



TENANCY DEPOSIT PROTECTION

INFORMATION FOR LANDLORDS AND TENANTS

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Housing Act 2004 Chapter 4, Sections 212-215 & Schedule 10 (Implemented 6th April 2007)

IMPORTANT NOTE: - THIS GUIDE SETS OUT, IN BROAD TERMS ONLY SOME ANSWERS TO FREQUENTLY ASKED QUESTIONS CONCERNING THIS LEGISLATION. WHILST EVERY EFFORT HAS BEEN MADE TO ENSURE ACCURACY, THESE ANSWERS SHOULD NOT BE TAKEN TO BE, AND ARE NOT INTENDED TO BE, A COMPREHENSIVE OR COMPLETE INTERPRETATION OF THE LAW. AGENTS, LANDLORDS AND TENANTS SHOULD TAKE ALL NECESSARY STEPS TO ENSURE THEY FULLY UNDERSTAND THEIR OBLIGATIONS AND RESPONSIBILITIES.

What is tenancy deposit protection (TDP) and when does it become law in England and Wales?

From 6th April 2007, all tenancy deposits taken (*e.g. tenants' money held against possible damages and dilapidations etc*) by landlords (*or agents on behalf of landlords*) in connection with an Assured Shorthold Tenancy (AST), must be protected by law under one of two types of statutory Tenancy Deposit Protection (TDP) schemes – a single Custodial scheme, or, one of two Insurance-based schemes.

Can a landlord or tenant or agent “opt-out” of the requirements of the legislation?

No, the legislation is mandatory and applies to tenancy deposits under relevant Assured Shorthold Tenancies (ASTs). You could not, for example, have a clause in the tenancy agreement (*or agree separately between the parties*) that said the rules did not apply. Such arrangements would be invalid and could lead to significant penalties upon the landlord or agent.

Does TDP apply to all types of residential properties?

No, only Assured Shorthold Tenancies (ASTs), so for example, assured tenancies or non-housing act tenancies such as “Company Lets” are not required to be covered under this new regime.

How does this legislation affect the traditional two ways a letting agent could hold a tenancy deposit – e.g. as agent for the landlord or as stakeholder between the parties?

This TDP legislation effectively does away with the historic concept of a letting agent holding the deposit as “Agent for the Landlord” (*where the agent had to do what the landlord tells him to*). This legislation reinforces the concept of “Stakeholder” as it prohibits the holder of the deposit (*even if that's a private landlord not a letting agent*) from disbursing any of the deposit without the agreement of both parties e.g. of landlord and tenant.



What about the tenancy deposit paid over on an AST which started before 6th April 2007 – Does that have to be covered?

No, unless a new or replacement fixed term AST is subsequently agreed after 6th April 2007, in which case the tenancy deposit has then to be covered under one of the new schemes as there is now a “new” tenancy, even though the tenants, the property and the basic tenancy terms have remained the same.

Were an AST, which commenced before 6th April 2007, is not subsequently formally renewed (*after that date*) for a further fixed term e.g. it is allowed to roll over as a “periodic” tenancy then that deposit on that continuing tenancy does not come under the new requirements.

Does the TDP Legislation apply to landlords who live outside England & Wales?

Yes, where the landlord lives is irrelevant – if the property itself is in England and Wales and is let under an AST after 6th April 2007 then the rules apply. [*Currently, the legislation does not apply to properties or tenancies in Scotland but the Scottish Executive are looking to introduce similar legislation in due course.*]

There are two different schemes, Custodial and Insurance-based, how do they work and how do they differ?

The single Custodial Scheme:

- The tenant pays the tenancy deposit to the landlord/agent as normal at commencement of the AST – the landlord/agent must, within 14 days, register all the tenancy details and pay the deposit over into the Custodial Scheme bank account and provide the tenant with specific information about how and where the deposit is protected.
- The Custodial Scheme administrator (*not the landlord or agent*) holds the deposit for the term of the tenancy.
- At the end of the tenancy, if the landlord/agent and tenant agree about how the deposit, or part of it, should be divided (*even if that means some being retained by the landlord*) they will sign some paperwork which tells the scheme how and to whom the deposit should be returned or allocated. The scheme must return any undisputed amount with 10 days of receiving confirmation of that agreement.
- If part (*or all*) of the deposit is in dispute between the parties and after proper attempts to resolve that dispute have failed then the Custodial Scheme administrator will continue to hold the disputed amount of the deposit until the (*free*) Alternative Dispute Resolution (*ADR*) service provider (*or the Courts*), adjudicate on the dispute and decide what is fair having considered the evidence submitted by both parties. Once

adjudication has been made and notified to the Custodial Scheme administrator, they will allocate and pay out the retained disputed deposit amount in line with the findings, within 10 days.

- The interest accrued on all the deposits held by the Custodial Scheme administrator will be used to pay for the running of the scheme; a small nominal amount of interest (*at a rate set by the government*) will be added to the deposit and divided up between the landlord and tenant.

The (two) Insurance-based Schemes:

- The tenant pays the tenancy deposit to the landlord/agent as normal at commencement of the AST – the landlord/agent must, within 14 days, register all the tenancy details and provide the tenant with specific information about how and where the deposit is protected.
- The Landlord or Agent holds the deposit for the item of the tenancy.
- At the end of the tenancy, if the landlord/agent and tenant agree about how the deposit, or part of it, should be divided (*even if that means some being retained by the landlord*) they will sign some paperwork confirming the arrangement and the deposit (*or relevant parts of it*) must be paid over by the landlord/agent within 10 days of receiving written confirmation of that agreement.
- If part (*or all*) of the deposit is in dispute between the parties and after proper attempts to resolve that dispute have failed then either party can notify the dispute to the Insurance-based scheme administrator. Any undisputed amount must be allocated as stated above and the disputed amount of the deposit must be promptly forwarded on by the landlord/agent directly to the Insurance-based scheme administrator. Both parties will then be required to submit evidence to the (*free*) Alternative Dispute Resolution provider (*or the Courts*) to adjudicate on the dispute and decide what is fair. Once an adjudication has been made the Insurance-based scheme administrator will allocate and pay out the disputed amount in line with the findings, within 10 days.
- If the landlord/agent fails to forward on the disputed amount of the deposit to the Insurance-based scheme administrator then the scheme ADR provider will still adjudicate the dispute and pay over to the tenant any amount allocated as part of the decision – the Insurance-based scheme will then pursue and take action against the landlord/agent to recover the unpaid monies.
- The entitlement to interest (*if any*) accrued on the individual tenancy deposit held by the landlord/agent during the course of the relevant tenancy will depend on any specific and applicable clause with AST.

Can the tenant insist that the landlord/agent uses one or the other particular TDP scheme to protect the tenancy deposit?

No. The legislation requires that the deposits covered by one of the 3 schemes but it is up to the landlord/agent to decide which one to use.

How can a tenant check that the landlord/agent has registered the tenancy deposit under one of the schemes and know that the deposit is protected?

Firstly, the landlord/agent is required to provide a tenant with the specific information about how and under which scheme the deposit is protected within a specific timescale (*14 days*) – this will usually be either by way of a clause in the tenancy agreement or by a separate document. Secondly, each scheme administrator is required to maintain a database of which tenancies are protected, names of tenants, property address etc and so tenants will be able to verify that their particular deposit has been registered and is protected.

Is there one scheme for landlords and another for agents and what are the contact details for each scheme?

All three schemes are required to be open to both private landlords and letting agents to join and make use of if they wish.

1. The “Tenancy Deposit Scheme” (TDS)

Is an insurance-based scheme run by an organisation called The Dispute Service and was established back in 2003 to provide independent dispute resolution and complaints handling for the lettings industry. It has been running a voluntary tenancy deposit scheme for use by regulated agents since that time and is backed by the three professional bodies for letting agents in the residential property sector, ARLA, NAEA and RICS. For more information visit the website www.tds.gb.com or call 0845 226 7837.

2. “Tenancy Deposit Solutions Ltd” (TDSL)

Is an Insurance-based scheme; it is a new company set up as a partnership between the National Landlords Association and Hamilton Fraser insurance brokers. For more information visit the website www.mydeposits.co.uk.

3. The “Deposit Protection Service” (DPS)

Is the sole Custodial scheme – the running costs of this scheme are funded entirely from the interest earned on all deposits held by the scheme. The Custodial scheme is run by Computershare who have administered similar schemes for some years in other parts of the world, particularly Australia and New Zealand. For more information visit the website www.depositprotection.com.



What are the cost implications for tenants, landlords or agents under the three schemes?

There is no cost implications to the tenant – a tenant may not be charged by the landlord/agent for protecting tenant's tenancy deposits. The Custodial Scheme is free to landlords or agents as the costs of running the Custodial scheme is funded entirely from all the interest earned from all the deposits held.

The two Insurance-based schemes will charge landlords or agents a fee or subscription to belong and have their deposits protected – this might be based on numbers of individual tenancies or, in the case of agents for example, per branch office.

In the event of a dispute, do you have to make use of the Alternative Dispute Resolution (ADR) service attached to the scheme under which the deposit is protected?

At the time the dispute arises after the end of the tenancy both parties will need to agree to use the free independent ADR service attached to the relevant deposit protection scheme.

Either landlord or tenant could decline to agree to use the ADR and opt for using the Courts to resolve the deposit dispute; however, bearing in mind the courts costs involved and the inherent time delay this is unlikely to be the preferred option of most people. Furthermore, it is possible that a court would look unfavourably upon a party to a dispute who had declined to make use of free, independent ADR linked to a statutory scheme.

On what information will the alternative dispute resolution (or Courts) base their adjudication?

On written evidence: statements from both sides and documentation – for example the clauses and obligations under the tenancy agreement, the Inventory (*including any check-in and check-out reports*), photos, contractor quotes, receipts etc.

Are the adjudications of the ADR service binding on both parties?

Yes, once the parties in dispute have agreed to go to ADR then the subsequent decision is final and binding on all the parties.

As a landlord, so that I can re-let the property promptly, I want to deal with some cleaning and decorating issues which are disputed by the ex-tenants – how do I deal with this situation?

Make sure you have collected all the evidence you need to support your submission to the adjudicator of the ADR, then, you are free to carry out any

repairs or maintenance work you wish but you will have to pay for it yourself. If subsequently you win your claim (*or part of it*) against the tenant then you will allocate the relevant amount from the deposit.

Are student lets covered by this legislation?

Yes, where an AST is used and a tenancy deposit taken then the legislation will apply.

What would happen about the refund of a deposit where an overseas student or other non-UK tenant has returned home?

All 3 schemes will be able to return deposits to a foreign bank account although there may be a charge for this and that would need to be paid for by the ex-tenant.

What are the penalties upon a landlord/agent if the legislation is not complied with?

A landlord will not be able to regain possession of the property using the usual "notice only" ground (*section 21*) until the deposit is safeguarded under one of the schemes.

The tenant can apply for a court order requiring the landlord either to repay the deposit or to safeguard the deposit under the Custodial scheme. Furthermore, the court must also order the landlord to pay the tenant an amount equivalent to 3 times the deposit.

Can a landlord/agent avoid the legislation by not taking a deposit at all under an AST?

Yes, if there is no tenancy deposit then the legislation does not apply. However, not calling an amount of money "a deposit" will not avoid the liabilities of the legislation, nor will a landlord be able to take some other item of property (*a car, a diamond ring etc*) in place of a monetary deposit.

Will TDP schemes return money back as cash?

In rare circumstances, perhaps where an ex-tenant or landlord does not have a bank account, otherwise the refund of money will be via cheque or electronic bank transfer.

What if a parent, friend or guarantor pays the tenancy deposit on behalf of the tenant, does that still have to be safeguarded by one of the schemes?

Yes, if the tenancy is an AST. However, at the end of the tenancy the deposit is paid back to the tenant(s) named on the tenancy agreement.



What if a tenant or landlord disappears or is un-contactable or is being deliberately un-co-operative after the end of the tenancy – how will the deposit or dispute be dealt with?

All 3 schemes will have a process (*called a single claim procedure*) for dealing with such situations and you will need to find out from them how that works, should that situation arise.

Disclaimer

The brief information contained in this guide is believed to be accurate; however, it should not be relied upon in place of formal legal advice.

