

Appendix 4: Tenancy Management Challenges

Flexible Tenancies: tenancy management challenges

The tenancy management challenges when using flexible tenancies include:

1. Renewing flexible tenancies and rent arrears

Where a tenant has accrued rent arrears and the court has awarded the Council a Suspended Possession Order, it would be reasonable to renew the flexible tenancy where the tenant has complied with the court order. However, if the arrears have not been cleared at the end of the flexible tenancy, any court order is negated by the signing of a new tenancy and the rent arrears become former tenant arrears. The Council's tenancy conditions allow these arrears to be added to the tenant's rent account, but the court order can no longer be relied on to enforce payment. This matter is pertinent where a tenant is in receipt of state benefits as there are limits set by the Department for Work & Pensions on the amount that can be deducted from benefits to be paid towards rent arrears; courts frequently set the Suspended Possession Order at that same level (currently £81.89 a month for tenants receiving Universal Credit). It is not common practice for courts to set a Suspended Possession Order at a higher level that would clear rent arrears by the end of the flexible tenancy period.

2. Ending a flexible tenancy during the life of the tenancy

One of the main challenges of taking possession proceedings during the life of a flexible tenancy is the requirement for the tenancy agreement to include a forfeiture clause, as this type of tenancy is treated in a similar way to a lease. By the time the Housing & Planning Bill was being debated in Parliament, it was acknowledged that a problem over forfeiture existed and a section was proposed that 'would ensure local authorities may terminate new fixed-term secure tenancies on the statutory fault grounds without the need to take action to forfeit'. Although enacted, this section in the Housing & Planning Act 2016 has not been implemented and no date for implementation is known. To date there has been one court case on this matter where Croydon Council was not awarded a possession order as the court found that their tenancy conditions did not have a forfeiture clause. Harrow Council's tenancy conditions do contain a forfeiture clause – whether it would be considered sufficient would be a matter for the courts to decide.

3. Expiry of flexible tenancy

Currently, where social landlords grant flexible tenancies, the tenancy will automatically become a lifetime tenancy at the end of the fixed term unless the landlord grants a new tenancy or is in the process of obtaining possession through the courts. Where the landlord does not propose to offer a new tenancy at the end of the flexible tenancy, the landlord is obliged to serve 2 separate notices, the first giving 6 months' notice of their intention not to award a new tenancy and a second notice giving 2 months' notice that the landlord requires possession of the property.

In practice where there may be every intention to award a new flexible tenancy at the end of the existing one, it can be possible to miss the deadline for signing the new tenancy and by default the tenant becomes a lifetime tenant. For example this could happen if a tenant was admitted to hospital at the point of signing or was otherwise unavailable. It could also be the case that a tenant deliberately misses a date to sign the new agreement in the knowledge that they will become of lifetime tenant, though this is likely to be rare.

The Housing & Planning Act 2016 acknowledged this issue and amended the law as follows: 'unless the landlord grants a new tenancy, a further five-year fixed-term tenancy will arise automatically at the end of the fixed term. That does not prevent the landlord from bringing the original tenancy to an end, but it gives the tenant some protection, while ensuring that

the tenancy does not roll over into a lifetime tenancy.’ This section of the Housing & Planning Act 2016 has not been brought into force.

There are problems with asking tenants to sign the new tenancy agreement at the time of the review meeting (likely to be 7-8 months in advance of the new tenancy date). If a tenant were to breach to tenancy conditions after the review and had signed the new agreement, the court would not be obliged to grant a possession order as this scenario specifically falls outside the mandatory grounds for granting possession even where the requisite notices have been signed.

4. Moving to alternative accommodation

Where the Council wants a tenant to move to different, smaller accommodation with a new flexible tenancy there is an added complication in that acceptance of the offer of a new flexible tenancy by signing the new tenancy is not sufficient, the tenant must actually move. Otherwise if the tenant has signed the new agreement but not moved prior to the end of the tenancy term, the court is not obliged to grant a possession order as this scenario specifically falls outside the mandatory grounds for granting possession even where the requisite notices have been signed.

Alternative accommodation of the required size may not be readily available, particularly in view of the small social housing stock in Harrow.

5. Providing advice and information when not renewing a tenancy

This provision within the legislation is not readily compatible with the Council’s decision not to award another flexible tenancy due to the tenant’s conduct. This fits as part of the aspirational aspect of flexible tenancies that people will move on of their own accord at the end of the 5-year tenancy as their income has improved or other opportunities for home ownership have arisen. Even if the Council does not wish to offer a further tenancy due to tenant’s conduct, the Council is still obliged to offer advice on future housing options which may be very contradictory to the reality of the reason for eviction.

The regulatory Tenant Standards says that as part of the Tenant Policy the Registered Provider must set out ‘The advice and assistance they will give to tenants on finding alternative accommodation in the event that they decide not to grant another tenancy.’ Harrow Council’s current Tenant Policy states that ‘The tenancy review should primarily be an opportunity for both landlord and tenant to consider if the current home still best meets the tenants needs and how it might be possible to meet future aspirations for example for home ownership by discussing low cost home ownership options available, savings for deposits etc.’.

Harrow Council’s Housing Services is currently carrying out a rolling 3-year programme of tenancy audits. Discussing tenant aspirations to move on to alternative accommodation would be more appropriate as part of the tenancy audit discussion than at the stage of seeking possession on conduct grounds. It can also be raised by a tenant at any time.

6. Changing the tenancy conditions

If the Council wished to change the tenancy conditions (apart from increasing rent / service charges) it would need to seek permission from each individual flexible tenant. This differs from the mechanism used to vary tenancy conditions for lifetime tenants, where they must be consulted on any proposed change but permission is not required and therefore any revision to tenancy conditions supersedes existing conditions. This would not be the case for those with flexible tenancies who would retain the tenancy conditions provided at sign up.

7. Section 137A Notice

As Harrow Council offers introductory tenancies followed by a flexible tenancy to new social housing tenants, the law states that a section 137A Notice must be served notifying the tenant of the type of tenancy they will get at the end of the successful introductory tenancy. The notice must set out that a tenant has the right to request a review of the type of tenancy they will be offered. This information should be provided to tenants in advance of signing the tenancy agreement.

In practice as there is frequently only a couple of days between a tenant viewing a property and signing the tenancy agreement there is insufficient time to provide the required information prior to the sign up. Delaying the sign up is not a viable option and will result in additional void time and loss of rental income to the Housing Revenue Account.

Issuing this section 137A Notice to all tenants invited to view a property would cause confusion to those tenants where it is not relevant and tenants for whom the section 137A Notice is relevant may not appreciate this so serving the Notice on the new tenant is the safest option.

As a practical measure Harrow Council has taken the decision to provide the section 137A Notice as the first part of the tenancy sign up process. Any tenant wishing to challenge the tenure they have been awarded is still able to do so and has 21 days from the date of the section 137A Notice so to do. If it is found that the wrong tenure has been awarded, this will be corrected with the award of a tenancy with the correct tenancy type.

Harrow Council's Housing Services' procedure states that providing the section 137A Notice and the tenancy conditions must be the first act of the sign up meeting to ensure compliance with this legislation. However, it is always open to challenge by a tenant to say that officers did not comply with the written procedure and thereby bringing the existence of a flexible tenancy into doubt.

This type of section 137A Notice is not required for introductory tenancies that are to be followed by a secure lifetime tenancy.