 must be given *'a tenancy with no less security where they choose to move to another social rented home'*.

This means that their security of tenure is 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 1 April 2012.

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, can 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 usually 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.

However 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 1 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 1 April 2012:

- 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.

Regulations provide that these provisions do 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.

In summary, this means that:

- Someone with a pre-April 2012 secure or assured tenancy can exchange with any other social tenant and be sure of keeping their existing level of security
- If such a tenant wanted to swap with a tenant who pays an affordable rent, there would be no legal guarantee of security in the new tenancy. The landlord may choose to offer a secure or assured tenancy – but it would be up to the landlord

- Tenants of affordable rent properties have the same rights to exchange as other tenants. If they exchange with a tenant who is not a pre-April 2012 tenant, then the exchange would happen in the 'normal' way, via deed of assignment.

A landlord can still refuse an exchange and the grounds on which they may do so are in Schedule 14 to the Localism Act. They have 42 days to make that decision. There are not 'grounds' and 'conditions' as are still found in Schedule III to the Housing Act 1985 for exchanges for secure tenants, just grounds for refusal.

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 are 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).

Notices to Quit cannot be served during a fixed term at any point, even if abandonment is suspected.

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. Abandonment issues will continue to be dealt with on a risk assessment basis but without using Notices to Quit.

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 for possession to terminate the tenancy:

1. The fixed term has ended
2. The tenant has been given no less than six months notice in writing stating:
 - a. that the landlord does not propose to grant another tenancy on the expiry of the fixed term
 - b. the reasons why
 - c. the tenant has a 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.

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 given information about how to obtain help and advice. This is in addition to the usual requirement for a section 21 notice.

Review of the decision to end the tenancy

Local authorities

The procedure for a review of decisions relating to flexible tenancies is set out in secondary legislation. The regulations are modelled very closely on those for introductory tenancies.

They 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 is entitled to request an oral hearing and the review must 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

No right of review is set out in the Localism Act for housing association tenants at the end of a fixed term. However, the revised tenancy standard requires that an appeal or complaints procedure is available, so it is suggested an appeal process is set up in the same way as for local authorities.

Possibility of challenge

The *Pinnock* and *Powell, Hall & Frisby* Supreme Court judgments clarified that tenants of public bodies may mount a Human Rights challenge even where the landlord has 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* judgments 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.

This has been more recently emphasised again in the case of *Corby BC v Scott; West Kent HA v Haycroft* decided in 2012. The Court of Appeal confirmed how exceptional the facts relied on by any occupier must be before such a defence can have a real prospect of success.

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 either follow that or 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 or proportionality arguments 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.

