

Fixed term tenancies: making them work for local authorities

Background

1. Under the Housing Act 1985 it has always been theoretically possible for local authorities to grant fixed term secure tenancies: see s. 82(1)(b) and (3). However, in practice this power has rarely if ever been used. The hallmark of the secure tenancy has been that it rolls on from one period to the next, and can only be brought to an end by the landlord proving discretionary grounds for possession.
2. This position began to change in 2012, with powers under the Localism Act 2011 for local housing authorities to grant 'flexible tenancies'. These were fixed term tenancies of at least 2 years' duration. The take-up of these powers was far from universal, however; possibly because of the perceived technicalities associated with terminating such tenancies. It is also fair to say that the idea of a two year fixed term tenancy was seen by many as being anathema to the concept of security of tenure.
3. The logical end point of the 2012 changes has now been reached in schedule 7 of the Housing and Planning Act 2016, which (when it comes into force) will have the radical effect of doing away with the periodic secure tenancy, which will henceforth be known as an 'old-style secure tenancy'. All new secure tenancies will have to be fixed term tenancies of between 2 and 10 years in duration.¹ The only exception on the statute book is where the new tenancy is offered as a replacement for an 'old-style' secure tenancy, although the Act contemplates that other exceptions might be specified.
4. In this article, I explain the key elements of the new regime and how to avoid some of the pitfalls.

Deciding on the length of the tenancy term

5. The first decision a local authority will need to make will be to decide how long the fixed term should last in the case of the prospective tenant (between 2 and 10 years). The Act envisages that government guidance will be produced to assist with this task.
6. Local authorities will also want to consider drafting their own policies to improve consistency and transparency. Indeed, although the Act does not expressly require the adoption of such policies, it plainly assumes that they will be in place. The prospective tenant will have 21 days to request a review of the decision on the length of the term, and the sole purpose of the review will be to consider whether length of term which has been offered complies with "any policy that the prospective landlord has about the length of secure tenancies it grants": s. 81D(2) of the 1985 Act. In the absence of a written policy, therefore, there would seem to be no scope for a review.

¹ There is specific provision for cases where a child under 9 will live in the dwelling. Then, the fixed term may end on child's 19th birthday.

7. Regulations will be made in due course about the procedure to be followed on the review, and the Act specifically provides that the regulations may “require the review to be carried out by a person of appropriate seniority who was not involved in the original decision” and may provide for a right to an oral hearing. It is therefore likely that the regulations will follow the model for reviews under Parts VI (allocations) and VII (homelessness) of the Housing Act 1996.
8. **Tip:** Local authorities may want to consider keeping the decision on length of term distinct and separate to the decision to offer a particular property, breaking the decision down into two stages. If the two decisions are bound together, any review may result in a delay in the identified property being occupied, with budgetary and stock management implications.

Terminating fixed term tenancies:

(i) Tenant's right to terminate

9. By new section 86F of the 1985 Act, it will be an implied term of every new fixed term secure tenancy that tenant can terminate if:
 - a. 4 week's written notice is given (although the local authority can dispense with this), and
 - b. On the termination date there are no rent arrears and no other material breach of the tenancy terms.
10. There are at least two problems or pitfalls with this provisions.
11. First, if the tenant is in rent arrears or has otherwise materially breached the tenancy, the local authority may be quite happy for the tenancy to come to an end. However in these circumstances the conditions for the exercise of the implied term are not met. There is no scope within the statutory provision for waiving them. This may be considered somewhat counterintuitive.
12. Second, if the tenancy ceases to be secure (due to non-occupation or subletting of the whole) the implied term will not be available because it is a term “of every secure tenancy”. Its availability depends on security being maintained.
13. **Tip:** local authorities should consider whether to include an express contractual break clause for tenants within the terms of their fixed term tenancy agreements. This could be drafted in a less restrictive manner, to avoid the problems just mentioned with the implied term. This would not be objectionable because it would not cut down the tenant's statutory right; in fact it would amount to an enlargement of that right.

(ii) Termination by the landlord at the end of the fixed term

14. Under new s. 86A of the 1985 Act, the local authority will be required to carry out a review when the fixed term has between 6 and 9 months left to run. The purpose of the review is to decide what should happen at the end of the term.

15. The options open to the local authority are: (i) to grant a new fixed term tenancy of the same property; (ii) to seek possession, but to offer a fixed term tenancy of another property instead; or (iii) to seek possession without offering any further tenancy. This provides flexibility for the local authority to respond to the changing circumstances of the tenant, in particular changing household size, and should go a long way towards alleviating problems with under-occupancy which can occur with long term periodic secure tenancies.
16. The outcome of the review will have to be notified to the tenant in writing no later than 6 months before the end of term: new s. 86B(2). The tenant will then have a right to request a reconsideration of the decision, in the event that the local authority decides on an option which involves seeking possession: new s. 86C. When carrying out the reconsideration, the local authority will have to consider “in particular” whether the review decision is in accordance with any policy it has adopted, but the scope of the reconsideration is not limited to that issue (in contrast with the review of the tenancy term) and all relevant issues are at large.
17. Again, regulations will be enacted to deal with the reconsideration procedure; and again, it is likely that the regulations will be modelled on the Part VI and VII Housing Act 1996 review procedures.
18. After the fixed term has ended, a statutory fixed-term tenancy arises automatically (unless a new fixed term secure tenancy of the same property has been granted and begins immediately on expiry). The purpose of this is to avoid any possible ‘tolerated trespasser’ issues, and to ensure that the rights and obligations of the tenancy continue to bind both parties until such time as the tenant’s right to occupy can be formally brought to an end by the Court. The fixed term tenancy that arises is (i) the length offered by the local authority following the s. 86A review, if the tenant fails to accept the offer in time, or (ii) in any other case, 5 years.
19. If the local authority has carried out a s. 86A review and decided to seek possession, and has maintained that decision on any s. 86C reconsideration, it may then initiate possession proceedings under new s. 86E. The Court must make a possession order in such a case, provided the Court is satisfied that:
 - a. The local authority has complied with all of the statutory requirements relating to reviews and reconsiderations towards the end of the fixed term;
 - b. The fixed term tenancy has ended;
 - c. The proceedings were commenced within three months of the end of the fixed term;
 - d. The only tenancy in existence is the statutory fixed term tenancy which arises immediately on expiry of the original fixed term.
20. If a possession order is made, the automatic statutory fixed term tenancy comes to an end on the execution of the order and the tenant then has no legal right to remain in the property and can be evicted.

21. In the event that the statutory requirements have not been fully or properly complied with, the local authority will be in a difficult position. As set out above, the requirements involve decisions being made and notified prior to the end of the fixed term. The 6-9 month window will only come around once. If the original fixed term has ended, it will not be possible to go back in time and re-do the review and reconsideration procedures again. It therefore appears that a local authority will only have one chance to rely on the mandatory basis for possession in s. 86E.
22. The local authority would of course be able to rely on the normal discretionary grounds for possession in this scenario; however it must also be borne in mind that after the original fixed term has ended, the tenancy then in existence will be the automatic statutory fixed term. There are likely to be difficulties in relying on breaches of the original fixed term tenancy as a basis for seeking possession of the automatic statutory fixed term; as this is a completely new tenancy as a matter of law.
23. **Tip:** It is obvious that compliance with the statutory review and reconsiderations procedures will be fundamental to the local authority's ability to seek possession at the end of the term, particularly given that the local authority seemingly only get one chance to get it right. It will also be noted that the timescales for carrying out the review are reasonably tight (bearing in mind that this requirement will eventually apply to all secure tenancies in the local authority's area). It will be very important for local authorities to schedule in these processes well in advance and to ensure that good records are kept of all stages of the process.
24. **Tip:** Although new s. 86E will provide a mandatory basis for making a possession order, it is worth remembering that a tenant can still mount a defence based on Article 8 ECHR, the Equality Act 2010 or public law errors even if the local authority has carried out all statutory procedures correctly. The review and reconsideration processes can be viewed as a useful way of flushing out any relevant issues or changes in circumstances and demonstrably having regard to them; potentially reducing the scope for successful challenges further down the line.

(iii) Termination by the landlord during the term of the tenancy

25. Provided the tenancy remains secure, it is open to the landlord to commence possession proceedings in the normal manner, by serving a notice seeking possession and issuing a possession claim relying on one or more of the statutory grounds. Even though the tenancy will be a fixed term tenancy, which would normally be brought to an end through forfeiture proceedings or a contractual break clause, new s. 82(A1) and (A2) provide that even in the absence of a break clause:

“a fixed-term secure tenancy of a dwelling-house in England that is granted on or after the day on which paragraph 4 of Schedule 7 to the Housing and Planning Act 2016 comes fully into force cannot be brought to an end by the landlord except by

(a) obtaining –

- (i) an order of the court for the possession of the dwelling-house, and
- (ii) the execution of the order...”

26. So far, so straightforward.
27. However, the situation is potentially much more complex in the event the tenancy ceases to be secure during the fixed term (for example, if the tenant has sublet the whole of the property). Landlords will be used to serving notices to quit in these situations to bring the tenancy to an end; because the requirement to prove grounds for possession only applies to 'secure' tenancies (s. 84(1) of the 1985 Act). However, service of a NTQ is not an option which is available in the case of a fixed term tenancy, because NTQs cannot be served during a fixed term (rather, they bring a periodic tenancy to an end at the end of a period of the tenancy).
28. In addition, s. 82(A1), which prevents local authorities from having to rely on break clauses and forfeiture proceedings during the fixed term, only applies to "a fixed term secure tenancy".
29. The consensus view is that, in these circumstances, a landlord will need to proceed to terminate the fixed term by exercising rights of forfeiture. The laws of forfeiture are complex and could themselves provide the material for many articles, and so I do not attempt to explain that procedure here. Suffice to say that great care needs to be taken to avoid the possibility of waiving the right to forfeit a tenancy, and the possibility of the Court granting relief from forfeiture also exists.
30. There are also difficult questions around the precise mechanism for ending a fixed term tenancy which has ceased to be secure, including issues around whether a statutory fixed term arises even after forfeiture proceedings, and how that is to be terminated. Such issues are beyond the scope of this article.
31. **Tip:** Local authorities should seek legal advice before attempting to terminate and seek possession in cases where it is believed that security of tenure has been lost.

Succession

32. Succession rights under s. 89 of the 1985 Act only apply to periodic tenancies, and therefore there will be no right whatsoever to succeed to a new fixed term secure tenancy.
33. In addition to this, the Housing and Planning Act 2016 contains provisions which amend s. 86A of the 1985 Act (persons qualifying to succeed) to make the Localism Act changes – which restricted succession rights to spouses and civil partners only – retrospective.
34. Finally, even where succession rights do still exist in the case of 'old-style secure tenancies', all successors will now acquire a new five year fixed term tenancy which is on the same terms as the previous periodic tenancy (as far as it is compatible with a fixed term agreement) and which is subject to any existing court orders (e.g. suspended possession orders).
35. **Tip:** Local authorities will need to take care when drafting new tenancy terms to take the above changes into account, and to ensure that staff are correctly trained on the retrospective changes.

Conclusion

36. It will be clear from the discussion in this article that the 2016 Act will introduce fundamental changes to the way local authorities grant and terminate tenancies. The new provisions include review and reconsideration procedures which will impose additional administrative burdens on local authorities, and will require careful training and overhauling of existing processes. There are various pitfalls in the possession procedure, notably in the requirement to get the statutory requirements right first time and in the very technical issues which arise where tenancies cease to be secure. The latter issue is almost certain to entertain the higher courts quite soon after the relevant parts of the Act come into force.

Emma Dring

Cornerstone Barristers