2. SETTING UP A TENANCY
2 Setting up a Tenancy

2.1 Types of tenancies

If you are a landlord or are looking to be one, it is important that you understand the types of tenancy which exist. This is because sometimes the rights and obligations of both the landlord and the tenant, particularly in the procedure for possession, will depend on the type of tenancy involved. [See section 6 for ending of tenancies]

Assured and assured shorthold tenancies

These types of tenancies are governed by the Housing Act 1988, which was amended slightly by the Housing Act 1996. The vast majority of tenancies today will be assured or, more usually, assured shorthold tenancies. Both assured and assured shorthold tenant landlords can charge a market rent for the property.

The main differences between an assured and an assured shorthold tenancy

Assured shorthold tenancies

Assured shorthold tenancies are now the ‘default’ type of tenancy, so if you are renting out a property and it does not fall into one of the exceptions discussed below, it will automatically be an assured shorthold tenancy, without you having to do anything (although letting a property without a written agreement is unwise).

The main benefit of assured shorthold tenancies is that the landlord can recover possession of the property, as of right, so long as any fixed term has expired and the proper form of notice has been served. This notice must be properly drafted and give the tenant notice of not less than two months.

These notices are known as section 21 notices as the landlord’s right to recover possession and the notice procedure is set out in section 21 of the Housing Act 1988.

Assured tenancies

These give tenants long-term security of tenure, and tenants are entitled to stay there until either they agree to go, or an order for possession is obtained against them. Possession under the ‘no fault’ section 21 procedure is not available for assured tenancies, and you will only be able to evict if one of the statutory ‘grounds’ for possession, as set out in Schedule 2 of the Housing Act 1988, apply. Before 24 February 1997 assured tenancies were the ‘default’ type of tenancy, and many 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.

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 shortholds. The only circumstances where you may want to consider letting a property under an assured tenancy are if you are certain that you will not want to recover possession and you wish the tenant to have security of tenure (for example a family member or former employee). However you should be very careful before doing this, as you will be depriving yourself of the right to recover possession, perhaps during your lifetime (bearing in mind that assured tenancies can be passed on to spouses), and ideally should take legal advice first.

Setting up an assured tenancy

In the unlikely event that you will wish to create an assured tenancy, you do this by giving notice to the tenant, saying that the tenancy is an assured rather than an assured shorthold tenancy. 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.

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 and the tenancy instead will be governed by either another statute or the underlying ‘common law’. These are as follows:

i. A tenancy which began, or which was agreed, before 15 January 1989 (this will normally be governed by the provisions of the Rent Act 1977)
ii. An agricultural tenancy: this will normally be governed by the Rent (Agriculture) Act 1976, assuming that the tenant is a qualifying agricultural worker
iii. A tenancy for which the rent is more than £100,000 a year
iv. A tenancy which is rent free or for which the rent is £250 or less a year (£1,000 or less in Greater London)
v. A letting to a company
vi. A tenancy granted to a student by an educational body such as a university or college
vii. A holiday let
viii. A letting by a resident landlord (i.e. where the landlord lets self-contained accommodation in the building where he lives and where accommodation is shared, this is a licence/lodger situation not a tenancy).

In the circumstances set out in points iii-viii the tenancy will be governed by the common law.
Note that the chief significance of a property not being an assured shorthold tenancy is that the procedures for recovery of possession are different.

**Tenancies that can be assured but not assured shorthold tenancies**

The following tenancies cannot be assured shorthold tenancies:

- Where you have an existing tenant who holds an assured tenancy, you cannot convert an existing assured tenancy into an assured shorthold tenancy, for example by giving a new form of tenancy agreement. This applies whether or not the fixed term in their tenancy agreement has expired.

- An assured tenancy which the tenant has succeeded to on the death of the previous regulated (pre-1989) 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.

**Fixed term tenancy**

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. Any fixed term of more than 3 years must be a ‘Lease by Deed’. After a fixed term has expired you can either allow it to run on [See section below on Contractual Periodic Tenancy] or give a new fixed term agreement.

**Statutory periodic tenancy**

When a fixed term assured or assured shorthold tenancy ends, a statutory periodic tenancy arises automatically if the tenant remains in occupation beyond the fixed term. The statutory periodic tenancy runs in ‘periods’.

It is perfectly acceptable for tenancies to run on in this way and many tenancies have operated for years as statutory periodic tenancies. It is not the case either that tenants become ‘squatters’ if they stay on, or that they will acquire additional rights if they stay as a periodic tenant for a long time.

Note: In rare cases, a tenancy agreement may contain a clause that determines what happens to the tenancy when the fixed term ends and creates a contractual periodic tenancy. If this is the case, then a statutory periodic tenancy does not arise because the tenancy has not ‘ended’ and the periods of the tenancy will be those defined in the clause.

If the tenancy becomes a statutory periodic tenancy, a landlord should reissue the prescribed information provided by the Deposit Protection Scheme to remind the tenant that the deposit is still protected.

**Contractual periodic tenancy**

An assured or assured shorthold tenancy that has no fixed term and just runs on the rental periods will be a contractual periodic tenancy. This type of tenancy is perfectly acceptable. The periods of a contractual periodic tenancy will be the same as the rental periods, so if the rent is payable monthly, the periods of the tenancy will be monthly and so on.

**Initial period of an assured shorthold tenancy**

The assured shorthold tenancy does not require an initial fixed term although one may be agreed. This may be a fixed term of less than six months if the tenant agrees or the tenancy can be set up as a periodic tenancy from the outset.

However, notwithstanding what is agreed, effectively assured shorthold tenants have a right to stay in the premises for a minimum period of 6 months, as under the section 21 possession procedure, a Judge cannot grant an order for possession to take effect during the first six months. 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 to possession until the initial six months has expired (although if the initial term was less than six months there is no reason why proceedings for possession cannot be commenced during this period).

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 section 6.2 on possession].

During this initial six months period, assured shorthold tenants can also apply to have their rent reviewed by the Rent Assessment Committee, although very few actually do this.

These rules do not apply to common law tenants. A common law tenancy can be forfeited (for example for non payment of rent) during the fixed term, and a landlord is entitled to recover possession as of right after the fixed term has expired. However, very few tenancies are common law tenancies and they cannot be created, save in the special circumstances set out above.
Regulated tenancies
Most lettings by private landlords which began before 15 January 1989 are regulated tenancies under the Rent Acts unless the landlord and tenant live in the same house. Regulated tenants have greater security of tenure and are subject to rent control.

Practically, it is virtually impossible to evict a regulated tenant unless they are in serious arrears of rent or you are able to provide suitable alternative accommodation.

More information can be found in the leaflet ‘Regulated Tenancies’ available from the CLG website at: www.gov.uk

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 them from being a trespasser. Most of the protective legislation for occupiers does not apply to licences.

The three main tests for a tenancy are:

i. Exclusive possession
ii. A fixed or periodic term and
iii. The payment of rent.

If these three factors are present, there will be a tenancy, unless there is some special circumstance reducing it to a licence. Landlords and Tenants cannot ‘contract out’ of the Rent Acts or other legislation, for example by getting a tenant to sign an agreement headed ‘licence agreement’.

A person who has exclusive possession of residential premises for a definite period is a tenant unless there are exceptional circumstances. This would include when the occupier’s possession is due to a relationship other than that of landlord and tenant, for example an employee who is required to live in employer’s premises as part of their employment.

Other circumstances where a tenancy will not occur is ‘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).

Subletting/assigning tenancies
If you have taken the effort to reference your tenant and check that they will be suitable, you will not normally want them to then assign (i.e. transfer the tenancy) or sublet it to someone else who may not have gone through your referencing procedure. In the past, tenancy agreements as a matter of course always used to prohibit any subletting or assignment. However, tenancy agreements are now subject to the rules in the Unfair Terms in Consumer Contracts Regulations 1999 which is administered by the Office of Fair Trading (OFT). In their guidance on this, the OFT stated that absolute prohibitions on assignment and subletting will be considered unfair and void under the regulations.

To enable you to retain some measure of control therefore, you should either ensure that your tenancy agreement provides for assignment and subletting only with your consent (and this will have to include the words ‘consent not to be refused unreasonably’ or similar), or provide some way for the tenant to end the tenancy early (for example if they get transferred by their job to another part of the country), by allowing them to end the tenancy if they are able to provide a suitable replacement tenant.

Even if your tenancy agreement does not provide for it, it is suggested that you should always agree to re-let the property to a suitable new tenant, allowing the existing tenant to end their agreement early should they wish; provided of course that a suitable replacement tenant can be found to take their place.

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.

If the tenant has paid a premium for the property (a sum which is additional to rent or a sum paid as a deposit which is greater than two months’ rent), the tenant is able to sublet unless there is a term in the tenancy agreement preventing this.

Joint tenancies
Joint tenancies can be agreed with two or more people from the outset of the tenancy. Each is then 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’.

For example, if a property is let jointly 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 still remain liable under the contract for all the rent. So C is still liable for rent even though she may not be living there, and A, B and D will each be liable to you, 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. Do not let the situation drift
and allow tenants to come and go at will without signing a tenancy agreement with you, otherwise when you need to recover possession of the property you will encounter difficulties.

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 this is not a problem.

**Succession rights/right of survivorship**

If a tenant dies and the tenancy is a joint tenancy, the remaining joint tenant or tenants have an automatic right to stay on in the property (Right of Survivorship).

If the tenant was a sole tenant, the right to succession will depend on whether the tenant had a fixed term tenancy or a periodic tenancy. If a fixed term tenancy and the fixed term has not expired, the executors will arrange for it to be passed onto whoever is left the tenancy in the will, or whoever inherits under the intestacy rules if there is no will.

If it was a contractual periodic tenancy or a statutory periodic tenancy, the tenant’s husband or wife or a person who lived with the tenant as husband or wife, has an automatic right to succeed to a periodic 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 (s17 Housing Act 1988).

If the tenancy was a contractual periodic tenancy or if it was or becomes a statutory periodic tenancy and there is someone living in the property who does not have a right to succeed to the tenancy, the landlord has a right to possession under Ground 7, provided that they start possession proceedings within a year of the death of the original tenant.

If the tenancy is a short hold tenancy, the landlord has an automatic right to repossess the property at the end of any fixed term, even if the tenant had a right to succession, provided that the landlord gave the proper form of 2 months’ notice under section 21, that the landlord required possession.

**Unlawful discrimination**

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.

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, age or disability. The specific legislation is as follows:

- Sex Discrimination Act 1975
- Race Relations Act 1976
- Disability Discrimination Act 1995
- Equalities Act 2010

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 discrimination.

To find out more about discrimination and guidance on avoiding discrimination see:

www.equalityhumanrights.com

### 2.2 Tenancy Agreements

**Written tenancy agreements**

Landlords should be aware of the benefits of written tenancy agreements and the procedures necessary for obtaining such an agreement. Generally it is most inadvisable to hand over the keys to a property unless your tenants have signed a form of tenancy agreement.
Benefits of written tenancy agreements
This is only required by law for fixed-term tenancies of greater than three years. However, it is highly advisable to have a written tenancy agreement, and to get the tenant to sign this before going into occupation. For example:
• It will prevent disputes later over what was agreed
• A well drafted tenancy agreement will help protect your interests
• You cannot force tenants to sign a tenancy agreement once they are in occupation of the property
• You may experience difficulties in evicting the tenant if you are unable to produce a tenancy agreement and in particular
• You will not be able to use the special ‘accelerated’ possession procedure [See section 6.2] as this can only be used where the tenancy and its termination can be shown from the paperwork.

Tenant’s right to a written statement
A 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 for this statement to you, the landlord, in writing. You must then provide the statement within 28 days of receiving the tenant’s request. If you fail to do this, without a reasonable excuse, this is a criminal offence for which you can be prosecuted and if found guilty, fined.

Implications of oral agreements
There is no reason legally, why a tenancy should not be created orally. If a tenant goes into a property and starts paying you rent, then this will be a tenancy notwithstanding the fact that there is no written agreement.

It is not possible, for example, for you to allow the tenant to live in the property ‘on approval’ on the basis that you will give them a tenancy later. If they have exclusive occupation of the property and pay a rent, then they will automatically be a tenant and will be entitled to all the statutory protection provided to tenants under the law.

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. If you need these altered you should seek specialist advice rather than doing it yourself.

Prospective tenants should be given every opportunity to read and understand terms of the tenancy, and any other agreement, before becoming bound by them.

You will need two tenancy agreements, one for the tenant(s) and one for yourself. You should keep the copy signed by the tenant and the tenant should keep the copy signed by you, but there is no harm in having both of you sign both copies. If the tenant is going to go into the property immediately the tenancy does not need to be witnessed, but if they are not going to move in for a while (for example when students sign up in June to go into a property the following September) it is best to ensure that the agreements are signed ‘as a deed’ which means getting the signatures witnessed by someone independent.

Be careful when completing the agreements, and if they are written by hand, ensure that they are legible. Remember that they may one day be scrutinised by a Judge if you ever need to evict your tenants! Make sure also that an address is given for the landlord. Under s48 of the Landlord and Tenant Act 1987, rent will not be due unless this is done. The address must be in England and Wales. It is acceptable for the address to be the address of your agent or a business address rather than your personal home address. If no address for the landlord is given at all this may cause difficulties if you later want to evict your tenant for arrears of rent.

Unfair terms in tenancy agreements
There are now regulations to ensure that 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 (OFT) who have issued guidance on their effect on tenancy agreements. The OFT have also published a draft ‘Guidance for Letting Professionals’ which assists letting professionals to comply with consumer law.

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 contrary to the requirement of good faith. If a term is found to be unfair it will be void and unenforceable.
So far as tenancy agreements are concerned:
- Any clauses which limit or exclude rights (e.g. legal rights) which your tenants would otherwise have had, are almost certainly going 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 your 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 landlords written consent, this should be followed by the words “(consent not to be unreasonably withheld)” or similar
- Finally, any clauses which are difficult to understand, or which use legal terminology which is not in common use, or words which have a specific legal meaning which may not be understood by the ordinary person (such as ‘indemnity’), 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 will actually be void, and it will not stop the tenant from keeping pets.

To make the clause valid, it should say something like “The tenant is prohibited from keeping pets, save with the landlords written permission which shall not be refused unreasonably”. You may say, “this is silly, there are no circumstances under which I will allow pets and this is just encouraging tenants to have them”.

However, a clause in this format is not saying you have given permission. There are many reasons for refusing permission for pets - that they damage the property, that some people are allergic to them, or that your own lease with the freeholders prohibits pets. If you gave one of these reasons it would be difficult for the tenant to argue that you were being unreasonable and your refusal of permission would stand.

Unless you are familiar with landlord and tenant law, it is very 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 by lawyers with these regulations in mind. Note also, that from time to time new cases may be decided or new guidance issued which will need to be reflected in the form of tenancy agreements. Make sure that the agreements you use are the most recent versions issued by the publisher, company or association concerned, and do not use old precedents. See Office of Fair Trading website for Guidance on Unfair Terms in Tenancy Agreements: www.of.t.gov.uk

Making an inventory/schedule of condition
If you are renting a property, having an inventory (sometimes also called a statement of condition) is essential if your property is let furnished, and a very good idea even if it is unfurnished. This will protect your position and prove evidence to prove the condition of the property at the time it was let to the tenant.

Care should be taken when drafting your inventory. Make a detailed list of all the belongings and furniture provided when a tenant first moves in. It is also a good idea to record the condition of such things as walls, doors, windows, and carpets etc. The list should be agreed with the tenant before they move in and a separate copy of the list held by them. This should then be checked again at the time the tenant moves out.

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, however the use of digital photographs is not always accepted by the courts as evidence; 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 very high value properties, landlords and agents are now also taking videos.

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, it is the landlord who has the ‘burden of proof’ not the tenant.

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 goes to court, is that they will be able to give independent evidence to the Judge. You can find an inventory clerk via the Association of Independent Inventory Clerks who have a web-site at: www.theaic.uk.com

Setting the rent
The landlord should agree with the tenant the rent and arrangements for paying it and, if required, arrangements for reviewing it, before the tenancy begins. The details should be included 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. Note that rent review clauses are subject to the Unfair Terms in Consumer
Contract Regulations 1999 and clauses which simply say (for example) that the landlord can increase the rent to whatever figure he things appropriate, will be void.

Rent reviewed should be referable to something independent and external such as the retail price index.

Rent book
A landlord is only legally obliged to provide a rent book if the rent is payable on a weekly basis (where failure to provide a rent book 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.

2.3 Deposits and tenancy deposit schemes
Most landlords nowadays will take a ‘damage 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 for ‘damage’. However, there have been many problems with deposits, including some landlords unreasonably withholding them from tenants on a regular basis. This has resulted in the imposition of a statutory scheme under the Housing Act 2004 which was effective from April 2007.

Requiring a deposit
A deposit may be required from the tenant before moving into the property. Many landlords feel the holding of a deposit decreases the chances of abandonment, by acting as an incentive for the tenant to terminate the agreement correctly. It also gives security in case the tenant leaves the property owing rent or to pay for any damage or unpaid household bills at the end of the tenancy. The amount should be negotiated with the tenant. However, if a deposit of more than two months’ rent is required, it could be regarded as a premium that may give the tenant a right to give the tenancy to someone else or sublet.

Tenancy deposit protection schemes
The Housing Act 2004 requires a landlord who has received a deposit after 06 April 2007 to protect the deposit with an authorised scheme and supply the tenant with a prescribed form within 30 days. The legislation only applies to Assured Shorthold Tenancies. The legislation will also apply if you renew a tenancy (grant a new fixed term tenancy to the same tenants) after the 6th April 2007, even if you received the deposit before this date for the previous tenancy.

The legislation does not require a landlord to take a deposit, it simply places requirements on a landlord should he choose to take a deposit.

A landlord may only take money as a deposit under the legislation.

There are two types of tenancy deposit schemes, custodial and insurance based. The main difference between the two is that the custodial scheme is free of charge to use but the deposit must be passed to the scheme administrator to hold for the duration of the tenancy. The insurance based schemes allow a landlord to retain the deposit in their own separate bank account but only whilst there is no dispute. If a dispute over the deposit arises, the deposit must be transferred to the insurance based scheme. The landlord must pay to use an insurance based scheme.

It is for the landlord to choose which scheme to use and there are three authorised schemes for a landlord to choose from. For contact details of the schemes [For details of the Deposit Protection scheme providers see Appendix 2 - Useful Contacts for Landlords]

Prescribed information
Along with protecting the deposit, a landlord must also supply a prescribed form (or a form substantially to the same effect) to the tenant within 30 days. The prescribed form is called a section 213 notice (because it is a notice required by section 213 Housing Act 2004) or a deposit information certificate. The form is probably best served at the same time as signing the tenancy agreement because the tenant must be “given the opportunity to sign” the certificate contained within the prescribed form. The landlord must sign the certificate within the form. (This is not the certificate provided by the scheme administrator about the deposit, it is a different certificate.)

The information required within the prescribed form is contained in The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 and it must contain a certificate signed by the landlord with specific wording (see below).

The prescribed information required is as follows:
• the name, address, telephone number, e-mail address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit;
• any information contained in a leaflet supplied by the scheme administrator to the landlord which explains the operation of the provisions contained in sections 212 to 215 of, and Schedule 10 to, the Act;
• the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to the tenant at the end of the shorthold tenancy (“the tenancy”);
• the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy;
• the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit;
• the facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation; and
• the following information in connection with the tenancy in respect of which the deposit has been paid:
  i. the amount of the deposit paid;
  ii. the address of the property to which the tenancy relates;
  iii. the name, address, telephone number, and any e-mail address or fax number of the landlord;
  iv. the name, address, telephone number, and any e-mail address or fax number of the tenant, including such details that should be used by the landlord or scheme administrator for the purpose of contacting the tenant at the end of the tenancy;
  v. the name, address, telephone number and any e-mail address or fax number of any relevant person;
  vi. the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy; and
  vii. confirmation (in the form of a certificate signed by the landlord) that:
• the information he provides under this sub-paragraph is accurate to the best of his knowledge and belief; and
• he has given the tenant the opportunity to sign any document containing the information provided by the landlord under this article by way of confirmation that the information is accurate to the best of his knowledge and belief.

Disputes
All schemes offer a free to use alternative dispute resolution (ADR) service, however the ADR is not compulsory on either party and in more complicated cases it might be wise to consider using courts instead, in particular because there is no appeal to the ADR.

If the deposit is not protected
If a deposit is taken but either the deposit is not protected in an authorised scheme by the landlord or the landlord fails to provide the prescribed information, the tenant may apply to the court who must order the landlord to pass the deposit to the custodial scheme or replay it to the tenant. The court must also require the landlord to pass the deposit to the custodial scheme or

Legitimate withholding of part or all of the deposit
Deposits can cover:
• Damaged items
• Stolen 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.

Allowance for fair wear & tear must be made, which is not recoverable from a deposit. Wear and tear is the sort of damage which is the result of normal living in a property. You cannot expect to receive a property back in the same pristine condition as it was at the start. You can expect it to be clean and tidy, but if a tenant has been living in the property for two years, you must take this into account. For example paintwork will be less fresh and carpets may be worn.

Best practice regarding deposits
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 is advisable to keep the deposit in a separate bank account so that it can be returned at the end of the tenancy, unless the conditions for withholding it are met.

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 send the balance of the deposit to the tenant.

If the tenancy changes from an assured shorthold to a period tenancy, a landlord should reissue the prescribed information to remind the tenant that the deposit is still protected.

2.4 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 upfront cash deposit and instead guarantee to the landlord, the cost of any damage to the property/rent arrears up to the value of the bond.
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/bond provider.

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 in your area.

### 2.5 Setting the rent

As the landlord you agree the initial rent with the tenant. However, during the first six months the tenants have rights if they consider the rent is above the market rent to refer the rent to the Rent Assessment Committee for review. This is very rarely done however.

The rent you charge can include a sum to cover the cost of repairs however these costs cannot be passed on to the tenant in the form of a separate service charge. Note in particular that you cannot seek to pass on to the tenant the cost of any repairs which are your responsibility under section 11 of the Landlord and Tenant Act 1985 or under the gas or similar regulations.

### 2.6 Raising the rent

There are three basic ways to increase the rent in an assured shorthold tenancy:
- By way of a rent review clause in the tenancy agreement
- By agreement with the tenant and
- By notice under Section 13 of the Housing Act 1988.

Rent review clauses in the tenancy agreement – If the landlord wishes to be entitled to increase the rent during the fixed term of the tenancy this must be done by way of a properly drafted rent review clause. The clause can also be effective to increase the rent after the fixed term has ended. The clause must comply with the provisions of the Unfair Terms in Consumer Contracts Regulations and be fair. Clauses allowing the landlord to increase the rent as he sees fit will be void - the increase must be referable to someone or something independent, such as the retail price index. Note also that clauses which provide for very large increases (i.e. increases which the tenant would be unable to pay) will normally also be void.

Most standard tenancy agreements do not include rent review clauses as most rent is increased by the tenant signing a new agreement.

**Rent increase by agreement**

The vast majority of rent increases are done by the tenant signing a new fixed term tenancy agreement giving the new rent. This is the best method of increasing the rent as it cannot be challenged by the tenant. You can also increase the rent by getting the tenant to sign a document (such as a copy letter sent to the tenant suggesting a new rent) confirming his agreement. If you wish to do this, perhaps speak to your tenant first to see that they are happy with the proposed increase. Then send a formal letter to them in duplicate proposing the new rent, asking them to sign and date one copy and return it to you to confirm their agreement. However if they fail to return the letter or to pay the increase then the rent will not have been validly increased.

Note however that you cannot increase the rent unilaterally by just 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, well and good, the increase is agreed, but if the tenant does not agree he is entitled to refuse to pay the increase.

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 you need to use a special form, 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 fully, and served on the tenant.

At least one months notice must be given to the tenant. If the tenant does nothing during this period, then the rent increase will take effect. However if the tenant feels the rent increase is too high then he can refer it to the Rent Assessment Committee for review. The application must be made not later than the last day of the month 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 for the rent proposed. This is not always in the tenant’s favour as it is not unknown for them to consider that the proposed rent is too low!

The rent can only be increased by section 13 after the fixed term has ended and can only be used once every 12 months.
Rent increases in fixed term tenancies
Normally it is not possible to increase the rent during the fixed term of the tenancy unless either there is a valid rent review clause, or the tenant agrees to the increase. If the tenant agrees this should be recorded, perhaps by getting the tenant to sign a new tenancy agreement.

Rent increases in contractual periodic tenancies
Rent can only be increased in contractual periodic tenancies by:
- A rent review clause in the tenancy agreement
- Agreement with the tenant or
- Alternatively if the tenancy is an assured or assured shorthold tenancy by the procedure in section 13 of the Housing Act 1988.

Rent increases in statutory periodic tenancy
If the tenancy agreement was initially for a fixed period as above, but the tenant has continued to live in the property after this period with the landlord’s consent and it becomes a statutory periodic tenancy the landlord can either agree a rent with the tenant or use the formal procedure under Section 13 of the Housing Act 1988 as discussed above.

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 15 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. You or the tenant may apply to register a fair rent. Contact details for the local Rent Service can be found on the Valuation Office Agency website: www.voa.gov.uk

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 (three years if the existing registration was made before 28 November 1980) unless:
- You and the tenant apply jointly
- There has been a change of circumstances, for example, major repairs, improvements or changes in the terms of the tenancy.

Note that it is in your interest to ensure that you apply promptly for the rent increases every two years. The reason being that the amount of increase is capped under a complicated calculation set out under regulations - The Rent Acts (Maximum Fair Rent) Order 1999.

2.7 Housing benefit and Local Housing Allowance

Housing Benefit is available to assist people on low incomes to pay their rent. An application has to be made to the local council for this benefit and can be made online, using a paper form or through the Department for Work and Pensions (if claiming a state benefit). In exceptional circumstances we can carry out home visits or telephone calls.

Tenants have to provide information and, in some cases, proof to support their claim for benefit. Examples include:-
- National Insurance Number
- Income and savings, capital or investments
- Identity, including nationality and whether they have leave to remain in the United Kingdom
- Rent liability
- Name and address of landlord/agent

We aim to make a decision on a Housing Benefit claim within 14 days of receiving all of the information that we need. If the information is not provided, we are unable to decide that the claimant is entitled to Housing Benefit.

The amount of Housing Benefit payable depends on the claimant’s circumstances and the income and savings that they have. This means that some tenants will still need to pay a proportion of the rent themselves.

Most full time students, people with limited or no leave to remain in the United Kingdom, those subject to immigration control and most economically inactive European Union nationals will not be eligible to claim Housing Benefit. In addition, the rent liability must be on a commercial basis. Those living with a close relative as their landlord cannot claim Housing Benefit.

2.8 Local Housing Allowance

Most private tenants have their housing benefit calculated using the Local Housing Allowance (LHA). This is a standard figure across an area (the Broad Rental Market Area) and depends on the size of property a household needs, according to the statutory ‘size criteria’. The Local Housing Allowance payable cannot exceed the rent of the property.

Local Housing Allowances are calculated annually by Valuation Office Agency Rent Officers. They are published in advance in January, coming into effect from April each year. LHA rates are based on the 30th percentile of a list of private rents for similar size properties in the Broad Rental Market Area. Changes introduced with effect from 2014 mean that the annual uprating will be either the 30th percentile or the previous LHA rate plus either a 1% or 4% increase depending on the property type and area. Increases are
capped by upper limits set out in the legislation. The current rates can be found on the council website.

Single tenants who do not have any children and are under the age of 35 will usually have their entitlement to Housing Benefit based on the Local Housing Allowance for a room in a shared house. This is irrespective of whether they rent self-contained accommodation.

There are some exceptions to this rule for some disabled people, certain ex-offenders and people who used to live in hostel accommodation. If this is uncertain, it is best to check.

Local Housing Allowance will usually be paid directly to the tenant every fortnight. It is their responsibility to make payments to the landlord. The landlord may be paid directly if there are exceptional reasons why the tenant is unable to receive payments themselves or if landlord payments would help to secure or maintain a tenancy.

If a tenant is eight weeks behind with their rent, the landlord can be paid directly. Note that this is based on when payment is due, so if rent is to be paid in advance, it is possible that only four weeks have passed by the time a tenant is in arrears. We do our best to provide advice to landlords but the information regarding someone’s Housing Benefit claim is confidential. Limited information can be shared with landlords if payments are made directly or the claimant has given their express permission that we can discuss the award with their landlord.

Changes in circumstance
Claimants must contact the council if there has been a change in their circumstances that may affect their Housing Benefit entitlement. Landlords should also tell the council if they think their tenant has had a change in circumstance.

Examples of changes include:
• The tenant moving out or changing address
• Absences from the property exceeding 13 weeks, even if the tenancy is ongoing
• Household circumstances have changed (partners, children moving in, out etc.)
• Change of room within the same property

If there has been a delay in notifying a change in circumstance an overpayment may result that will need to be repaid either by the landlord or tenant (depending on the payment method and circumstances of the case).

If the change results in more Housing Benefit entitlement it is important that the change is reported to the council within one month of the date of change, otherwise it may only be paid following the date the council was informed. In very exceptional cases the council can accept changes reported up to 13 months late.

Overpayments
An overpayment occurs when Housing Benefit entitlement ends or is reduced and results in more Housing Benefit being paid than the claimant is entitled to. Most overpayments are recoverable from either the claimant or the landlord (if paid directly).

The council will not recover an overpayment from the landlord when they have notified the council that they suspect that an overpayment has occurred and the reason for the overpayment was not a change of address.

If it is decided that an overpayment is recoverable from the landlord, the council will send a letter to them explaining how the overpayment has occurred, the period it covers and the amount.

The council can send an invoice to the landlord to request payment in full or arrange instalments. If the landlord has other tenants who receive Housing Benefit the council can make deductions from payments made in respect of those tenants.

A court order can be obtained for Housing Benefit overpayments to allow the use of bailiffs or a charging order, as well as attachments to earnings and making deductions from the landlord from third party debtors.

Appeals
There is a right for ‘affected persons’ to appeal to an independent tribunal. The council will review its decision in any case where an appeal is made. Landlords are limited to appealing against:
• The amount of an overpayment
• Whether the overpayment is recoverable

If the council cannot revise its decision, it will submit the appeal to the HM Courts and Tribunals Service to be considered by the First Tier Tribunal. They will look at whether the council made the correct decision when assessing the case.

Where the landlord does have a right of appeal they must do so within one month of the decision notice being issued to them.

2.9 Universal Credit

Universal Credit is a new benefit that will replace 6 existing benefits with a single monthly payment. It is gradually being introduced across the country, it will be rolled out in Bath in Spring 2014, although is not likely to be brought in for the other West of England authorities until 2016/17.
2.10 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. The tenants will usually need to arrange for meters to be read, and the supplies put in their name.

The utility companies may send someone to read the meter or they may ask you or the occupier to supply a reading. It is recommended to include all relevant meter readings on the inventory.

If fuel has been used during the void period you can either 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 you charge for utilities on the rent, for example because you are renting out rooms and there is no separate bill, you should set the rent at a level that reflects the cost. However, you cannot usually increase the rent just because the water bill has gone up. You must follow the normal rules for rent increases. However, a contract term which provides for rent to be increased to reflect increases in the utility bills paid by the landlord, will normally be considered fair under the regulations, so long as the tenant is given reasonable notice of the increase and is given the right to inspect the relevant bills to check that the increase in rent reflects the increase in the bills.

If you pay for the utilities, and your tenant is receiving Housing Benefit, the payment they receive will be reduced by an amount to reflect this, and they will need to pay you from their other income.

You can agree the meter readings with the incoming tenant, and let them know which companies are currently supplying the fuel. The tenant can choose their own electric/gas utility supplier after one months’ period of a tenancy.

If you need to find out which company is supplying your property; for gas supply you need to phone the Meter Number Helpline on 0870 608 1524, and for electric you need to phone Western Power Distribution on 0845 601 5972.

2.11 References

It is very important that the landlord interviews tenants carefully. The landlord will want to choose a person who will be a trustworthy and reliable tenant and although first impressions are useful, the landlord is strongly advised to take up references from the prospective tenant’s current or previous landlord, employer and bank. Landlords should also verify that their prospective tenants are who they say they are. Landlords should get the tenant to show some identification (ID) with a photo such as a passport or European style driving licence so that the landlord can see the tenants’ name and an identifying picture.

The landlord may also consider using a tenant referencing service, which will make these and additional checks for the landlord. There are many companies who do this, many of whom can be found via a search on the internet. Alternatively your insurer or Landlords Association may be able to recommend someone.

Ask new tenants for contact details of a close family member or friend whom the landlord can contact in an emergency. This information is also useful if the tenant leaves without notice.

The landlord should note that tenants should not be chosen on the basis of race, religion, marital status, disability, sexuality or age. 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. Some local authorities have introduced Selective Licensing Schemes which require landlords to take up references.

2.12 List of rents used to calculate Local Housing Allowance rates

The rental information used to calculate Local Housing Allowance rates is provided on a goodwill basis by landlords and letting agents. VOA Rent Officers keep all the information on a secure database and comply with the Data Protection Act 1998. Their independence of any commercial interests enables them to collect rents from all parts of the market. Without compromising commercial confidence, they also publish free downloadable Private Rental Market statistics and maps by local authority; www.voa.gov.uk/prmmaps

Landlords wishing to contribute rental information can contact their local Lettings Research Manager. Go to www.voa.gov.uk/lettingsresearch (and follow the link to ‘Contact a Lettings Research Rent Officer’).