

# FLEXIBLE TENANCIES

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A note on flexible tenancies as introduced by the Localism Act 2011. The note covers duration, possession and the rights of a tenant to review various decisions by their landlord.

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## SCOPE OF THIS NOTE

Section 154 of the Localism Act 2011 (LA 2011) amended the Housing Act 1985 (HA 1985) to introduce a new type of “flexible” social housing tenancy from 1 April 2012. This note covers:

- The similarities and differences between secure tenancies and flexible tenancies.
- The rights of flexible tenants.
- Possession in the case of flexible tenants.

This note does not cover secure tenancies in detail or:

- Introductory tenancies (see *Practice note, Introductory tenancies* ([www.practicallaw.com/4-501-0105](http://www.practicallaw.com/4-501-0105))).
- Demoted tenancies (see *Practice note, Demoted tenancies* ([www.practicallaw.com/6-502-4535](http://www.practicallaw.com/6-502-4535))).

## FLEXIBLE TENANCIES: BACKGROUND

On 22 November 2012, the government announced its plans for social housing reform, which included introducing a new type of “flexible” tenancy, as an alternative to secure tenancies (see *Legal update, Government announces plans for social housing reform* ([www.practicallaw.com/7-504-0078](http://www.practicallaw.com/7-504-0078))).

Under section 79 of the HA 1985, where a tenant occupies a property as their only or principal home, any tenancy granted by a local authority landlord will be a secure tenancy (subject to the exclusions listed in Schedule 1). This had traditionally meant that social homes were allocated for life, even if a tenant may only have a short-term housing need. The intention behind the new type of tenancy was to give landlords more flexibility to decide what sort of tenancy they should offer based on their current levels of housing stock and the needs of individual tenants.

Section 154 of the LA 2011 inserted a new section 107A into the HA 1985, which introduced flexible tenancies

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(see *Practice note, Localism Act 2011* ([www.practicallaw.com/1-504-2706](http://www.practicallaw.com/1-504-2706))). The LA 2011 also required local housing authorities to produce and publish tenancy strategies listing the types of tenancies that they offer (including whether they offer flexible tenancies).

## WHAT ARE FLEXIBLE TENANCIES?

A flexible tenancy is a type of secure tenancy, which is granted for a fixed term (*section 205(1)(xxvi), Law of Property Act 1925* (LPA 1925)). During the fixed term, a flexible tenant has many of the same rights as under a traditional secure tenancy (see *Similarities to secure tenancies* below). However, when the fixed term expires, then a landlord can, in theory, regain possession far more easily than under a secure tenancy.

### Creating a flexible tenancy

Although generally tenancies for a fixed term of more than three years have to be created by deed (*section 52, LPA 1925*), section 52 does **not** apply to flexible tenancies (*section 52(2)(da), LPA 1925 as amended by section 156 of the LA 2011*).

In addition, Section 157 of the LA 2011 amends the Land Registration Act 2002, so that flexible tenancies also do not need to be registered with the Land Registry, whereas previously if a fixed term was for seven years or more the tenancy would need to be registered (*paragraph 1, Schedule 3, Land Registration Act 2002*).

### Similarities to secure tenancies

As a flexible tenancy is a type of secure tenancy, a flexible tenant also has the following rights under the HA 1985:

- Right to exchange. Section 158 of the LA 2011 enables flexible tenants to exchange with fully secure tenants, so that each tenant keeps their existing security of tenure or obtains the nearest equivalent.
- Right to buy (see *Practice note, Right to buy: the process* ([www.practicallaw.com/1-540-4750](http://www.practicallaw.com/1-540-4750))).
- Right to repair. Section 166 of the LA 2011 amends section 11 of the Landlord and Tenant Act 1985, so that the repairing obligation in that section also applies to flexible tenancies, even where they are granted for more than seven years.
- Right to information.
- Right to consultation.

- Right to let to lodgers (but not to entirely sub-let the property).
- Right to assign.
- Right to succeed. The amendments to the right to succession for assured and secure tenancies under sections 160 and 161 of the LA 2011 also apply in relation to flexible tenancies.

However, flexible tenants are expressly prohibited from exercising the right to make improvements and to be compensated for them (*section 155, LA 2011*).

## DURATION OF A FLEXIBLE TENANCY

A tenancy will be a flexible tenancy if, before granting a secure tenancy for a fixed term of at least two years, the landlord serves a notice on the tenant stating that the tenancy will be flexible (*section 107A(2), HA 1985*).

Although the minimum fixed-term period for a flexible tenancy is two years (*section 107A(3)(e), HA 1985*), the government has recommended that flexible tenancies should not be granted for less than five years, except in exceptional circumstances (see *Department for Communities and Local Government: A plain English Guide to the Localism Act* ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/5959/1896534.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf)) and *Homes & Communities Agency: Regulatory Framework for Social Housing in England from April 2012* (<http://www.homesandcommunities.co.uk/sites/default/files/our-work/regfwk-2012.pdf>)).

## POSSESSION

### Possession by landlord

During the fixed term flexible tenancy period a landlord can terminate the tenancy and recover possession in the same way as for any secure tenancy. That is, it must serve a notice under section 83 of the HA 1985 and prove one of the grounds for possession set out in Schedule 2 to the HA 1985 and that it is reasonable for the court to make an order for possession (see *Practice note, Grounds for possession: secure tenancies* ([www.practicallaw.com/2-523-9769](http://www.practicallaw.com/2-523-9769))). As a flexible tenancy is not a periodic secure tenancy section 83(3) and (4) of the HA 1985 applies, which means that a claim for possession at the end of the fixed term of a secure flexible tenancy is actually a forfeiture claim. As such, the prescribed notice under section 83 is set out in part 2 of the Schedule to the Secure Tenancies (Notices) Regulations 1987 (*SI 1987/755*).

If during the fixed term the flexible tenancy has lost security of tenure, a landlord will need to invoke the forfeiture clause contained in the tenancy agreement. Possession can then be obtained by enforcing a right of re-entry or forfeiture by issuing court proceedings for possession. A possession order will be required in this case ([section 2, \(www.practicallaw.com/6-508-5048\)](http://www.practicallaw.com/6-508-5048), *Protection from Eviction Act 1977*). A court could also consider relief from forfeiture under [section 138 \(www.practicallaw.com/2-513-3414\)](http://www.practicallaw.com/2-513-3414) of the *County Courts Act 1984 (www.practicallaw.com/3-506-7183)*.

Once the fixed term period has expired, a landlord can:

- Offer the tenant another fixed term tenancy.
- Offer the tenant a secure tenancy.
- Not renew any form of tenancy.

If a landlord chooses not to renew the tenancy and wants to regain possession then they can do so under section 107D of the HA 1985 without needing to prove any of the grounds listed in Schedule 2 as this section makes it clear that this right is additional to other means by which a landlord may obtain possession against a secure tenant ([\*section 107D\(10\)\*](http://www.practicallaw.com/107D(10))). This new procedure for possession remains available despite the fact that a tenant has remained in the property under a statutory periodic tenancy following the expiry of the flexible fixed term ([\*section 107D\(8\) and \(9\)\*](http://www.practicallaw.com/107D(8))). Terminating a flexible tenancy when the fixed term has expired is therefore likely to involve serving a series of notices and potentially claiming possession in alternative formats in any statement of case.

Under this possession procedure, a court **must** make a possession order if the following three conditions are met:

- The flexible tenancy has come to an end and no further secure tenancy (or flexible tenancy) exists, other than a periodic secure tenancy (whether or not this has arisen under section 86 of the HA 1985).
- The landlord has given the tenant at least six months written notice, which:
  - states that the landlord does not propose to grant another tenancy on the expiry of the flexible tenancy;
  - sets out the landlord's reasons for not proposing to do so; and

- informs the tenant of the right to request a review of the landlord's proposal and the time within which such a request must be made (see [\*Right to request a review\*](#) below).

- The landlord has given the tenant at least two months' notice in writing stating that it requires possession of the dwellinghouse.

([\*Section 107D, HA 1985.\*](#))

When deciding whether to grant a further tenancy a landlord is likely to consider:

- The behaviour of the tenant.
- Whether the property is over or under-occupied.
- The tenant's financial circumstances.
- The need for social housing in their area.

### Refusal by a court to grant possession

A court may refuse to grant a possession order on expiry of a flexible tenancy if any of the required notices are invalid or:

- A review has been requested and the court is satisfied that the landlord has failed to carry one out in accordance with section 107E of the HA 1985.
- A review decision is otherwise wrong in law. It is inevitable that human rights defences (for example under Article 8 of the [\*European Convention on Human Rights \(www.practicallaw.com/1-107-6550\)\*](http://www.practicallaw.com/1-107-6550) (ECHR)) or public law defences are likely to be raised at this stage in the process (see Article 8 arguments).

([\*Section 107D\(6\), HA 1985.\*](#))

### Termination by tenant

Where a tenant wants to terminate their flexible tenancy then they must give at least four weeks' written notice to the landlord ([\*section 107C\(2\)-\(3\), HA 1985.\*](#)) A landlord may, however, dispense with:

- The minimum notice period.
- The requirement that notice is given in writing.

([\*Section 107C\(4\), HA 1985.\*](#))

A flexible tenancy will only be terminated at the date of the notice if:

- There are no rent arrears.
- The tenant is not otherwise materially in breach of a term of the tenancy. The courts have yet to determine what a material breach is, but presumably causing a material breach could defeat the objective of granting a flexible tenancy in the first place. That is, arguably if there is a material breach then the flexible tenancy will not be determined and as such will not be terminated (potentially resulting in the tenant remaining in the property for longer than was originally agreed under the terms of the flexible tenancy).

(Section 107C(5), HA 1985.)

## RIGHT TO REQUEST A REVIEW

A tenant can request a review of:

- The flexible tenancy term length being offered.
- The landlord's decision not to offer another tenancy.

The review procedures are set out in the Flexible Tenancies (Review Procedure) Regulations 2012 (SI 2012/695) (the Regulations).

### Length of flexible tenancy: initial review

Where a person is offered a flexible tenancy or given notice that their introductory tenancy will become a flexible tenancy, they have the right to request a review of the length of the term being offered (section 107B(2), HA 1985).

A request for a review must include a statement of the reasons why, in the applicant's opinion, the length of the tenancy does not accord with the landlord's policies on flexible tenancy length (regulation 2(c)).

If the landlord has offered a term that complies with its flexible tenancy policy then a request solely based on this argument (assuming there are no other reasons) is unlikely to be successful. Most review requests are likely to be based on the initial flexible tenancy length and are unlikely to be made with the assistance of legal representation (which would be likely to additionally include public law arguments or arguments based on Article 8 of the ECHR (see [Article 8 arguments](#) below).

If, following a review, a landlord confirms its earlier decision to offer a particular tenancy term then must it must also give reasons for doing so (section 107B(8)-(9), HA 1985).

### Landlord's decision not to offer another tenancy: subsequent review

A tenant may also request a review of a landlord's decision not to grant them another tenancy when their flexible tenancy fixed term expires (section 107E(1), HA 1985).

A request for a review must be made within 21 days of the landlord having given six months (or more) written notice that it does not propose to grant the tenant another secure or flexible tenancy. Unlike reviews under section 107B of the HA 1985, there is no power for a landlord to extend the time for requesting a review.

If a review is requested, the review must consider whether the landlord's decision is in accordance with its policies regarding when it will consider granting a further tenancy when an existing flexible tenancy ends (section 107E(3), HA 1985).

Aside from the above, the review procedure in the case of a landlord's decision not to extend the term of a flexible tenancy is the same as in the case of a review concerning the length of term being offered under section 107B of the HA 1985 (see [Length of flexible tenancy: initial review](#) above).

### Review application requirements

An application for a review must:

- Be made in writing.
- Contain:
  - the applicant's name and address;
  - a description of the decision being reviewed, including the date on which it was made;
  - either a statement of the grounds for review or where the review concerns the length of term offered, why this term does not accord with the landlord's policy on flexible tenancy lengths;
  - confirmation of whether an oral hearing of the review is required; and

- a statement confirming whether the applicant agrees to receive communications concerning the review by email and if so which email address should be used.

(Regulation 2.)

Any review request made within 21 days of receiving the offer or notice, although the Regulations do permit a landlord to allow a longer period (*section 107B(4), HA 1985*).

Once a review has been carried out, a landlord must notify the tenant in writing of its review decision and give reasons (if the previous decision is reaffirmed) (*section 107B(8) and (9), HA 1985*).

## Communications

A notice, document or other communication relating to a review will be deemed to have been received:

- In the case of email, at the time that the email was sent to the address specified in the review application.
- In any other case, when it has been:
  - given to the applicant in person;
  - sent by the landlord by first class post to the address specified in the review application; or
  - delivered by hand to the address specified in the review application.

(Regulation 4.)

## Request for an oral hearing

The Regulations provide that a request for a review must be made in writing and must state, among other things, whether an oral hearing is required (*regulation 2(e)*).

All reviews (with or without a hearing) should be:

- Undertaken by a person appointed for that role by the landlord (an officer or an employee).
- Conducted by a person who is more senior than the person who reached the original decision.
- Conducted by someone who was not involved in the original decision.

(Regulations 5 and 7.)

## Oral hearing not requested

If an oral hearing is not requested, then the review must be conducted in accordance with regulation 5 of the Flexible Regulations.

Following a request for a review and confirmation that an oral hearing is not requested, a landlord must send a written notice setting out the right to make written representations before the date specified in the notice (*regulation 5(1)*). This date must be at least five days from the day on which the notice is received by the applicant (*regulation 5*). Any representations received should be taken into account.

## Oral hearing requested

If an oral hearing is requested, then it must be conducted in accordance with regulations 6 to 10 of the Regulations.

Following an oral hearing request, a landlord must send a written notice to the applicant setting out the date, time and location of the proposed oral hearing (*regulation 6(1)*). The date set out in the notice must be at least five days from the day on which the notice is received by the applicant.

A landlord can change the hearing date to a later date but again the date of the postponed hearing must be at least five days after the tenant receives notice of the postponement (*regulation 6(3) and (4)*). A hearing can also be adjourned by the person conducting it. Where a hearing is adjourned by more than one day, the person conducting the hearing must specify when the hearing will be resumed and send a notice to this effect to the applicant and the others whose attendance at the hearing is required (*regulation 9*).

An oral review hearing should “be conducted with the minimum amount of formality” and in accordance with any directions given by the person conducting the review. A review applicant (and the original decision-maker who is also able to attend the hearing) is entitled to:

- Make representations (oral or written).
- Be represented or accompanied by another person (there is no requirement for them to be professionally qualified). A representative will have the same rights and obligations as the applicant

or original decision-maker for the purposes of the conduct of the hearing.

- Call people to give evidence and put questions to them.

(Regulation 7.)

Where an applicant does not turn up for a hearing then the person conducting the hearing can decide to proceed in their absence or to give directions about how the review should proceed (regulation 8).

### Article 8 arguments

When a landlord seeks possession, a tenant could potentially raise a human rights defence, relying on Article 8 of the ECHR (see *Practice note, Article 8 of the ECHR: right to respect for private and family life* ([www.practicallaw.com/0-500-6346](http://www.practicallaw.com/0-500-6346))).

When the fixed period for the flexible tenancy ends a landlord will have to decide whether to grant a further flexible tenancy, and if so, whether it should be of the same property, of the same duration, and be on the same terms. Issues that may need to be considered include:

- Whether the tenant has paid their rent in a prompt manner and whether they are likely to be able to continue to do so (for example, are they in paid employment).
- Whether the tenant or any members of their family have engaged in anti-social behaviour.
- The level of occupation in the property.

- The need for social housing in the area.

These considerations will all need to be addressed in the landlord's flexible tenancies policy as they will form part of its overall tenancy strategy (section 150, LA 2011).

If it appears that a landlord's policy has not been followed or is open to challenge on public law grounds, a tenant could raise Article 8 as a defence to possession.

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## RELATIONSHIP WITH INTRODUCTORY AND DEMOTED TENANCIES

### Introductory tenancies

A landlord that operates the introductory tenancy scheme may serve a notice on a prospective tenant stating that when their introductory tenancy ends, the tenancy will become a flexible tenancy rather than a secure tenancy (section 137A(2), Housing Act 1996) (see *Practice note, Introductory tenancies* ([www.practicallaw.com/4-501-0105](http://www.practicallaw.com/4-501-0105))). This is only if the introductory tenancy probationary period expires and is not ended by other means.

### Demoted tenancies

A flexible tenancy may also arise following a demoted tenancy or a family intervention tenancy (as introduced under section 297 of the Housing and Regeneration Act 2008).

For more information on demoted tenancies, see *Practice note, Demoted tenancies* ([www.practicallaw.com/6-502-4535](http://www.practicallaw.com/6-502-4535)).