

Briefing Paper

Flexible Tenancies

March 2013

Introduction

The Localism Act created a new type of tenancy that can be used by local authority and registered social landlords, called a flexible tenancy. The provisions creating flexible tenancies came into force on 1st 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 the 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.

This more flexible model may be of some assistance in making the best use of properties and helping reduce waiting lists a little. However, new flexible tenancies may also adversely affect the stability of communities. Councils will also be required to work with social landlords to produce a tenancy strategy. At this level it is hoped that partnership working between local authorities and housing associations will ensure that housing options and requirements are fully understood by local residents.

Communities and Local Government said in 2010 that the Localism Act would give:

“Councils the flexibility to use their social housing stock to the maximum effect and reduce waiting lists”.

In introducing the new flexible tenancies, Grant Shapps MP, then Minister for Housing stated that they would:

“Help end long-held prejudices about social housing and ensure it once again becomes a springboard for success”

In January 2013, Mark Prisk MP, the housing minister said councils should be using the new flexibilities to ensure social housing goes to people who most need it. He was quoted in 'Inside Housing' saying:

“Councils should be using the flexibilities we have given them to ensure homes go to those in greatest need in their area, better meet the needs of current and future tenants and cut waiting lists... Social housing is a valuable resource to protect the most vulnerable in society, but one that helps far fewer people than it should... ‘That is why we have introduced common sense reforms to make the system fairer and more responsive.’”

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Tackling tenancy abuse is also crucial as it can prevent homes being put to good use for local residents. The Government has recently announced a consultation on social housing fraud with a view to strengthening landlords' powers in this area. There is also an intention to charge high earners in social housing an increased rent to 'pay to stay'. The questions that government is asking social landlords are:

- How can your council use the reforms to create and maintain sustainable communities?
- Is there an opportunity to work with social landlords and the private rented sector to create flexible arrangements which meet local needs and create balanced mixed-income communities?

Housing Associations

Following directions from the Department for Communities and Local Government (DCLG), the revised regulatory framework published by the Tenant Services Authority (TSA) included revisions to the tenancy standard that 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 rented housing. The Tenant Services Authority has now been abolished and its functions taken over by the Homes & Communities Agency (HCA).

The tenancy standard now includes a requirement that social landlords 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. Associations and tenants need to remember that 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). 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 that 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.

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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

Under section 13 of the 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 seven years or less. The Localism Act extends the obligation to secure or assured tenancies for seven 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 three 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).

There is a relationship between fixed term tenancies and affordable rent. Housing associations and local authorities are able to agree with the Homes & Communities Agency 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 bids for funding from the Homes & Communities Agency – a list of successful bidders is available on their website. Housing associations that 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 Homes & Communities Agency or the Greater London Authority.

This has been summarised by the Department for Communities & Local Government as follows:

“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.”

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 that 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.

Tenancy policies

The revised tenancy standard sets out that housing associations and stock-holding local authorities must publish 'clear and accessible' policies that 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.

Reaction

The Local Government Association in their paper *'Writing an effective tenancy Strategy'*¹ following the flexible tenancy announcement stated:

"The adoption of the strategy is not the end of the process, but the end of the beginning. Councils and landlords are feeling their way through a lot of policy change, in a very challenging economic context. There may be yet further policy change. So it is important to make sure your council is monitoring the impact of its Strategy against the policy objectives it is seeking to achieve. It may well increase the effectiveness of this process if it is done alongside providers.

"As the economic climate changes, current policy changes take effect and others emerge, councils will need to look further at the local approach to social housing tenancies. Having good information on how things have been working up to that point will help councils and housing providers carry on doing the best they can for local people in housing need."

Chartered Institute of Housing (CIH) Chief Executive Sarah Webb said in the consultation period for social housing reform that:

"CIH is positive about creating a modern and flexible approach to social housing and our sector is ready to make the best use of the potential that new flexibilities offer. However, housing professionals, who are committed to serve the interests of tenants and communities and will see the immediate impact of these reforms, have expressed concerns about the current proposals.

"We are clear that the emphasis must be on offering tenants positive and supported choices to improve their housing options and to support the development of sustainable communities, rather than on enforcing particular behaviour or eligibility. And without turning our attention to the wider housing market, we will fail to address the housing problems faced by many households."

Brynmor Adams of the Guardian newspaper said that:

"While yet another type of tenancy gives social landlords more choice, it does not necessarily follow that fixed-term tenancies are actually more flexible. It will often prove more burdensome for a social landlord to grant a fixed-term tenancy than to grant a periodic (weekly or monthly) tenancy"

Local Authority Reaction

In light of these provisions of the Localism Act, local authorities are making changes to their housing strategies. Below is an overview of what some councils are doing to prepare for the new flexible tenancies which will be available.

¹ http://www.local.gov.uk/c/document_library/get_file?uuid=f71cd5e1-6b8c-4d3f-9576-b9231af71af8&groupId=10171

Barnet Borough Council

Barnet Council is already making use of flexible, fixed-term tenancies, as is permitted in the Localism Act 2011. Since 9th July 2012, new council tenancies have been subject to the local tenancy strategy. In doing this the council say that it:

“Aims to be able to offer more tenancies to households in high housing need. The strategy recognises that many households are granted council tenancies at a crisis point in their lives, but that their circumstances and housing requirements change over time. Flexible tenancies enable us to respond to these changes.”

Councillor Tom Davey, Cabinet member for Housing, said in ‘Inside Housing’ that:

“Flexible tenancies ensure we can free up properties for those who most need it.”

Cornwall County Council

Cornwall Housing recently consulted its tenants about a draft Council Tenancy Policy for introduction by 1st April 2013. Tenants were broadly supportive of the policy but had some concerns about the introduction of flexible and fixed term tenancies across all general need properties.

Cornwall Housing recommended to Cornwall Council that its 2013 Tenancy Policy did not include the introduction of flexible and fixed term tenancies, but that during the year a review should be carried out to consider their introduction.

Before the review begins this summer, tenants are researching the issues that will help inform future discussions on the Council’s Tenancy Policy.

Hammersmith & Fulham Borough Council

Hammersmith & Fulham Borough Council will be introducing fixed-term tenancies of five years, and in some cases two years, in April 2013.

Councillor Andrew Johnson, Cabinet member for Housing, said:

“It is morally wrong for anyone, apart from the most vulnerable, to be given a subsidised home for life.”

Northampton Borough Council

Since 1st March 2013 new tenants who are offered a council home in Northampton will be given a flexible tenancy for a maximum of five years instead of a life time tenancy. This new type of tenancy will be granted after a successful one year introductory tenancy that all new council tenants initially receive.

The change means that at the end of the five years, tenants will be reassessed to see if their housing needs have changed and they may not be offered a new tenancy. Anyone over the state retirement age or households with a disabled person who matches the criteria for mobility level 1 and 2 on the housing register will still be offered a lifetime tenancy. All other new households will be offered a flexible tenancy.

The changes are part of the Tenancy Strategy that was approved by Northampton Borough Council's Cabinet in December 2012. The Localism Act 2011 requires all Councils to have a Tenancy Strategy in place by 15th January 2013.

Councillor Mary Markham, Cabinet member for housing said:

"The number of people in housing need continues to grow and Councils are being challenged to make the best use of the limited properties that are available.

"Not everyone may need to be granted a tenancy for life. By introducing flexible tenancies we can reassess people's needs and if their circumstances have changed they may no longer need to rent a council house."

Southwark Borough Council

Southwark Borough Council opposes fixed-term tenancies. Councillor Ian Wingfield, Cabinet member for Housing was quoted in 'Inside Housing' as saying:

"I've been a member of the council for 23 years and during that time we have been trying to create stable communities - fixed-term tenancies go against that."

Tamworth Borough Council

Tamworth Borough Council believes that flexible tenancies will provide a more flexible use of housing, prioritise housing need and can be used to respond to tenancy changes and because of this the Council will start giving flexible tenancies from April 2013.

The council say that they will continue to offer secure tenancies and non-secure tenancies in addition to flexible tenancies. Existing tenants will not be affected by the changes. However, people on the Housing Register who might be offered a property in the future may only be given a tenancy for five years.

The key features of the Tenancy Management Policy are:

- Five year flexible tenancies will be available for all family type housing and automatically renewed if there has been no change in circumstance
- Tenants will have the right of appeal of any decision not to reissue a tenancy on their current home.

Inside Housing Survey

In January 2013, an 'Inside Housing' survey of the hundred largest stock-owning councils in England revealed their emerging tenancy and allocation policies. Of fifty councils that responded, 29 were in favour of retaining lifetime tenancies, while 16 were backing flexible five-year tenancies, made possible under the Localism Act 2011. The survey results also showed that councils' approach to fixed-term tenancies correlates with their political leadership. Of the 29 backing security of tenure, 25 were Labour-led authorities, while twelve of the sixteen authorities preferring five-year tenancies were Conservative-led.

Conclusions

With many councils deciding to offer the flexible tenancies this seems like it will bring a better range of available tenancy and allow those in social housing to be given a better deal to help revive the social housing sector in these uncertain times

The aim of the introduction of flexible secure tenancies is to allow local authorities to manage their stock more effectively and to ensure that the occupation of social housing reflects actual need. Only time will tell if this goal is achieved and does indeed improve the way those in social housing live. If this aim is not achieved it will remain to be seen how much damage this new introduction could cause to the social housing sector.

Adrian Waite and Adam M. Waite
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