

Housing Rights

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Policy Briefing

The Tenancy Deposit Scheme

November 2015

when everyone has a **home**

1.0 Introduction

The Minister for Social Development launched a fundamental review of the private rented sector on 12 November 2015. The review is wide-ranging and aims to make the private rented sector better able to meet the growing demands put on it. Between 1991 and 2011, there was a five-fold increase in the number of people living in the private rented sector. Latest housing figures show that 21% of households in NI now live in the private rented sector.¹

It is about 10 years since the private rented sector was last examined in such detail. One area which Housing Rights hopes will be addressed is the operation of the Tenancy Deposit Scheme, (the Scheme), which flows from the Private Tenancies (NI) Order 2006.

On 1 April 2013, Northern Ireland joined the rest of the UK in implementing tenancy deposit protection for private tenants.² Under the rules of the Scheme all private tenancy deposits received on or after 1 April 2013 must be protected with one of three government approved scheme administrators:

1. Tenancy Deposit Scheme Northern Ireland (TDSNI)
2. My Deposits Northern Ireland
3. Letting Protection Service Northern Ireland (LPS).

All three scheme administrators have been approved by the Department for Social Development (DSD), which maintains overall responsibility for the Scheme.

2.0 Key features of the NI Scheme

Type of scheme

The landlord, or their agent, can decide which Scheme to opt for:³

1. Custodial scheme – the landlord pays the deposit to the scheme administrator who holds onto the deposit until repayment is requested. Where the repayment of the deposit is disputed, the tenant can access the Scheme’s dispute resolution mechanism where an adjudicator will decide how much of the deposit will be repaid.
2. Insurance scheme – the landlord registers the deposit with a scheme administrator, but continues to hold onto the actual money. In the event that the deposit is not repaid to the tenant, the tenant can notify the scheme administrator. They will call in

¹ <https://www.dsdni.gov.uk/publications/family-resources-survey-report-2013-2014>

² The provision of the tenancy deposit scheme comes from the Tenancy Deposit Schemes Regulations (NI) 2012

³ Part 3 of the Regulations

the deposit and consider the matter under the dispute resolution mechanism. If the landlord does not pay the deposit to the Scheme, the scheme administrator will pay any amount owed to the tenant and will then pursue the landlord for the money.

Timescales

From 1 April 2013, all landlords must:

- Register a deposit with an approved scheme administrator within 14 days of receipt; and
- Within 28 days of receipt of the deposit provide Prescribed Information to the tenant.⁴

The statutory requirements only apply to deposits received on or after 1 April 2013. **The legislation does not offer retrospective protection to deposits paid to a landlord prior to that date, or to tenancies which renew post that date.** It also does not apply to other monies handed over to a landlord e.g. a holding deposit.

Prescribed information

The Regulations set out what information must be provided by the landlord to the tenant.⁵ Some of the information includes:

- the amount of the deposit which is being protected and the full address to which it relates;
- the landlord's full name;
- the name, address and contact number of any agent acting on behalf of the landlord;
- the landlord's contact details including their address, telephone number(s), including a mobile, and a contact email address;
- details of the scheme in which the deposit is being protected, including the dispute resolution mechanism.

Dispute resolution mechanism

The legislation stipulates that all scheme administrators must make available a free and impartial dispute mechanism to any tenant who is unhappy with the deposit deductions being proposed by their landlord. The onus is on the landlord to show evidence in support of the deductions they wish to make.

The Regulations require that, where the tenant wishes to use the dispute resolution mechanism, then the landlord must use it.

An adjudicator's decision can only be challenged in limited circumstances e.g. where there has been an error in fact or law. If an

⁴ Regulation 11 and 12

⁵ Schedule 1

error has been made, the review request will be accepted by the scheme administrator and a different adjudicator is appointed. The replacement decision becomes final and binding on the parties.

The purpose of the dispute resolution mechanism is to avoid cases having to go to court. Once a determination has been made, the case should not be heard again. However, a case may be reheard if a court believes that the decision of the adjudicator is fundamentally flawed. In this instance, the decision of the adjudicator would need to be set aside and the facts reheard. The courts should not be used if it is simply a matter of one party being unhappy with the decision.

3.0 Deposit protection in other jurisdictions

Before looking at some of the issues which to be need addressed with the NI Scheme, it is worthwhile examining what happens in other jurisdictions to see what lessons, if any, may be learnt.

3.1 England and Wales

Landlords are required by virtue of the Housing Act 2004 (as amended) to protect deposits relating to Assured Shorthold Tenancies with an approved scheme and issue Prescribed Information to the tenant. Landlords must do this **within 30 days** of receiving the deposit. (Extended from 14 days to 30 days under the Localism Act 2012.) If a landlord fails to comply with the 30 days limit, a tenant can take the landlord to court where **a judge can order the deposit be returned to the tenant**, (or paid into a custodial scheme), and order the **landlord to pay to the tenant compensation** of between one and three times the deposit value.

Landlords who fail to comply with deposit protection cannot rely on a section 21 notice, in the event that they wish to gain possession of the property. Landlords wishing to take a section 21 notice who have registered the deposit late or not at all, must first release the deposit to the tenant, (or with deductions as agreed by the tenant), before a notice of possession can be granted. In addition, a fine of between one and three times the deposit may still apply. It should be noted that the penalty is retained by the tenant, not by the local authority, as is the case in NI.

When the regulations were introduced on 6 April 2007, they applied to new deposits received on or after this date and deposits for tenancies which renewed on or after 6 April 2007. **Initially, it was believed that fixed term tenancies created before 6 April 2007, which became periodic after this date, were not included. However, a**

court has since ruled otherwise⁶ and the legislation has been amended by the Deregulation Act 2015.

3.2 Scotland

Landlords must protect their tenants' deposits with an approved scheme and issue them with Prescribed Information. The Tenancy Deposit Schemes (Scotland) Regulations 2011 requires them to do this **within 30 working days** of receiving the deposit.

The 2011 **Regulations are retrospective**, which means that they apply to all tenancy deposits in Scotland, including those taken before the Regulations were introduced. The requirement to protect all deposits was phased in after the launch of the schemes in July 2012, but since 15 May 2013 all tenancy deposits in Scotland must be held in a tenancy deposit scheme.

Should a landlord fail to protect deposits and/or provide information in accordance with the Regulations, tenants can apply to the Sheriff Court for sanctions against the landlord. **Financial penalties, payable to the tenant, will be imposed on a landlord who fails to comply.**

If the Sheriff is satisfied that the landlord has failed to comply with the Regulations, they must order the landlord to pay the tenant up to three times the amount of the deposit. In addition they may order the landlord to submit the deposit to an approved scheme. A tenant has up to three months after the tenancy has ended to make an application to the court for sanctions against the landlord.

4.0 Improving the NI Scheme

For many years Housing Rights advocated for the introduction of deposit protection and we believe that the Scheme has been a very positive development in protecting the interests of many private tenants. However, a number of issues have come to light which Housing Rights believes need to be addressed by the DSD in order to improve deposit protection. Housing Rights believes that, as consumers, private tenants should be afforded the maximum protection available. Housing Rights hopes that the DSD will take the opportunity of the review of the private rented sector to address these defects:

- **Inadequate level of protection.** Housing Rights continues to get many calls to our advice line from clients whose deposits have not been protected. We find it disappointing that this is still a common occurrence more than 2 years after the legislation came into force. According to the latest statistics, in 2013/14 there

⁶ Superstrike V Rodrigues 2013

were less than six fixed penalties/court actions across NI and in 2014/15 there was one fixed penalty and one court case adjourned.⁷ **Housing Rights believes that the DSD should consider taking further action to raise the profile of deposit protection and work with local councils to ensure that they are fully carrying out their enforcement functions.**

- **Failure to protect should be an ongoing offence.** Although local councils have the authority to pursue landlords who have not protected a deposit, it is generally the case that they are unable to do so where the matter is referred to them after 6 months of the deposit having been paid. The Magistrates' Court has previously ruled that Section 19 of the Magistrates' Court (NI) Order 1981 time-bars an action taken after the 6 months. This would appear to go against the intention of the Regulations; which ultimately is to protect a tenant's deposit. A tenant is not at fault for their landlord failing to protect a deposit. However, in reality, the legislation does not provide adequate protection to the tenant. **Housing Rights believes that the relevant authorities need to look at amending this piece of legislation to ensure that the intention of the Scheme is fully realised in practice.**
- **Repayment of a non-protected deposit.** The current Regulations do not provide for the repayment of a non-protected deposit even if the matter reaches court. This issue has come to light recently after a local council prosecuted a landlord for failing to protect a deposit. The council firstly issued a fixed penalty and subsequently took court action. Although the landlord was fined by the court, (a sum much lower than the original fixed penalty notice), the tenant still failed to get their deposit back as there is no provision in the Regulations to enable a court to order the repayment of a deposit. Clearly this is a serious gap in the legislation as it is currently written and needs urgent attention. This means that the tenant would have to take a separate action in Small Claims Court to get their deposit back. One of the main aims of the Scheme is to avoid court action being taken. **Housing Rights believes that the Regulations should be reviewed so that a court can rule for a tenant's deposit to be repaid.**
- **Retrospective protection.** At present the Regulations only protect deposits paid on or after 1 April 2013. However, there are many tenants who have paid a deposit prior to this date who continue to live in the accommodation to which the deposit relates. **Housing Rights believes that all private tenants, regardless of when they paid their deposit, should be afforded the same protection for getting their deposit back, rather than having to resort to the Small Claims Court.**

⁷ Provided by the DSD

- **Adjudication decisions.** The inclusion of a dispute resolution mechanism as part of the Scheme was put in place to reduce the number of deposit issues ending up in court. **Housing Rights believes that the wording of the legislation should be reviewed so as to ensure certainty regarding the status of adjudicators' decisions.**

5.0 Conclusion

Housing Rights believes that the current review of the private rented sector provides an ideal opportunity to address the existing anomalies in the Scheme. Housing Rights looks forward to working with the DSD and other interested parties in improving the tenancy deposit protection afforded to private tenants.

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