

## Tenancy Deposit Scheme Frequently asked Questions

### General

#### **Q.1 When does tenancy deposit schemes start?**

It commences on the 6th April 2007 but only in respect of deposits received on or after that date. If you receive a deposit before that date then you do not have to deal with it under the scheme (except where a tenancy agreement is expressly renewed after that date).

However, it is understood that preliminary Government legal advice is that where the deposit is paid before 6th April 2007 and the tenancy commences (i.e. the tenant moves in) after that date, the deposit will be subject to Tenancy Deposit Scheme. The RLA does not necessarily consider Government view to be correct and further clarification is awaited.

#### **Q.2 Do I have to take a deposit?**

No - you are not obliged to take a deposit. If you do so, however, then you will have to deal with it in accordance with the tenancy deposit scheme. Otherwise you can suffer penalties.

#### **Q.3 What sort of tenancies will deposit protection apply to?**

All deposits taken by landlords in relation to assured shorthold tenancies (ASTs) in England and Wales. It only applies where an AST is entered into.

#### **Q.4 Are there are types of tenancy to which the tenancy deposit scheme does not apply?**

Yes - If your tenancy is not an assured tenancy at all or if it is a non shorthold tenancy even though you take a deposit then you can legally deal with it outside the tenancy deposit scheme.

#### **Q.5 Please explain further when I can take a deposit legally without having to deal with it under the scheme?**

Certain types of tenancy are not assured tenancies or even if they are they may be non shortholds. For example, you can opt out of the assured shorthold tenancy regime by giving the tenant a written notice to that effect ie. You tell the tenant it is a non shorthold tenancy. If you did this then you would not need to deal with the deposit under the tenancy deposit scheme. However, instead you would be giving your tenant security of tenure, so this is not advisable.

If you let to a company the tenancy is not an assured tenancy at all. Therefore, company lets are outside the tenancy deposit scheme.

If an owner occupier lets his or her house and gives what is called a Ground 1 Notice then the tenancy is not an assured shorthold so again any deposit paid would be outside the tenancy deposit scheme.

If the rent payable is more than £25,000 per annum then the tenancy is not an assured shorthold so again the tenancy deposit scheme does not apply. This could apply to lettings at the higher end of the market or alternatively it can apply to lettings to joint tenants (eg. Student houses) where the rent level exceeds £25,000 per annum. The Government have stated that they do not intend to alter this limit at the moment.

If you let a property for a holiday and then enter into an out of season holiday let provided you give what is called a Ground 3 Notice then, again, the tenancy is a non shorthold tenancy.

If the tenants (or at least one of the tenants if it is a joint tenancy) do not occupy the property as their only or main home (e.g. if it is a second home) then it will not be an AST so Tenancy Deposit Protection will not apply.

**Q.6 What happens if the tenancy is called an assured shorthold tenancy when, in fact, it is not?**

Often unwittingly properties are let to companies on a tenancy which is described as being an assured shorthold tenancy or a tenancy where the rent payable is over £25,000 is mis-described as being an assured shorthold tenancy. This will not affect the position because, as a matter of law, however, the tenancy is described, it is not an assured tenancy if it is a company let or if the rent exceeds £25,000. In such a situation the deposit will not be subject to the tenancy deposit scheme.

**Q.7 It has been suggested that if I let a property on a license then I can take a deposit outside the tenancy deposit scheme?**

Legally, it is very difficult to create a license. You would need specialist advice. You are only likely to be able to create a license if you let hostel type accommodation. If you were successfully able to create a genuine license arrangement then the tenancy deposit scheme would not apply to any deposit taken.

**Q.8 What about holiday lettings?**

Any deposits taken in connection with holiday lettings would be outside the tenancy deposit scheme.

**Q.9 What happens regarding the deposit if it not an assured shorthold tenancy?**

You can deal with the deposit as provided for in the agreement. Provided the tenancy is not an assured shorthold tenancy then it is not subject to the tenancy deposit scheme. You must still keep to any contractual provisions relating to the deposit which are set out in the tenancy agreement.

**Q.10 Even where the Scheme applies is there any control on the amount of the deposit payable?**

No.

**Q.11 Does it matter who pays the deposit?**

As long as a deposit is paid it does not matter whether it is paid by the tenant or someone else on the tenant's behalf. It could be a parent. Some local authorities operate tenancy deposit schemes which pay over a deposit. All of these are subject to the tenancy deposit scheme where there is an AST in place.

**Q.12 Does tenancy deposit protection apply to landlords who live overseas?**

If a landlord lives overseas but lets a property in England or Wales on an assured shorthold tenancy (AST) and takes a deposit, the landlord will have to protect their tenants' deposit.

**Q.13 What is the average deposit for an assured shorthold tenancy (AST)?**

According to the Government, the most recent Survey of English Housing (05/06) found that the average deposit for an AST in England is £695. Deposits are usually set at an amount equivalent to one month's rent or perhaps six weeks rent.

**What is a tenancy deposit?****Q.14 Can you please explain what is a tenancy deposit?**

The legislation defines a tenancy deposit as money intended to be held as security to ensure that the tenant pays the rent and complies with the terms of the tenancy. Money is defined as cash or otherwise, so it would include cheques, bank transfers credit card payments, money orders and postal orders as well. The purpose of the scheme is to protect sums of money, deposited with the

landlord which are returnable so long as the tenant has paid the rent and has not otherwise broken the tenancy terms.

**Q.15 Can I take a deposit in some other form?**

No – deposits can only be paid in the form of money. The legislation outlaws other transfers of moveable property attempted to give as security. Thus you could not take the tenant's Rolex watch off him to keep it during the tenancy as security!

**Q.16 What about guarantees?**

There is nothing to stop you taking a guarantee eg. From a parent.

**Operation of the tenancy deposit scheme**

**Q.17 How will deposit protection work in practice?**

There are two types of scheme: a custodial scheme and two insurance-based schemes.

The landlord — not the tenant — will have the option to choose whether to safeguard the deposit in the custodial or an insurance-based scheme.

**Q.18 How long will the landlord have to take action?**

A landlord will have 14 days to safeguard a deposit from the day he receives it. The landlord will have to provide the tenant prescribed information about the scheme safeguarding the deposit within these 14 days.

**Q.19 What happens if there is a dispute?**

To avoid disputes having to go to the courts, both schemes will be supported by an alternative dispute resolution (ADR) service - although the use of this will not be compulsory. Instead of dispute it can go to Court if either the landlord or the tenant objects to the ADR procedure being used.

**Q.20 What information does the landlord have to give the tenant?**

Within 14 days of receiving a deposit, landlords will have to provide tenants with details of which scheme is protecting the deposit

### **Q.21 How can tenants find out if their deposit is protected?**

The scheme will be able to confirm if the deposit is protected. A tenant will be able to ask the scheme administrators direct for confirmation that the deposit is protected under the tenancy deposit scheme.

#### **Schemes**

### **Q.22 Who will be running the schemes?**

The Government has awarded contracts to three companies to run its tenancy deposit schemes from 6 April 2007. **Computershare Investor Services Plc** will operate the custodial deposit scheme. There will only be one scheme. There will be two insurance schemes.

Further information about joining these schemes will be available in early 2007.

#### **Custodial Scheme**

### **Q.23 How will the custodial scheme work?**

The tenant will pay the deposit to the landlord as now. But - and here's the difference with the insurance-based scheme - the landlord will then pay the deposit into the custodial scheme. It will have to be sent to the custodial scheme in 14 days of receipt. At the end of the tenancy, if the landlord and tenant agree how the deposit should be allocated, they will tell the scheme, which will pay out the money as agreed.

### **Q.24 What is meant by receipt for these purposes?**

You should assume that the 14 day period will run from the time you actually receive the money. Where you receive a cheque, the 14 days will start when you receive the cheque; rather than the date when the cheque is subsequently cleared.

### **Q.25 What happens if I take a deposit but the tenancy starts at a later date?**

The legislation requires the deposit to be dealt with within 14 days of when you receive the deposit. It does not matter that the deposit relates to a tenancy which commences at a later date. For example, a property may be let in May with the tenancy commencing in July. You must deal with any deposit taken in accordance with the scheme as soon as you receive it. You cannot wait until the tenancy starts at a later date.

**Q.26 What happens if the landlord or tenant cannot contact the other party to agree how the deposit should be returned, or where one party is being un-co-operative?**

A 'single claim' can be submitted to the scheme in these circumstances.

If the landlord is unable to contact the tenant, he can submit a single claim to the scheme indicating the reason for the claim, including evidence.

If a tenant cannot contact the landlord and makes a single claim, no other reason is required as the deposit is the tenant's money.

A single claim can also be made, if both the landlord or tenant are contactable, but one party refuses to co-operate - either in agreeing deposit release or agreeing to resolve any dispute via ADR or court.

**Q.27 Does this mean that I have to get the tenants agreement in writing even if the full amount of the deposit is to be repaid to the tenant?**

It is understood that the legislation is to be changed so that it will provide that you can have a clause in your tenancy agreement pre-agreeing the return of the full deposit to the tenant. You can then rely on this tenancy clause but only where the full amount of the deposit is to be returned at the end of the tenancy to the tenant. Otherwise, you will not be able to rely on clauses in the tenancy agreement to pre-agree how the deposit is to be dealt with once the tenancy has come to an end. This is to be confirmed.

**Q.28 Will landlords have to pay to transfer the deposit to the custodial scheme?**

No. The custodial scheme will be free to use by landlords and tenants.

**Q.29 How will the custodial scheme be paid for?**

Deposits held in the custodial scheme will earn interest which will go to the administrator to pay for the running of the scheme. The remainder will be used to pay interest to the tenant/landlord. Where the deposit, or part of it, is divided between the landlord and tenant the interest will be allocated pro-rata.

**Q.30 Will the addition of interest on the deposit affect a tenant's entitlement to housing benefit?**

During the period of the tenancy, the interest that accrues on the deposit will be disregarded for the purposes of housing benefit. This is because the tenant is unable to use the deposit and any interest accrued.

However, at the end of the tenancy the position may change. When the deposit and any interest is returned, provided that the housing benefit claimant's capital remains under £6000 then the capital will continue to be disregarded. If the deposit and the interest received raises the claimant's capital to over £16000 then benefit will cease to be paid.

In practice, however, since it is likely that the deposit will be transferred to a new tenancy, the returned deposit plus any accrued interest may only have a minimal, if any, effect on entitlement to benefit.

### **Insurance-based Scheme**

#### **Q.31 How will an insurance-based scheme work?**

The tenant will pay the deposit to the landlord. The landlord will retain the deposit and pay a premium to the insurer. This is the difference from the custodial scheme as, under the custodial scheme, the deposit has to be paid over to the scheme administrator. Under the insurance scheme the landlord will be able to keep the deposit himself. At the end of the tenancy, if the landlord and tenant agree how the deposit should be divided, the landlord returns all or some of the deposit.

#### **Q.32 If there is a dispute, what happens where the deposit is held under the insurance based scheme?**

If there is a dispute then the amount in dispute must be paid over to the administrator of the insurance scheme in question by the landlord and it will then be held by the scheme administrator pending the dispute being resolved.

#### **Q.33 Will a landlord pay for the deposit to be covered by an insurance-based scheme?**

Yes. Landlords will pay a fee to belong to an insurance-based scheme. This will safeguard the deposit, should it be misappropriated.

#### **Q.34 How much will the fee be?**

The scheme administrators will decide on these arrangements. Details are expected in January 2007. The RLA is negotiating with one of the insurance scheme administrators to set up a scheme.

#### **Q.35 Will the proposed insurance based scheme be open only to landlords who are members of a trade body or professional organisation?**

No. The use of any scheme will not be dependent on membership of any trade body or professional organisation.

76A Dartnell Road, Croydon, CR0 6JA Tel: (020) 7117 7177 Email: info@scarletsletting.co.uk

## **Students**

### **Q.36 Will students who pay deposits be subject to tenancy deposit schemes?**

Where student accommodation is let under an assured shorthold tenancy (AST), the deposit must be safeguarded, as with any other AST.

Halls of residence are not let on an AST if they are controlled by the university/educational institution. However, some universities lease their halls of residence to private companies. These companies may let the accommodation on an AST in which case the Scheme will apply.

### **Q.37 What happens where a parent pays the deposit on a student tenant's behalf?**

Where the deposit is paid for an assured shorthold tenancy, it would still need to be safeguarded in a scheme.

### **Q.38 How would the deposit be repaid once an overseas student returns home?**

Schemes will be able to return deposits into foreign bank accounts. There would be a charge for this that would need to be paid by the tenant.

## **Disputes**

### **Q.39 What happens when there is a dispute over the return of the deposit?**

Each scheme will contain an alternative dispute resolution (ADR) service.

When a dispute occurs, and if landlord and tenant both agree to use the ADR service, they will also have agreed to be bound by its decision with no recourse to the courts. Disputes will only go to the courts if the landlord and tenant do not agree to use the ADR service. Where it goes to Court it will be dealt with under the small claims procedure.

In the custodial scheme, where a landlord or tenant does not co-operate in order to release the deposit, i.e. by not agreeing to the release of full or part of the deposit; and not agreeing to resolve the dispute through ADR or court, ADR will be the default way in which to resolve a dispute.

In the Insurance-based scheme, where the landlord is contactable by the scheme but is refusing to co-operate with the scheme by choosing whether to use ADR or the courts, it will be mandatory for the case to be referred to the scheme for resolution through its ADR service.

### **Q.40 Will there be a charge for the use of ADR?**

No, ADR will be free of charge for landlords and tenants. It will be paid for from the running costs of the Scheme.

**Q.41 In the event of a dispute in the insurance-based scheme, what happens to the deposit?**

If there is a dispute and the deposit is safeguarded by an insurance-based scheme, the landlord must hand over the disputed amount to the scheme for safekeeping until the dispute is resolved.

The scheme administrator will divide the disputed amount in accordance with the ADR services, or court's, decision.

For example, say that a tenant has paid £1000 as a deposit. At the end of the tenancy the landlord states that he wishes to retain £200 to pay for replacing damaged furniture, but the tenant disagrees claiming the property was already in that condition when he or she moved in. If the landlord only wishes to retain £200, the remainder of the deposit (£800) has therefore been agreed to belong to the tenant and should be returned to him/her. The disputed £200 will then be transferred to the scheme administrator until the dispute is settled.

**Q.42 What happens if the landlord fails to transfer the disputed amount into the insurance-based scheme?**

The scheme itself will pay the amount due to the tenant as a result of the ADR service's or court's decision. The scheme will then recover the money from the landlord.

**Q.43 In the event of a dispute in the custodial scheme, what happens to the deposit?**

If there is a dispute, the scheme will continue to hold the amount until the ADR Service or courts decide the dispute. Unlike the insurance policies the whole of the deposit will be retained even if part of it is not in dispute.

The scheme administrator will divide the disputed amount as a result of the ADR service's, or court's, decision.

**Paying back the deposit**

**Q.44 When must deposits be paid back?**

When the landlord and tenant agree how the deposit should be returned, in full or in part, it must be paid back within 10 days as follows:

In the custodial scheme: within 10 days of the scheme being notified of agreement between the landlord and tenant or notified of an ADR/court decision.

In the insurance-based scheme: within 10 days of the tenant requesting that the landlord return his deposit

In case of a dispute: within 10 days of the scheme being notified of the ADR service's, or court's, decision.

**Q.45 Do both the landlord and the tenant have to agree?**

Yes – However where the full amount of the deposit is to be paid back to the tenant then the tenant's agreements can be pre-agreed in the tenancy agreement. Otherwise, pre-agreement as to how a deposit is to be dealt with it not permitted.

**Q.46 Can't it be paid back before then ie on the last day of the tenancy?**

Yes. 10 days is the maximum. In practice, DCLG would like to see deposits returned more quickly and will be working with scheme administrators to see how this can best be achieved.

Many landlords currently pay the deposit back on the last day of the tenancy. In the insurance-based scheme, if the landlord and tenant agree on the amount to be returned, the deposit can be returned on the last day of the tenancy.

**Q.47 Will schemes return cash to tenants without bank accounts?**

The custodial scheme will not be able to return cash to tenants. It will return deposits electronically or via cheque.

Landlords in insurance-based schemes can continue to give deposits back in cash.

**Failure to comply with the tenancy deposit rules**

**Q.48 What are the penalties if a deposit has not been protected?**

- a) the landlord is unable to use 'notice only' possession procedure (the AST "ground")

Currently, a landlord can obtain an order for possession of an AST at any point after the first six months of the tenancy providing any fixed term has expired and the landlord gives the tenant at least two months' written notice (Under Section 21 of the Housing Act 1988). This is known as 'notice-only'.

However, under TDP, the landlord is unable to regain possession of the property using the usual 'notice only grounds', if the deposit has not been safeguarded and the prescribed information passed onto the tenant within 14 days of the landlord receiving it.

- b) Financial penalty

Tenants can apply for a court order requiring the deposit to be safeguarded or the prescribed information to be given to him about the scheme in which the deposit is safeguarded.

Where the court believes that the landlord has failed to comply with these requirements, or the deposit is not being held in an authorised scheme, the court must either order the landlord within 14 days of the making of the order to repay the deposit; or order the landlord to pay the deposit to the custodial scheme administrator.

The court must also order the landlord to pay to the tenant a penalty of three times the deposit amount within 14 days of the making of the order. There is no provision for this penalty to be reduced/mitigated. It is automatic if the Court finds against the landlord.

**Q.49 What if a tenant moves out of their home before realising that their deposit hasn't been protected?**

The tenant will need to apply for a court order and the court will order the landlord to repay the deposit amount to the tenant.

In order to avoid this situation, tenants have been advised to make sure that their landlord has given them the prescribed information relating to the scheme that is safeguarding their deposit, and check that the deposit is safeguarded, within 14 days of paying the deposit.

**Deposits paid before 6/4/07 and renewal of tenancies**

**Q.50 How will this affect deposits paid for ASIs which start before 6 April 2007?**

The legislation will only apply to new deposits paid for AST5 entered into on or after 6 April 2007. Any deposit paid before this date will not need to be safeguarded by a tenancy deposit scheme.

**Q.51 What happens if the tenant renews their contract after 6 April 2007?**

If the tenant decides to remain in their existing rented property beyond the initial fixed term of 6 months how the deposit is treated will depend on how the tenancy is continued:

Periodic tenancy - i.e. the tenancy continues with no new agreement —TDP will not apply, as no new AST will have been created. This is what is called a statutory periodic tenancy.

Replacement tenancy - i.e. a new AST is created between the same landlord and tenant for the same property on substantially the same basis — TDP will apply to the initial deposit that was paid prior to 6 April 2007. Thus only if the tenancy is expressly renewed by new agreement will the deposit have to be dealt with under the TDP.

**Existing deposit schemes**

**Q.52 Where do those provisions leave organisations that already have voluntary schemes up and running?**

TDP will replace voluntary schemes. Voluntary schemes will not be permitted to take new deposits in England and Wales from 6 April 2007.

**Q.53 Some local authorities operate rent deposit schemes. Will these be covered by TDP?**

It depends. Where a rent deposit scheme actually pays money to the landlord on behalf of the tenant, then this will need to be protected by TDP. However, where the rent deposit scheme offers a letter of guarantee, no money passes to the landlord, so TDP will not apply.

**Inventories/Condition of the Property**

**Q.54 Will an inventory be compulsory?**

No - Although it will not be a legal requirement to complete an inventory, DCLG wants to see the continued use of inventories as standard good practice to reduce the potential of a dispute at the end of the tenancy.

**Q.55 What evidence should be available if there is a dispute?**

A landlord will be in a much better position to prove his case if he has taken a full inventory when a note of the condition of the furniture etc. Photographs/a video would assist. Likewise, as regards the condition of the property, if there is a proper record of the condition of the property at the start of the tenancy this would assist. Again, photographs/a video record would be helpful. Without a proper inventory/schedule of condition the landlord may well fail when it comes to the ADR/Court process to decide the dispute.

**Q.57 Would it be preferable to agree the inventory/any photographic evidence with the tenant?**

Yes - it is good practice to ensure that the inventory is signed off by the tenant(s) so as to confirm the tenant's agreement to this (or any other record of the condition of the property) at the outset of the tenancy.