

**GOOD PRACTICE NOTE**

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# Tenure

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November 2007

## Introduction

This Good Practice Note has been produced to enable housing associations to comply with the law relating to occupancy agreements and the Housing Corporation's requirements contained in the Regulatory Code and related Circulars. It provides housing associations with clear guidance about the circumstances in which it is appropriate to grant something other than the most secure form of occupancy agreement.

This Good Practice Note replaces the Code of Practice on Tenure for Supported Housing 1999 and applies to all rented housing stock. There have been substantial changes since the Code of Practice was issued:

- housing Associations are using different types of agreements to manage anti-social behaviour;
- the Supporting People programme has separated the funding for support from the funding for housing; and
- new legislation has been introduced including the Anti-social Behaviour Act 2003, Housing Act 2004, Mental Capacity Act 2005 and the Disability Discrimination Act 2005.

These changes will influence housing associations' decisions about which occupancy agreements to grant to their residents. This Good Practice Note contains information on:

- granting starter or probationary tenancies;
- tenancy agreements for young people;
- capacity; and
- support.

It also includes good practice case studies to support housing associations in this area of their work.

## The role of the Housing Corporation

The Corporation is committed to ensuring that residents of housing associations are provided with the most appropriate occupancy agreement both in law and in line with Corporation requirements.

The Regulatory Code section 3.5 states that housing associations must provide good quality housing services for residents and prospective residents. In 3.5.2 the Corporation explicitly states that associations "should offer the most

secure form of tenure compatible with the purpose of the housing and the sustainability of the community”. This means that housing associations must grant assured periodic tenancies, unless there are specific circumstances where assured shorthold tenancies, common law (contractual) tenancies or licences are appropriate. Housing associations should not grant licences to applicants in circumstances in which tenancies should be offered. If in doubt about the type of occupancy agreement the law requires to be issued in any given circumstances, housing associations should obtain legal advice from a reliable source. The Corporation recognises that housing associations may legitimately place reliance on that legal guidance.

## Managing agents

The Corporation recognises that many housing associations enter into arrangements with agents to undertake housing management activities on their behalf, including the issuing of tenancies. Housing associations should monitor the performance of managing agents to ensure compliance with the Regulatory Code and guidance, and Circulars issued

by the Corporation. References in this note to housing associations include managing agents carrying out housing management activities on behalf of housing associations.

## Licence/tenancy (lease) distinction

Housing associations have no discretion when deciding whether to grant an assured tenancy or a licence. If the conditions for a tenancy are fulfilled, the occupant will be recognised by the courts as a tenant, even if they have been issued with and signed a licence agreement.

The distinction between a licence and a tenancy (lease) is that a tenancy represents a grant of interest in land and a licence is merely permission to stay. The distinction between a licence and tenancy has been established in case law. The most significant case in relation to this is the decision in *Street v Mountford* (1985) AC 809. In this case the House of Lords overruled a long line of decisions concerning the use of “non-exclusive occupation agreements”. These agreements were used by landlords to avoid granting an occupier the rights of a tenant. It was the Law Lords’ decision that such mechanisms were “shams” and

devices to circumvent protection given to occupants by statute, in this case the 1977 Rent Acts. The decision means that someone is a tenant if (s)he has exclusive possession of residential accommodation for a fixed or period term for which they paid a rent or charge. In most circumstances exclusive use of premises is the equivalent of exclusive possession.

The most common reason an association will have for issuing a licence agreement is when the resident does not have exclusive possession of any part of the premises. The main circumstances where associations will issue licence agreements are as follows:

- 1 Two or more unrelated residents, each with their own occupancy agreement are required to share a bedroom

#### Case study 1

An association manages hostel accommodation for young single homeless people. Initially residents stay in a shared room which allows the workers to assess the behaviour of the residents as it is sited near to the office which is staffed 24 hours a day. The occupants of the shared room do not have exclusive possession, cannot hold a tenancy and are issued with licences.

- 2 The association requires that residents are mobile and moves residents between rooms for the purpose of managing the accommodation efficiently
- 3 The association requires and actually gains unrestricted access to the accommodation for the purpose of providing care/support services or checking on the residents' welfare

#### Case study 2

An association manages a temporary shared housing scheme which provides short stay accommodation for women and their children escaping domestic violence. The rooms are different sizes to accommodate different sized families. When a new family moves in, the staff frequently move existing residents to a different room to accommodate the new family. Residents do not have control over their rooms or exclusive occupation of any particular room and are issued with licences.

#### Case study 3

An association manages accommodation for people who are released from prison. The conditions of the discharge require residents to be checked by association staff every 15 minutes. Staff require 'unfettered access' to the residents' rooms to allow them to perform this level of supervision. The residents do not have exclusive possession and are issued with licences.

The Corporation recognises that the need for unrestricted access – the most common reason exclusive occupation is not present – is not a legally defined concept. In the opinion of the Corporation, exclusive occupation is not inconsistent with an association's requirement for access to provide a particular service, for example cleaning, health and safety inspections or repairs. Similarly, if the provision of support or care services is limited to particular times or regular visits, the resident will

have exclusive occupation despite the need for access to provide these services. It is also reasonable for an association to enter a property in an emergency without compromising the resident's exclusive occupation.

Licences should only be used when unrestricted access is a necessary and proportionate requirement, for instance when:

- the association needs to check on the residents' condition or wellbeing, (particularly if they are unable to communicate verbally); or
- support/care services that are genuinely required by the resident have to be delivered in their premises, for example assisting a resident in dressing or undressing; or
- a high level of service/staffing is provided to meet the support needs of the residents which require unrestricted access.

### No legal interest

The Corporation advises housing associations that they should not issue a licence even where they have no legal interest in the property. In the decision of the House of Lords in *Bruton (AP) v*

*London and Quadrant Housing Trust (1999)* 31 HLR 902, the judges returned to a very straightforward interpretation of the lease/licence distinction. As the tenant had exclusive possession for an identifiable period (here, for a weekly term) at a rent of a room in the Trust's hostel, he was found to have a tenancy. This was despite the fact that The trust itself only had the premises on licence and that Mr Bruton had understood that he only had a licence.

The Corporation advises housing associations either to enter into a management agreement with the owning landlord, or enter into a formal lease for the property. A management agreement will mean that the association issues occupancy agreements on behalf of the owning landlord. Housing associations should be aware that agreements issued on behalf of the landlord should comply with legal requirements. A lease will enable the association to issue agreements in its name, the association will be expected to apply the lease/licence distinction. In these circumstances, if a tenancy exists, housing associations would not be expected to grant full assured tenancies as the accommodation interest in the land is time limited (see later section on assured shorthold tenancies).

## Types of licence

A licence can either be a bare licence where an occupant is simply given permission to be on the premises (for instance, a guest has a bare licence) or it can be contractual where the terms of the agreement have been agreed between the resident and the landlord.

The Corporation expects that housing associations will issue a contractual licence which clearly sets out the terms of the contract. This is in line with 3.5.3 of the Corporation's Regulatory Code which states that housing associations must provide residents with "agreements that clearly set out residents' and landlords' rights and obligations". The length of notice should be defined in the agreement and the Corporation expects that residents should be given no less than 28 days notice of termination except on grounds specified in the agreement.

Examples of where it would be appropriate to terminate more quickly include grossly disruptive or violent behaviour. It is important to note that licensees who have a contract cannot be evicted without a notice to quit and a court order, unless they are specifically excluded from the Protection

from Eviction Act 1977. Licences that are not excluded from the Protection from Eviction Act are commonly known as 'protected licences'.

Since the Housing Act 1988 licences that are used in hostel accommodation are excluded from the Protection from Eviction Act 1977. These are commonly known as 'excluded licences'. Hostel accommodation is defined under the Housing Act 1985 as "a building which is provided for persons generally or for a class or classes of persons and

- a) residential accommodation otherwise than in separate and self contained sets of premises; and
- b) either board or facilities for the preparation of food adequate to the needs of those persons or both."

The Corporation expects housing associations to follow good practice in issuing excluded licences and not to evict residents without a court order if the resident does not voluntarily leave even though this is not a legal requirement.

## Registered care homes

Schemes registered under the Care Standards Act 2000 that provide support and care cannot automatically issue licence agreements simply because they are registered. In *Alternative Futures Ltd v National Care Standards Commission* (June 2003), the tribunal, in considering whether a home should be registered or not, established that the existence of a tenancy would not prevent an establishment from being a Care Home within section 3 of the Care Standards Act 2003. Housing associations must apply the test of exclusive possession to care homes residents and only issue licences:

- if the care and support required by the residents necessitates unrestricted access:
- if residents share rooms: or
- if residents are genuinely required to move rooms.

## Almshouses

The Corporation recognises that residents are not tenants as they are beneficiaries of a trust. Neither the 1985 or 1988 Housing Act affords almshouse residents security

of tenure. Residents are not, however, excluded from the Protection from Eviction Act 1977 and the Corporation expects residents to be issued with protected licences.

## Minors

The Corporation advises that housing associations issue either a tenancy or licence agreement to minors (aged 16 and 17 years) in line with the agreements issued to residents aged 18 years and over in the same circumstances.

## Tenancy agreements

There are two obstacles to young people becoming tenants. First, they have to be aged 18 years or over to acquire a 'legal interest in land'. Second, contracts with young people under 18 are enforceable against the young person only if they are 'contracts for necessities'. In most circumstances a contract to rent accommodation would be enforceable as it would be considered by the courts to be a 'contract for necessities'. A contract to supply a minor with 'necessaries' is binding upon the minor where the contract as a whole is for the benefit of the minor and its

terms are not harsh or onerous. Case law indicates that 'necessary' is widely defined, although the meaning depends upon the status of the minor – the wealthier he or she is the more goods will be defined as necessary.

Property law prevents housing associations granting legal tenancies to people under the age of 18. Housing associations can however grant 'equitable' tenancies.

Equitable tenancies – in very simple terms – are tenancies which do not comply with all the legal formalities but the courts consider should be treated as if they do. When there is an equitable tenancy, a trust is created and the legal title vests in the trustees. In most circumstances the association landlord will be the trustee. Alternatively, the Director of Social Services can be the trustee if they sign the tenancy. The trustee has a legal responsibility to grant the equitable tenant a legal lease as soon as he or she reaches 18 years of age. Equitable tenants have the same statutory protection as legal tenants and can be evicted for non-payment of rent on the same grounds. Housing associations should use their standard form of tenancy agreement; however they will need to issue a new tenancy agreement once the young

person reaches the age of 18 years. This is to avoid any legal uncertainty and to fulfil their obligations as trustees.

The difficulties in recovering arrears of rent accrued during the equitable lease can be avoided by including a clause in the new tenancy agreement requiring the tenant to repay the previous arrears as a condition of granting the new tenancy. If the tenant breaches that term the association can issue possession proceedings for breach of tenancy agreement.

### Licence agreements

Licences are contracts. Therefore there are no difficulties in an under 18 year old signing a licence as it would most likely represent a contract for necessities.

The Corporation advises housing associations that if the agreement grants exclusive possession the courts are likely to find that the agreement is a lease. The lease will, of course, be equitable because an under 18 year old cannot hold a legal estate in land.

#### Case study 4

An association accepts nominations from the local authority through the choice-based letting scheme. For those aged 16 and 17 years nominated for housing the association grants an equitable tenancy. If the young person accrues rent arrears during the equitable tenancy the association can take action under that agreement. If the amount of the arrear does not necessitate formal action when the association grants a new tenancy they include the following clause: "It is a term of this tenancy agreement that the tenant repays arrears of £ xxx accrued during the previous tenancy of this property. The arrears shall be repaid at the rate of £x per month which is payable at the same time and in the same manner as the rent."

### Mental capacity

The Mental Capacity Act 2005 has established principles relating to capacity that housing associations should apply to the issuing of agreements. The Act established the presumption of capacity unless otherwise proven. All individuals should be supported with practical help in

making decisions. The test for capacity is decision and time specific. This means that housing associations should assess capacity at the time of issuing the agreement. The Corporation expects associations to use a range of communication methods to enable residents to understand the terms of the agreement to be used. The Mental Capacity Act 2005 also recognises that people move in and out of capacity and housing associations should consider whether the agreement can be signed at a later date.

Contracts with incapacitated adults are only enforceable if they are 'contracts for necessities' or if the association was not aware of the incapacity at the time or the person became incapacitated after signing the contract. Section 7 of the Mental Capacity Act sets out a statutory rule to cover 'necessary' goods and services which includes accommodation and support/care. The person who was incapacitated would be expected to pay a reasonable price for the 'necessary' goods and services. Necessary means 'suitable to a person's condition in life and requirements at the time the goods and services were supplied'. Mental incapacity is not a ground for the setting aside of a contract or for the return of benefits conferred under a contract, unless

the incapacity is known to the other party to the contract.

The law relating to capacity is complex and the Corporation expects housing associations to consider the statutory Code of Practice which can be downloaded from the Ministry of Justice website [www.justice.gov.uk](http://www.justice.gov.uk).

### ‘Decant’ accommodation

When a resident is moved to temporary decant accommodation the Corporation expects the association to grant the resident a tenancy if the occupant has exclusive possession. The tenancy would be a common law tenancy as the temporary accommodation is not the occupant’s principal home. The Corporation expects the association to set out the terms of the agreement for the temporary accommodation in a contract. These tenancies are commonly referred to as contractual tenancies.

The Corporation would only expect a licence to be granted if the occupant did not have exclusive possession. The absence of a charge for a property does not automatically confer the status of licensee.

### Assured shorthold tenancies

Assured shorthold tenancies were introduced by the 1988 Housing Act and are a type of assured tenancy. Assured shorthold tenancies are less secure than assured tenancy agreements and can be terminated by a mandatory ground for possession after the landlord serves a section 21 notice requiring possession. The Corporation expects assured shorthold tenancy agreements to be used only in specific circumstances which are set out below. Assured shorthold tenancies can be fixed term or periodic and the Corporation recognises that housing associations may use either appropriately depending upon specific circumstances. If periodic assured shorthold tenancies are used, the association should advise the tenant of the intended length of stay. If fixed term tenancies are used, the fixed term should reflect the intended length of stay. Housing associations should not allow agreements to become periodic agreements by default (i.e. after the expiry of the fixed term). They should use periodic tenancies from the outset or replace a fixed term on expiry with a new fixed term or periodic assured shorthold tenancy. Housing associations should take all reasonable steps to ensure that those whose assured shorthold

tenancies are terminated do not become homeless.

### Starter and demoted tenancies

In Circular 02/07 Tenancy Management: Eligibility and evictions the Corporation permits the use of assured shorthold tenancies as starter tenancies as part of a managed strategy for dealing with anti-social behaviour (ASB) either:

- across the association's whole stock;
- across the association's stock in a local authority area; or
- in defined street areas or estates.

The Corporation expects associations to review their use of starter tenancies within three years of their introduction. The review should be informed by monitoring. The association must monitor the extent to which they achieve the objectives of managing anti-social behaviour and this should be reported to the governing board of the association. The use of starter tenancies should have the approval of the governing body and residents.

### Demotion of assured tenancies

Section 14(2) of the Anti-social Behaviour Act 2003 requires housing associations to obtain a court order before demoting an assured tenancy agreement. The Corporation expects other less formal intervention tools to have been exhausted before applying for an assured tenancy to become a demoted assured shorthold tenancy. For example, acceptable behaviour contracts or injunctions.

Starter tenancies should only last for 12 months at which point they should be converted into a full assured tenancy agreement. Demoted tenancies automatically convert to full assured tenancies after 12 months. The Corporation expects housing associations to review the assured shorthold (demoted) tenancy on a regular basis to assess whether the tenant is able to comply with the obligations of a tenancy and to provide support. Housing associations should have policies and procedures ensuring that the tenancy is not terminated without good reason and the governing body monitors use and termination of the agreements. In the case of starter and demoted tenancy agreements, the mandatory avenue for possession should only be used in cases of anti-social

behaviour. In all cases the association is expected to take all available steps to resolve the issue prior to embarking on this course of action. The mandatory avenue for possession should not be initiated automatically at the start of the tenancy.

#### Case study 5

An association has experienced high levels of anti-social behaviour on a particular estate. It has taken possession proceedings against some tenants and the court has demoted some tenancies to demoted assured shorthold tenancies. Other tenants have transferred from the estate citing anti-social behaviour as a reason. The association's board agrees that all new tenancies issued for the estate will be assured shorthold tenancies. The association has policies and procedures that the new and demoted assured shorthold tenancies are reviewed every three months and board approval is required to evict using the mandatory avenue for possession.

#### Time-limited accommodation

The Corporation expects that assured shorthold tenancies will be used either when the association's interest in the accommodation is time limited or when the tenant's stay at the accommodation is time limited, for example temporary supported housing.

The mandatory avenue for possession should only be used when:

- the association's interest is coming to an end; or
- the resident no longer requires the accommodation or support if the accommodation is supported.

#### Case study 6

An association leases private sector accommodation to house single people with support needs. The association issues fixed term assured shorthold tenancies to tenants which reflect the length of the lease with the private letting agent. The association issues a section 21 notice requiring possession if the lease comes to an end and the private landlord requires the property to be returned.

## Accommodation for homeless people

If a housing association provides housing to assist the local authority with its duties under s193, 194 and 195 of the Housing Act 1996 to an unintentionally homeless person in priority need it will automatically be an assured shorthold tenancy. If an association accommodates a resident during the period when the local authority is investigating a claim for assistance under sections 188, 190, 200 and 204 of the Housing Act 1996, the agreement can be a contractual tenancy. However, the Corporation expects the association will grant an assured shorthold tenancy.

## Housing co-operatives

The Corporation recognises that the vast majority of housing co-operatives registered with it will be fully mutual. The residents of housing co-operatives will normally be tenants, unless they do not have exclusive possession. Because fully mutual housing co-operatives are excluded from the protections of the Housing Acts 1985 and 1988, the tenancies will be common law tenancies. The Corporation, however, expects fully mutual housing co-operatives

to issue contractual tenancies, that is to set out the full terms and conditions of the tenancy in the agreement. Non fully mutual co-operatives are not excluded from the protection of the Housing Acts 1985 and 1988 (see earlier sections on assured and assured shorthold tenancies).

## Support

The Supporting People programme came into effect in April 2003. This separated the funding for support from the funding for housing. The Corporation no longer distributes revenue funding for supported housing, but it continues to regulate housing associations which own and manage supported housing. The Corporation sets out in Circular 03/04, definitions of housing association supported housing and housing for older people for the purposes of Corporation regulation, data collection and investment systems.

Supported housing is defined in the Circular as either purpose built supported housing or designated supported housing. 'Purpose built' is where the housing has been designed or remodelled to enable independence where specific design features are required and support is

provided by the landlord or another organisation. 'Designated' is where the housing has no design features but is used for a specific client group that requires support services for independent living.

### Tenancy agreements

In *Paddington Churches Housing Association v Boateng* [27 May 1998 Central London Civil Trial Centre] the judge concluded that the ground for possession for breach of tenancy could not be used to evict the tenant if the alleged breach related to the tenant's failure to participate in support. This was the case even if the requirement was included as a term of the tenancy. An obligation that is personal to the tenant cannot be relied upon in a possession action if it is breached. It is only breaches of obligations relating to the property that can lead to eviction. The Corporation recognises that if the support is not required, it is no longer appropriate for the tenant to continue to occupy designated supported housing. For full assured tenancy agreements if the tenant is living in supported housing which (s)he does not require any longer the association would have to seek possession by providing suitable alternative accommodation. For an assured shorthold agreement

the mandatory avenue for possession is available. In both cases it is good practice to include in the general terms of the tenancy a term specifying this as a reason the association may seek or require possession. It is good practice to identify the terms of the support and the rights and responsibilities of the support provider and recipient in a separate support agreement. Sample support agreements for long term and short term services are available on the Sitra website: [www.sitra.org](http://www.sitra.org)

The Corporation expects assured shorthold tenancies to be used in supported housing when the tenant's stay in the accommodation is time limited, and the nature of the accommodation is designed to meet the tenant's support needs. The Corporation expects the mandatory avenue for possession to be used only in the following circumstances:

- the tenant has withdrawn, is not engaging with, or has refused the support;
- the tenant has been offered and refused move on accommodation; or
- the tenant's stay is incompatible with the aims and objectives of the scheme.

### Case Study 7

An association manages temporary supported housing. Tenants are issued with periodic assured shorthold tenancies. The tenancy contains the following term in the general terms of the agreement:

“This tenancy is granted to facilitate the provision of support to you. The support services we provide and your obligations are set out in the support agreement in schedule X. The support we provide is an essential part of your stay here. If you withdraw from support, do not require the support agreed or require a different level of support, we will review your stay and may take steps to end your tenancy by issuing a section 21 notice. If we serve you with a notice we will use our best endeavours to assist you in finding alternative accommodation.”

### Case study 8

An association manages a temporary supported scheme for single people in shared housing. If a tenant becomes pregnant, the association issues her with a section 21 notice requiring possession and supports her accessing suitable alternative accommodation by presenting as homeless to the homeless persons unit.

When an assured shorthold tenancy term has been breached, for example rent arrears or nuisance, the association should use the same procedure as it uses for assured tenancies, i.e. it should use the discretionary grounds.

### Licences

Protected and excluded licences are contracts and can, therefore, contain a term requiring the licensee to engage in support. It is good practice:

- to use the same termination process for licences and tenancies;
- that the supportive nature of the accommodation is set out in the general terms of the agreement; and
- a separate support agreement is in place.

## Ending agreements

The Regulatory Code and guidance paragraph 3.5c states that legal possession is a last resort. Circular 02/07 sets out the Corporation's expectations of housing associations when working to prevent or respond to breaches of tenancy. Housing associations are expected to have policies and procedures in place to respond to breaches of the tenancy agreement and licence, for example policies on nuisance and rent arrears. The Corporation expects that for all occupancy agreements, possession action should not be taken until all other interventions to resolve the problem have been exhausted.

Possession actions must follow due process of the law. If the association is uncertain about legal requirements it should seek legal advice. When the support needs of the resident can no longer be met by the scheme or their stay is incompatible with the aims and objectives of the scheme, the association must use its best endeavours to find alternative accommodation before possession is sought through the courts. The Corporation expects housing associations to have agreements which set out the circumstances in which they may be terminated. For assured shorthold

### Case study 9

An association uses an assured shorthold tenancy in its temporary supported housing stock. The agreement includes the following clause:

“We will normally only serve a Notice Requiring Possession if you are in serious breach of your support agreement, you withdraw from support or your continued residence has become incompatible with the aims of the project. This could arise in the following circumstances:

- you have turned down a reasonable offer of alternative accommodation;
- you no longer need or will not accept the support services provided;
- you need a different kind of accommodation and/or support, this includes if your circumstances change, for example you are having a baby, or an illness means you need specialist accommodation.”

tenancy agreements, these should include the circumstances when the mandatory ground for possession will be used. The Corporation does not expect a section 21 notice requiring possession to remain active on a tenant's file 12 months after serving unless the association intended to take possession action.

### Useful contacts

#### Sitra

[www.sitra.org](http://www.sitra.org)

#### Housing Corporation

[www.housingcorp.gov.uk](http://www.housingcorp.gov.uk)

#### National Housing Federation

[www.housing.org.uk](http://www.housing.org.uk)

### Useful publications

#### 02/07: Tenancy management: Eligibility and evictions

This Circular sets out the Housing Corporation's expectations of housing associations when assessing the eligibility of applicants for a housing association home, and when working to prevent or respond to breaches of tenancy.

Available at [www.housingcorp.gov.uk](http://www.housingcorp.gov.uk)

#### 03/04 The Housing Corporation's definitions of housing association supported housing and housing for older people

This Circular sets out the Housing Corporation's definitions of housing association supported housing and housing for older people.

Available at [www.housingcorp.gov.uk](http://www.housingcorp.gov.uk)

#### Housing associations and managing agents: Performance assessment framework for housing associations working with managing agents

This good practice guide aims to assist associations in meeting the standards of the Regulatory Code and promotes good joint working with managing agents. Available at [www.housingcorp.gov.uk](http://www.housingcorp.gov.uk)

### **Mental Capacity Act code of practice**

The Code of Practice for the Mental Capacity Act was issued in April 2007. It provides guidance and information on how the Act will work on a day-to-day basis for anyone who works with or cares for people who lack capacity, including family, friends and unpaid carers. Under the terms of the Act, certain groups of people will be legally required to have regard to the Code when acting or making decisions on behalf of people who lack capacity.

Available at [www.justice.gov.uk](http://www.justice.gov.uk)

### **Supported housing and the law**

This book equips providers of supported housing, their advisers and service users with an accessible and user-friendly introduction to the law governing supported housing. It offers guidance on how to deliver good quality services and improve tenancy management. Available at [www.lag.org.uk](http://www.lag.org.uk)

