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Tenancy deposit schemes

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Summary

This House of Commons Library briefing paper explains the duty on landlords to protect tenants' deposits and summarises how the schemes operate.

Why were tenancy deposit schemes introduced?

In June 1998 the National Association of Citizens Advice Bureaux (NACAB) published a report based on CAB clients' experience of the payment of deposits. In the light of evidence highlighting the difficulties faced by tenants trying to reclaim their deposits from private landlords, NACAB concluded that the case for reform was "overwhelming" and that the failure to regulate deposits damaged the image and reputation of the private rented sector.

What does the legislation require?

Provisions were added to the Housing Act 2004 to place a duty on 'the appropriate national authority' to establish at least one statutory tenancy deposit protection (TDP) scheme. TDP schemes became operational from 6 April 2007 in respect of assured shorthold tenancies (ASTs) created in England and Wales after that date.

In England and Wales landlords/agents are required to place a tenant's deposit into a government-approved TDP scheme, and give the tenant prescribed information about how the deposit is being protected, within 30 days of receiving the deposit. There are two types of TDP scheme - a custodial scheme and an insurance-based scheme – and three Government-approved TDP scheme providers:

- Deposit Protection Service
- Tenancy Deposit Scheme
- MyDeposits

Failure to protect a tenancy deposit can result in the imposition of a financial penalty. It also restricts a landlord's ability to serve a section 21 notice seeking possession of a property let on an AST.

At the end of a tenancy, if the landlord and tenant disagree on how much of the deposit should be returned, they have the option of using the alternative dispute resolution (ADR) service provided by the relevant TDP scheme

provider. There is no obligation on either party to use ADR, but it will normally be faster and cheaper than trying to resolve a dispute through the courts.

There were around 4.1 million deposits protected in England and Wales at the end of March 2020, with a total value of around £4.31 billion, according to statistics published by the Tenancy Deposit Scheme.

Scotland and Northern Ireland have also legislated to make protecting deposits mandatory. The end result is similar in all constituent parts of the UK.

Legal challenges and amendments

The legislation governing mandatory TDP in England and Wales has been modified several times. The Localism Act 2011 amended (with effect from 6 April 2012) sections 213 and 214 of the Housing Act 2004 to resolve issues arising from several court cases. The amendments ensured that landlords who had failed to protect a deposit could continue to serve a section 21 notice to terminate an AST if they did, eventually, protect the deposit. The changes also made it clearer that late protection of a deposit would be subject to a financial penalty determined by the courts.

The Deregulation Act 2015 tackled further issues arising from case law. The Act clarified that, for those tenancies starting before 6 April 2007 but renewed or rolling into a statutory periodic tenancy after that date, any initial deposits received would need to be protected by a TDP. This Act also provided that a section 21 notice could not be served if a deposit was not protected, even if the tenancy (AST or statutory periodic) started before 6 April 2007.

Further attempts to amend TDP were made as the Housing and Planning Act 2016 progressed through Parliament. None of the proposed amendments were made. Most recently, the Tenant Fees Act 2019 has placed a cap on the amount that tenants can be required to pay in the form of a security deposit in England.

Critics of the TDP process point to the number of non-compliant landlords; the length of time it can take to resolve disputes; as well as persistent loopholes and abuses of the schemes.

Further reforms are planned

The Government is considering whether improvements can be made to the TDP process in England to benefit both tenants and landlords. The Ministry of Housing, Communities and Local Government (MHCLG) launched a call for evidence on Tenancy Deposit Reform in June 2019, which sought views on potential improvements to the current system and alternative innovative

approaches to deposit protection. Submissions were accepted up to 5 September 2019. The Government is currently analysing the consultation responses.

In the Queen's Speech December 2019, the Government announced that "a new lifetime deposit", to assist tenants when moving from one tenancy to the next, would be taken forward through the Renters' Reform Bill 2019-20. The Bill was not introduced in the 2019-21 parliamentary session.

The Queen's Speech 2021 confirmed the Government's intention to outline proposals for a new 'lifetime' tenancy deposit model later in the year. A White Paper setting out a package of reforms to the private rented sector is expected in autumn 2021, with legislation to follow in due course.

1 Statutory Tenancy Deposit Protection (TDP) schemes

1.1 Background (England and Wales)

The draft Housing Bill 2002-03, which was subject to pre-legislative scrutiny by the Office of the Deputy Prime Minister (ODPM) Housing, Planning, Local Government and the Regions Select Committee,[1] did not contain provisions to introduce a mandatory Tenancy Deposit Protection (TDP) scheme but the Committee concluded that there was a case for such a scheme.[2] The Government's response to the Committee's report was published on 10 November 2003.[3] The Government, at that time, did not agree that a statutory tenancy deposit scheme should be included in the forthcoming Housing Bill on the grounds that more time was needed to work up proposals.[4]

The Housing Bill 2003-04 was presented on 8 December 2003. The original Bill did not contain measures to introduce a statutory TDP scheme. During the Commons Committee Stage an amendment was moved to place a duty on the 'appropriate national authority' to introduce a mandatory tenancy deposit scheme within 12 months of the Act coming into force. The then Minister for Housing, Keith Hill, reiterated the Government's commitment to consider the case for legislation alongside the Law Commission's proposals.[5]

However, on 19 May 2004 the then Minister announced that amendments would be added to the Housing Bill in respect of tenancy deposits.[6] Thus provisions to enable the establishment of mandatory tenancy deposit schemes were added to the Housing Bill: these provisions can be found in Chapter 4 and Schedule 10 to the Housing Act 2004.

1 Draft Housing Bill, Cm 5793, 31 March 2003
2 HC 751-1, ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, pp 64-65, para 196
3 Cm 6000, 10 November 2003
4 Ibid., para 64
5 SC(E) 24 February 2004 c705
6 HC Deb 19 May 2004 cc51-2WS

1.2 The statutory TDP scheme: April 2007 onwards

Since 6 April 2007 tenancy deposit protection has applied to all newly created assured shorthold tenancies in England and Wales where a deposit is taken.[7] There are two main aims:

- To ensure good practise in deposit handling, so that when a tenant pays a deposit, and is entitled to get it back, they can be assured that this will happen.

- To assist with the resolution of disputes by having an alternative dispute resolution (ADR) service. It should also encourage tenants and landlords to have in place, from the outset, clear agreement on the condition of the property through appropriate use of inventories.

Landlords are required to join a statutory TDP scheme if they take deposits from assured shorthold tenants. Failure to comply can result in a penalty charge.[8] Tenants can get all or part of their deposit back if they have kept the property in good condition and meet the requirements for the return of the deposit. The scheme offers alternative ways of resolving disputes which aim to be faster and cheaper than taking court action.

Landlords can choose between two types of scheme:

- A **custodial scheme**, in which the deposit is held by the scheme. This is free to join and is funded by the interest generated by deposits.

- An **insurance-based scheme**, in which the landlord keeps the deposit and pays a fee to the scheme.

In each scheme the deposit must be returned within 10 days of the end of the tenancy, provided the landlord and tenant have agreed the amount to be returned.

The three operators of the TDP schemes have published a guide to dealing with disputes over deposits: Guide to deposits, disputes and damages.[9]

The insurance-based scheme

- The tenant pays the deposit to the landlord.
- The landlord retains the deposit and pays a premium to the insurer.

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[7] Assured shorthold tenancies are currently the standard type of private sector tenancy in England and Wales. These tenancies are governed by Part 1 of the Housing Act 1988.

[8] See section 4.1 of this note concerning a Court of Appeal ruling on the penalty payable and amendments introduced by the Localism Act 2011 from 6 April 2012.

[9] Revised in June 2017.

- Within 30 days[10] of receiving a deposit, the landlord must give the tenant information about the scheme being used.[11]

- At the end of the tenancy, if the landlord and tenant agree how the deposit should be divided, the landlord returns all or some of the deposit. In England and Wales, this should happen within 10 working days; in Scotland and Northern Ireland it is 5 working days.[12]

- If there is a dispute, the landlord must hand over the disputed amount to the scheme administrator for safekeeping until the dispute is resolved.

- If for any reason the landlord fails to comply, the insurance arrangements will ensure the return of the deposit to the tenant if they are entitled to it.

  Example: This means if the full deposit is £1000, and the tenant agrees to the landlord's claim of £300 for redecoration, but not their claim of £200 for cleaning, the landlord would keep £300, repay £500 to the tenant and pay £200 to TDS, but only if and when requested. TDS would hold the disputed sum while either awaiting an agreement, a Court decision or a published report of adjudication by TDS. After gathering evidence from both parties, the adjudicator may either make an award to the landlord and/or return any balance held to the tenants.[13]

Insurance-based providers include MyDeposits, the Tenancy Deposit Scheme and the Deposit Protection Service. Fees vary between providers.

The custodial scheme

- The tenant pays the deposit to the landlord.

- The landlord pays the deposit into the scheme, unlike the insurance-based schemes. This scheme is free for landlords. The interest accrued by deposits is used to pay for the scheme, as permitted in the Housing Act 2004, Schedule 10, Section 3(4). Providers are entitled to keep all the interest accrued on deposits they hold. Providers can, however, choose to deduct their fees and return the remainder to a tenant or landlord as per their contract.

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[10] Originally 14 days but this was extended with effect from 6 April 2012 - see section 2.1 of this note.

[11] The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (SI 2007/797) sets out the information that a landlord must give to a tenant who has paid a deposit.

[12] See section 5 of this paper for information on deposits in Scotland and Northern Ireland.

[13] Tenancy Deposit Scheme, AskTDS: "Can I hold my tenant's deposit?" (accessed on 6 August 2021)

- Within 30 days[14] of receiving a deposit the landlord must give the tenant information about the scheme in which their deposit is protected.[15]

- At the end of the tenancy, if the landlord and tenant agree how the deposit should be divided, they tell the scheme and the deposit is returned on the basis agreed by both parties. In England and Wales, this should happen within 10 working days; in Scotland and Northern Ireland it is 5 working days.[16]

- If there is a dispute, the scheme holds the amount until the dispute resolution service or courts decide what is fair.

Interest rates in custodial schemes

In 2007, the Housing (Tenancy Deposits) (Specified Interest Rate) Order 2007 (SI 2007/798) specified that where interest is payable on money deposited in a TDP in accordance with paragraph 3(5) of Schedule 10 to the 2004 Act, the rate of interest applied will be equivalent to the Bank of England base rate less 2.32 per cent.

This was subsequently revoked in England by The Housing (Tenancy Deposits) (Specified Interest Rate) (Revocation) (England) Order 2015. As Bank of England rates had remained below 2.32 per cent for several years, this had no impact at the time.[17]

MyDeposits, the Tenancy Deposit Scheme and the Deposit Protection Service run a custodial deposit scheme.

1.3 Alternative dispute resolution (ADR) vs the courts

All the schemes offer alternative dispute resolution (which is funded by the scheme providers as part of their overall running costs[18]) but landlords/tenants may opt to use the courts to resolve deposit disputes. The

[14] Originally 14 days but this was extended with effect from 6 April 2012 - see section 2.1 of this note.

[15] The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (SI 2007/797) sets out the information that a landlord must give to a tenant who has paid a deposit.

[16] See section 5 of this paper for information on deposits in Scotland and Northern Ireland.

[17] English Tenancy Deposits Are Less Interest-ing, Nearly Legal, 13 January 2015

[18] HC Deb 16 December 2010 c 938W

Tenancy Deposit Scheme (TDS) provides the following advice in its leaflet, The dispute process:

> Either party may go to court if they prefer. We can only deal with their dispute if both tenant and landlord agree they want us to. However, if the landlord refuses to make a decision, we will deal with the dispute anyway. Most people prefer to come to us because they feel it will be quicker, cheaper and less stressful. Like the courts, we are independent and authoritative. We can deal with proposed deductions from a deposit, but we cannot award compensation.[19]

Decisions under ADR are binding:

> Because participation in this ADR process requires consent by both parties, the final decision of the adjudicator is binding on both the landlord and tenant. It cannot be challenged except through a Court of Law – although the parties should seek their own independent legal advice first. The Schemes are NOT permitted to re-open cases unless it can be shown that the Scheme did not follow the processes laid down in its own rules, or did not take into account all the evidence submitted by the parties.
>
> In extreme circumstances adjudicators may ask for further evidence or clarification on a particular matter from either party. In some cases, the adjudicator may decide that the case would be better dealt with through a formal court process. However, in the majority of cases the adjudicator will make a decision based on the evidence he has in front of him.[20]

In principle, tenants should be able get all or part of their deposit back if they have kept the property in good condition and meet the requirements for the return of the deposit. Charges for 'wear and tear' should not be deducted from the deposit, although the meaning of this phrase is debateable. The website of the relevant TDP scheme should provide further information: for example, the jointly produced publication, Guide to deposits, disputes and damages outlines what evidence is collected and provides a definition of damage and 'wear and tear'.

1.4 Implications of failing to protect a deposit

If a landlord does not protect a deposit the tenant can pursue the matter through the local county court. Failure to protect a deposit can result in a penalty charge of up to three times the value of the deposit, payable to the tenant. Courts have discretion over how much the penalty charge will be

[19] TDS leaflet: The dispute process can be downloaded from the TDS website (accessed on 6 August 2021)

[20] TDS, Guide to deposits, disputes and damages (accessed on 6 August 2021)

according to the circumstances of the case (section 214(4) of the Housing Act 2004).

A landlord in this situation will also find that they lose certain rights, including the right to serve a section 21 Notice of Possession on an assured shorthold tenant. This is the means by which a landlord can end an assured shorthold tenancy on or after the expiry of the initial fixed term.

1.5 Accountability & financial stability of TDP scheme operators

Landlords and tenants who are unhappy with the outcome of a dispute dealt with by the alternative dispute resolution service offered under the TDP schemes have questioned whether the operators of the schemes are accountable to the Government. The providers operate under a Service Concession Agreement with the Government:

> **Nicholas Brown:** To ask the Secretary of State for Communities and Local Government, what recent assessment he has made of the effectiveness of the Deposit Protection Service; and what plans he has to strengthen protections for tenants' damage deposits.
>
> **Brandon Lewis:** The Department has a governance role in ensuring that all Tenancy Deposit Protection schemes perform to high standards.
>
> The Deposit Protection Service is required to submit monthly key performance indicators and provide annual updates of their management and financial plans to the Department, in accordance with the Service Concession Agreement we have with them. In addition, the Department holds quarterly monitoring meetings with the scheme operators at which any performance issues can be discussed. Since the schemes began in 2007, the Deposit Protection Service's performance against the benchmarks set by our key performance indicators has been consistently high.[21]

The scheme providers each have a complaints procedure that landlords/tenants can use if they feel that their cases have been badly handled – details can be found on the providers' websites.

Questions have also been asked about the financial stability and integrity of TDP scheme providers:

> **Nigel Adams:** To ask the Secretary of State for Communities and Local Government pursuant to the answer to the hon. Member for

[21] PQ 10482, 15 October 2015

Dudley North of 14 December 2009, Official Report, column 919W, on tenancy deposit schemes,

(1) what (a) guarantees, (b) underwriting, (c) liabilities and (d) obligations were agreed in relation to support for the three tenancy deposit protection schemes under the previous Administration;

(2) what assessment he has made of the financial stability and integrity of each of the three tenancy deposit protection schemes, including the effect of low interest rates on their integrity, since May 2010;

(3) what steps he has taken since May 2010 to ensure that tenancy deposit schemes can meet their financial liabilities.

Grant Shapps: The three tenancy deposit protection schemes are operated by private companies under service concession agreements with my Department. All three schemes are designed to be self-financing.

The service concession agreement that was agreed by the previous Administration with the custodial tenancy deposit protection scheme contained a guarantee that the Government would meet any shortfall arising if approved fees were not covered by the interest on deposits held. That guarantee was removed as part of a revised agreement negotiated in August 2010 which also incorporated a four year extension of the original agreement.

Neither of the two insurance based tenancy deposit protection schemes' agreements have ever included any similar government guarantees, underwriting, liabilities or obligations.[22]

[22] HC Deb 5 April 2011 cc855-6W

2 Case law and responses since 2010

The legislation governing tenancy deposits has been amended following several court cases.

2.1 Court of Appeal ruling November 2010

Late compliance with deposit protection and prescribed information

The Court of Appeal handed down its judgment in the two conjoined cases of *Universal Estates v Tiensia* and *Honeysuckle Properties v Fletcher* in November 2010.[23] These cases concerned situations where landlords had not complied with the requirement in section 213(1) of the Housing Act 2004 to arrange for the protection of a deposit paid on an assured shorthold tenancy in an authorised scheme.

At the time the cases were taken, landlords had 14 days to comply with any initial requirements imposed by the terms of the TDP scheme chosen after taking payment of a deposit.[24] In addition, sub-sections 213(5)-(6) require landlords to provide tenants with certain prescribed information regarding the TDP scheme used. Failure to comply with these requirements gave the tenant the right to apply to the county court (section 214) for an order that the deposit be repaid or put in a custodial scheme. If the court made either order prior to 6 April 2012, it also had to order the landlord to pay the tenant a sum equal to three times the amount of the deposit (s.214(4)).[25] However, The Act did not specify whether the court was to assess the question of compliance at the date of the hearing, the date when proceedings were issued, or at some other date.

In *Draycott v Hannells Lettings Ltd*[26] the High Court held that, so long as the deposit was protected and the prescribed information provided prior to the tenant issuing proceedings, the court could not grant the tenant any remedy under section 214 of the 2004 Act.

In *Tiensia*, the respondent landlord issued proceedings for possession and a money judgment for rent arrears against the tenant. The tenant

[23] [2010] EWCA Civ 1224

[24] The following section explains the extension of the period from 14 to 30 days by the Localism Act 2011.

[25] The following section provides information on amendments to the penalty payable by landlords by the Localism Act 2011.

[26] [2010] EWHC 217 (QB); [2010] HLR 27

counterclaimed for, inter alia, an order under section 214 of the 2004 Act and applied for summary judgment on the counterclaim. It was common ground that, when the claim was issued, the landlord had not complied with the initial requirements of an authorised TDP nor provided the prescribed information. These defects were remedied prior to the hearing of the summary judgment application. The District Judge granted summary judgment and held that the failure of the landlord to comply with the initial requirements of the scheme or provide the prescribed information within 14 days of receiving the deposit, was not capable of remedy. An appeal to the Circuit Judge was allowed and Ms Tiensia applied to the Court of Appeal.

In *Honeysuckle Properties*, the appellant landlord issued proceedings for a money judgment in respect of unpaid rent. The tenants counterclaimed for an order under section 214 of the 2004 Act. As in *Tiensia*, it was common ground that the initial requirements of a scheme had not been complied with, nor had the prescribed information been provided when the proceedings were issued, although both obligations were complied with by the time of the trial. The District Judge allowed the counterclaim. Permission to appeal was granted by the Circuit Judge who transferred the appeal to the Court of Appeal.

By a majority, the Court of Appeal dismissed the appeal in *Tiensia* and allowed the appeal in *Honeysuckle Properties*. It was held that court was only empowered to make an order under section 214 if – at the date of the hearing – there had been a failure by the landlord to comply with the initial requirements or provide the prescribed information. If the landlord was late in complying with these obligations, but did so before the hearing, s/he had a complete defence to the claim.

There was a widely held view that the decision of the Court of Appeal in these cases undermined the protection offered by the mandatory tenancy deposit schemes. Subsequent amendments to the 2004 Act are explained below.

The Localism Act 2011

During the Commons Committee Stages of the Localism Bill Stephen Gilbert sought to improve the existing mandatory tenancy deposit scheme to "clarify the circumstances in which landlords must protect deposits and give judges greater discretion over the size of the penalty for landlords' non-compliance to ensure that it is appropriate."[27]

The then Minister, Andrew Stunell, said he was sympathetic to the main thrust of the proposed new clause but argued that it would make changes that did not flow from the Court of Appeal decision and would miss one of the key issues that did arise in the Court of Appeal.[28] He set out the Government's position in some detail:

[27] PBC 10 March 2011 cc948-53

[28] PBC 10 March 2011 c951

The key finding of the Court of Appeal concerned the application of a financial penalty for non-compliance with the requirements of tenancy deposit protection legislation in a situation when the tenancy is still in place and the landlord has protected the deposit after the deadline of 14 days. While the new clause tackles that issue, one of the reasons behind the Court's view concerned the ability of a landlord to use section 21 of the Housing Act 1988 to evict a tenant when they were found to be in breach of tenancy deposit protection legislation. Under the legislation as it stands, a landlord who fails to comply with the deposit protection legislation cannot use section 21 to evict a tenant. That is important, because section 21 is one of the key characteristics of assured shorthold tenancies to which the tenancy deposit scheme relates. It allows a landlord to evict a tenant, having given reasonable notice, on a non-discretionary basis and without having to give a reason. The ability to gain possession of their property is key to a landlord's confidence in letting out that property in the first place, and in the current economic climate, we would not want to undermine that confidence.

As the Court of Appeal pointed out, under the tenancy deposit protection legislation as currently drafted, it could be argued that once a landlord has failed to protect a deposit, they would be unable to use section 21 in connection with that tenancy, even when they had subsequently protected the deposit and, where appropriate, paid the fine imposed by the court. That outcome is not the intention of the legislation, and we are therefore clear that any amendments aimed at tightening up the requirement to protect tenants within 14 days must also address that point.

The Government's view is that to address fully the concerns underlying the Court of Appeal's decision, it is important to allow the courts greater discretion than currently available when setting the financial penalty. My hon. Friend the Member for St Austell and Newquay relayed the current regime to the Committee. However, subsection (11) of the new clause does not offer sufficient flexibility, because as well as allowing flexibility up to a maximum tariff, it still leaves the minimum of one times the deposit. We think that there should be no lower limit. If the objective of such legislation is to encourage landlords to comply and to protect the deposits they take, it cannot be right to levy a substantial penalty when a well-intentioned landlord had made a mistake that, for instance, could result in the deadline for protection being missed by only one day. It is essential that the courts have the discretion to do justice in those de minimis cases, but that would not be possible if the minimum sanction were to be the payment of a penalty equal to the full amount of the deposit.[29]

[29] Ibid., c952

The Minister said he would "reflect further on how the matter might best be addressed."[30]

On 20 July 2011 a new Government clause was added to the Localism Bill to amend the tenancy deposit sections of the Housing Act 2004.[31] The changes, which came into effect on 6 April 2012, gave landlords 30 days, rather than the original 14, to protect the deposit. Once that period has expired the tenant can immediately raise a claim against the landlord. The landlord cannot protect the deposit late without penalty. However, the penalty for late protection is now variable ranging from one, to three times, the sum of the deposit, so if the landlord has, in fact, protected the deposit before the hearing the court can take this into account and reduce the penalty payable accordingly. The amendments also cleared up some small loopholes so that the landlord cannot pay back the deposit and claim that the tenant is not entitled to a penalty. The restriction on serving a section 21 notice where the deposit has not been protected was tidied up so that the landlord can simply return the deposit or resolve court proceedings with the tenant and then serve the notice.

The Localism Act 2011 (Commencement No. 4 and Transitional, Transitory and Saving Provisions) Order 2012 brought the new TDP provisions into force on 6 April 2012.

2.2 Superstrike Ltd v Rodrigues 2013 [32]

Tenancies beginning before 6 April 2007 and renewals after this date

The Court of Appeal handed down judgment in respect of this case on 14 June 2013.

Mr Rodrigues was the assured shorthold tenant of Superstrike Ltd. His tenancy began in January 2007 (i.e. before the mandatory deposit scheme came into force for newly created assured shorthold tenancies on or after 6 April 2007) and was for a fixed period of one year less one day. He paid a deposit of £606.66. At the expiry of the fixed-term in January 2008, he became a statutory periodic tenant. Where a fixed-term assured tenancy comes to an end by effluxion of time (and no new agreement is reached) a statutory periodic tenancy arises (section 5, Housing Act 1988).

In June 2011, Superstrike gave notice under section 21 of the Housing Act 1988 requiring possession. A section 21 notice is the means by which a landlord can end an assured shorthold tenancy on or after the expiry of the initial fixed-term without having to prove fault on the part of the tenant. Mr Rodrigues

[30] Ibid., c953
[31] HL Deb 20 July 2011 c1489-90
[32] [2013] EWCA Civ 699

defended the claim contending, inter alia, that the statutory periodic tenancy was a new tenancy and the previously paid deposit should be treated as having been paid in respect of that new tenancy and, as the deposit had not been protected within an authorised scheme, the section 21 notice should have no effect. Effectively, he argued that the trigger for the requirement to protect the deposit occurred in January 2008 on the creation of the statutory periodic tenancy. A Deputy District Judge found for Mr Rodrigues, but the Circuit Judge allowed an appeal.

The Court of Appeal held that the statutory periodic tenancy **was** a new tenancy: the deposit was held to guarantee obligations under it and was therefore to be treated as having been paid under it. It therefore followed that the provisions of the 2004 Act applied and the section 21 notice was deemed to be invalid.

Then Housing Minister, Mark Prisk, indicated in a letter to the Residential Landlords Association that a legislative response to the *Superstrike* case would be forthcoming.

Legislative response to Superstrike

Section 32 of the Deregulation Act 2015 inserted three new sections into Chapter 4 of Part 6 of the Housing Act 2004.

Section 215A confirmed the decision in *Superstrike* that a deposit previously held for an AST before 6th April 2007 must be put into a tenancy deposit scheme after this date if the AST becomes a statutory periodic tenancy. Failure to do this means that a landlord cannot serve a section 21 notice of intention to seek possession unless the deposit has already been returned to the tenant in full or with agreed deductions.

The Act provided an amnesty period of 90 days (23 June 2015) to allow for compliance with these provisions.[33]

These provisions are 'treated as having had effect since 6th April 2007'.[34]

Section 215B dealt with another potential issue arising from *Superstrike;* namely, whether deposit protection must be re-issued when an AST contract is renewed or rolls into a statutory periodic tenancy.

The Deregulation Act 2015 clarified that renewal is not necessary:

> New section 215B is intended to deal with the issue mentioned at paragraph 168 above. It covers cases where a landlord "receives" a deposit on or after 6 April 2007 (which could be at the start of a brand new tenancy or at the start of a renewed tenancy – see subsection (3)) and subsequently protects that deposit and sends the required information to the tenant. **If the tenancy is subsequently**

[33] Explanatory notes to the Deregulation Act 2015, para 172

[34] Deregulation Act 2015 Section 32 (215C) and accompanying Explanatory note

renewed or rolls over into a statutory periodic tenancy, then so long as the deposit remains protected in accordance with the same authorised tenancy deposit scheme from one tenancy to the next, subsection (2) makes clear that there is no requirement for the landlord to re-send the same information to the tenant each time the tenancy is renewed or rolls over: the landlord will be treated as having complied with the tenancy deposit protection requirements afresh at the start of each new tenancy. Subsection (1)(d) and (e) make clear that subsection (2) applies not just to the first "renewal" of the tenancy but also to cases where there are multiple tenancy renewals, which could include a mixture of fixed term tenancies and periodic tenancies.[35]

2.3 Charalambous & Anor v Maureen Rosairie Ng & Anor [2014]

Tenancies and renewals beginning before 6 April 2007

Charalambous & Anor v Maureen Rosairie Ng & Anor [2014] was another case which tested the impact of tenancy deposit legislation on section 21 of the Housing Act 1988 (service of notice of intention to seek possession).

This case parallels the case of *Superstrike Ltd v Rodrigues 2013* (see section 2.2). In *Superstrike*, the AST in question had started before the deposit scheme legislation came into force on 6 April 2007 but had rolled over into a statutory periodic tenancy after this date. In *Charalambous*, **both** the original tenancy and the statutory periodic tenancy began before 6 April 2007.

In the case of *Charalambous*, the landlord was not obliged to protect the deposit because both the AST and statutory periodic tenancy had begun before 6 April 2007. However, in October 2012, the landlord served a section 21 notice. The tenants appealed, arguing that a section 21 notice could not be served because their deposit was not held in a TDP scheme. The case hinged on the interpretation of section 215 of the Housing Act 2004:

> **215 Sanctions for non-compliance**
>
> (1) Subject to subsection (2A), if a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at a time when–
>
> (a) the deposit is not being held in accordance with an authorised scheme, or
> (b) section 213 (3) has not been complied with in relation to the deposit.

[35] Deregulation Act 2015 Section 32 Explanatory notes

> (2) Subject to subsection (2A), if section 213 (6) is not complied with in relation to a deposit given in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy until such time as section 213 (6) (a) is complied with.
>
> (2A) Subsections (1) and (2) do not apply in a case where—
>
> (a) the deposit has been returned to the tenant in full or with such deductions as are agreed between the landlord and tenant, or
> (b) an application to the county court has been made under section 214 (1) and has been determined by the court, withdrawn or settled by agreement between the parties.

The Court held that the section 21 notice was unlawful, but the landlord was not liable for the financial penalties provided in the 2004 Act. This was because the deposit had not been received by the landlord at a time when the legislation applied. However, the Court felt that since "the deposit is not being held in accordance with an authorised scheme" (as per section 215(1)(a)), the landlord could not proceed with a section 21 notice unless the deposit was protected in a scheme or returned to the tenant as per section 215(2A)(a).[36]

Legislative response to *Charalambous*

The section 31 of the Deregulation Act 2015 amended Chapter 4 of Part 6 of the Housing Act 2004 to support the Court's judgment that a section 21 notice could not be served in cases such as *Charalambous*. The amendments also made it clear that in such scenarios, a landlord could not be subject to a financial penalty under section 214. The explanatory notes to the Act provide more detail:

> Although it was never the government's intention – either in 2007 or following amendments made to the tenancy deposit legislation in 2012 by the Localism Act 2011 – that the tenancy deposit legislation should apply to such deposits, the amendments enshrine the Court of Appeal's decision in the legislation. However, they also make it absolutely clear that, since the tenancy deposit requirements in section 213 of the 2004 Act have never applied to such deposits, the other sanctions and penalties provided for in sections 214 and 215 do not apply in such cases. Subsection (2) amends section 214(1) to make it clear that section 214 does not apply in relation to such deposits. Section 214 (proceedings relating to tenancy deposits) enables tenants to apply to the court for a mandatory financial penalty where a landlord has failed to comply with the tenancy deposit requirements in section 213.
>
> Subsection (3) replaces the current subsection (1) in section 215 (sanctions for non-compliance) with two new subsections. The new

[36] Of Penalties and Possession, Nearly Legal, 17 December 2014

subsection (1) gives legislative effect to the Court of Appeal's judgment by making it clear that no matter when a tenancy deposit was last "paid" the landlord will need to protect that deposit if he or she wishes to serve a valid notice under section 21 of the Housing Act 1988 on the tenant (unless the deposit has already been returned to the tenant in full or with agreed deductions).[37]

[37] Deregulation Act 2015 Section 31 Explanatory notes

3 Attempts to amend the Housing and Planning Bill 2015-16

Proposed amendments 24 to 31 to the Housing and Planning Bill 2015-16 attempted to change some of the provisions governing tenancy deposits. Debate on these amendments took place mainly on 1 March 2016 during the Bill's Committee Stage in the House of Lords (day two).

3.1 Notification of 'relevant persons'

Amendment 24 attempted to remove the landlord's obligation to notify a 'relevant person' that a deposit was being held in a TDP. A relevant person is someone who has paid the deposit on behalf of the tenant. The Minister, Baroness Williams of Trafford, outlined what this usually entails and the reasons why the Government rejected the amendment:

> [The 'relevant person'] can be a family member but in most cases it is a charity such as Crisis or Shelter, which offers deposit loan schemes to vulnerable people with a history of homelessness, or a local authority, which pays the deposit through housing benefit in cases where tenants are out of work or on a low income.
>
> I welcome proposals which reduce burdens for business and I understand the spirit in which this amendment has been tabled. However, the proposals set out in Amendment 24 have the potential to adversely affect the willingness of a charity or a local authority to pay a deposit on behalf of a tenant. This could lead to vulnerable people or those on low incomes being unable to access the private rented sector, which is something we would want to avoid.[38]

Amendment 24 was withdrawn.

[38] HL Deb 1 March 2016, cc702-711

3.2 Electronic communication of prescribed information

Amendment 25 sought to clarify that tenancy deposit information could be supplied via email, rather than in hard copy. The Minister said that there was no need for this amendment:

> Baroness Williams of Trafford: The Government welcome proposals that seek to reduce burdens on business but in this case primary legislation is not required. The aim of this amendment can be achieved through secondary legislation, using powers in the Electronic Communications Act 2000. I will be happy to look further into the proposals outside this Chamber and consider introducing secondary legislation at a later date.[39]

Amendment 25 was not moved.

3.3 Absent tenants/landlords

More information about the process for claiming all or part of a deposit in the absence of a tenant or landlord (a 'single claim process') can be provided by a tenancy deposit scheme provider. For instance, both TDS and DPS provide guides.

The Housing (Tenancy Deposit Schemes) Order 2007 added articles 4A, 4B and 4C to Schedule 10 of the Housing Act 2004. These articles established a procedure for **custodial** deposit schemes where either a tenant or landlord cannot be contacted. If, after 14 days, no agreement has been reached over the deposit and no ADR or court action taken due to an absent party, the other party can claim what they believe they are due from the deposit. A landlord must justify their claim. Either party, if they proceed with the claim, must make a statutory declaration, i.e. a declaration usually in the presence of a solicitor.

Amendments 26 and 31 aimed to remove the need for a statutory declaration:

> **Earl Cathcart:** Interestingly, legislation in Scotland and Northern Ireland approaches this problem in a different way, and my amendment to Schedule 10 to the Housing Act 2004 proposes that we should adopt that process here. In Scotland and Northern Ireland, where a tenant fails to respond to requests from the landlord regarding the deposit repayment, the portion of the deposit requested is paid by the custodial scheme to the landlord once the custodial tenancy deposit scheme is itself satisfied that the tenant has failed to respond. A similar process applies where the tenant says that the landlord is not responding. This means that the deposit is repaid more quickly, without recourse to solicitors and statutory declarations, while ensuring that if the tenant or indeed landlord later reappears, they can seek to recover any disputed deposit

[39] HL Deb 1 March 2016, c708

> through the courts. I am further advised that the proposed process has been working very successfully in both Scotland and Northern Ireland for the last three to four years.[40]

Baroness Williams explained why the Government disagreed with the proposed amendment:

> I accept that there is a minor cost to a landlord or tenant in arranging for a solicitor or magistrate to witness a statutory declaration, but this process is necessary for the landlord or tenant to prove beyond any doubt that they have attempted to contact the other party and that they have not been able to reach an agreement on the amount claimed from the deposit before it is repaid. The example that the noble Lord, Lord Beecham, gave just before he sat down underlines this. Removing the requirement could leave the process open to abuse, with no independent verification that the other party had been contacted to give their consent.[41]

These amendments were not moved.

3.4 Government review of TDP

Amendment 28 sought to secure a Government review of tenancy deposit protection schemes. This was chiefly due to a concern that those who are not happy with ADR, and who would like to pursue their claims via the courts, may find this option financially unviable:

> **Lord Beecham:** Very often, one reads that allegations are made that the tenant has damaged the property and so forth. Given that usually not large sums are at stake, it seems to be the case that some tenants give up the ghost rather than pursue the matter. There is a scheme for dispute resolution, which is operated by the relevant agency without charge. However, it is not binding on both parties to accept the scheme's involvement, so if a landlord, or it could arguably be a tenant, is at the wrong end of a claim, the other party would have to seek redress through the courts. We have already had a reference to the small claims limit this afternoon, and it is probable that most deposits would be within the range of up to £5,000. No legal aid is available and no costs are recoverable on a successful claim. This is going to make it less likely than ever that tenants will exercise their right to recover a deposit which is being wrongfully withheld.[42]

[40] HL Deb, 1 March 2016, c704
[41] HL Deb, 1 March 2016, c708
[42] HL Deb, 1 March 2016, c706

For more information about the Service Concession Agreement, see section 1 of this paper.

In response, Baroness Williams argued that the Department for Communities and Local Government already performed a "governance role" through the Service Concession Agreement[43] and highlighted that:

> From the overall feedback received, we are satisfied that the alternative dispute resolution system generally works well. Of the 11.5 million deposits which have been protected since the launch of the scheme, less than 2% have gone to adjudication. On average, following adjudication, 27% are awarded to tenants, 17% to landlords or agents, and just over half are split between the two sides.[44]

Lord Beecham reiterated that the ADR might not work for all, and some may simply accept its adjudication because a small claims case would be too expensive. He contended that the figures cited "do not necessarily reflect the situation in the marketplace." Lord Beecham explained that he wanted the review to consider the role of deposits in the industry, beyond the smaller governance role played by the Government.[45]

The amendment was not moved in Committee, however the issue arose again as amendment 35 on the first day of Report. The House divided on the amendment. Amendment 35 was disagreed to by 157 votes to 50.

3.5 Access to tenancy deposit information for local authorities (England)

The Housing and Planning Act 2016 made amendments to the Housing Act 2004 to enable the sharing of certain data held by the three TDP schemes in England. At April 2017 the three scheme providers held information relating to nearly 3 million private rented properties and address data for around 2 million landlords.[46]

Since 6 April 2017 authorities have been able to request and obtain certain information held by the TDP schemes – the aim is to help them identify private rented housing and landlords in their areas with a view to cracking down on rogue landlords through targeted enforcement and prevention work.[47]

[43] HL Deb, 1 March 2016, c708
[44] Ibid.
[45] HL Deb, 1 March 2016, c710
[46] DCLG, Obtaining and using tenancy deposit information: explanatory booklet for local housing authorities, April 2017
[47] Ibid.

4 Caps on deposits payable

4.1 England

In addition to preventing residential letting agents and private landlords from charging **most** upfront fees to prospective tenants in England, the Tenant Fees Act 2019 has placed a cap on the amount of security deposit that a tenant can be required to pay.[48]

A **maximum** tenancy deposit of no more than five weeks' rent (refundable) is payable where the annual rent is less than £50,000, or six weeks' rent where the annual rent exceeds £50,000.

The Government has published separate guidance for landlords/agents and tenants on the Tenant Fees Act 2019. Pages 10-11 of the guidance for tenants provide advice on the steps to take if a prohibited payment has been charged.[49]

4.2 Scotland

Section 90 of the Rent (Scotland) Act 1984 provides that a deposit cannot exceed 2 months' rent payable. Charging any more than 2 months' rent for a deposit constitutes an illegal premium under the 1984 Act, which is a criminal offence.

4.3 Wales

The Renting Homes (Fees etc.) (Wales) Act 2019 contains a power to cap deposits through regulations.[50] The Explanatory Memorandum on the Bill referred to unclear evidence on the need to cap deposits in Wales:

> Evidence for capping security deposits in Wales is unclear and did not feature in responses to the consultation. However there is a risk that such deposits could rise and therefore become unaffordable.

[48] The Commons Library constituency casework page, Tenancy related fees (last updated 13 December 2019) provides further information on the 2019 Act.

[49] MHCLG, Tenant Fees Act 2019: Guidance, last updated 30 September 2020

[50] Paragraph 2(4) of schedule 1 to the Act. Senedd Research Paper: Renting Homes (Fees etc.) (Wales) Bill: Bill Summary, November 2018, p16

Powers for the Welsh Ministers to set a lower cap have therefore been included within the Bill as a necessary safeguard.[51]

4.4 Northern Ireland

There is no limit on the amount of deposit a landlord/agent can ask for in Northern Ireland.

[51] Explanatory Memorandum, Renting Homes (Fees etc.) (Wales) Bill, June 2018, para 3.28

5 Deposit protection in Scotland and Northern Ireland

Housing is a devolved matter in Scotland, Northern Ireland and Wales. **The relevant provisions of the Housing Act 2004 apply in Wales** as they do in England. Both Scotland and Northern Ireland have legislated to make tenancy deposit protection obligatory in respect of private sector tenancies.

5.1 Scotland

The Housing (Scotland) Act 2006 Part 4 section 121 allows the Scottish Government to define and prescribe Tenancy Deposit Schemes for a rental contract involving a deposit. The Tenancy Deposit Schemes (Scotland) Regulations 2011 brought this legislation into force on 7 March 2011, although deposit schemes did not become available until July 2012.[52] Article 1(3) requires landlords to put deposits into an approved scheme within 30 days of receipt and provide the tenant with details of the chosen scheme.

Scottish Tenancy Deposit Schemes must provide an Alternative Dispute Resolution service (Article 6). The Regulations provide that the deposit must be "paid by the landlord to the scheme administrator": it therefore **only provides for custodial schemes**, not insurance-based schemes (Article 3, Section 11).

There are three Scottish Tenancy Deposit Scheme providers: Letting Protection Service Scotland, SafeDeposits Scotland, and My Deposits Scotland.

More information can be found on MyGov.Scot.[53]

The Scottish Government published a Review of Tenancy Deposit Schemes in Scotland on 21 December 2018. The review concluded that the Regulations provide a robust regulatory framework for the protection of tenants' deposits and the conditions for the operation of the schemes.[54] Some minor issued

[52] The Scottish Government, Review of Tenancy Deposit Schemes in Scotland, 21 December 2018

[53] https://www.mygov.scot/tenancy-deposits-landlords

[54] SP WA 21 August 2019, S5W-24607

identified through the review were addressed through amending Regulations.[55]

5.2 Northern Ireland

Articles 5A and 5B of the Private Tenancies (Northern Ireland) Order 2006 were inserted by the Housing (Amendment) Act (Northern Ireland) 2011. Article 5B stipulates that all deposits for a private tenancy must be protected by a deposit scheme. Once received, a deposit must be protected within 14 days and the landlord must give the tenant details of the chosen TDP scheme within 28 days.

Article 5A allows the Northern Ireland Government to define approved deposit schemes: the Tenancy Deposit Schemes Regulations (Northern Ireland) 2012 brought this legislation into effect. It allows for both insurance and custodial schemes (Part 3) and outlines the ADR they must provide (Part 6). These approved schemes became operational on 1 April 2013. Since that date, a TDP has been a legal requirement for all private tenancy deposits.[56]

There are three TDP scheme providers: Tenancy Deposit Scheme Northern Ireland (TDS), My Deposits Northern Ireland, and Letting Protection Service NI (LPSNI).

NI Direct has more information on TDP schemes in Northern Ireland.[57]

[55] The Tenancy Deposit Schemes (Scotland) Amendment Regulations 2019 (S.I. 2019/331) made minor improvements to the operation of tenancy deposit schemes to address new legislation, payment by instalments and best practice.

[56] For more information, see A Guide to the Tenancy Deposit Scheme Regulations, TDS Northern Ireland, April 2019

[57] https://www.nidirect.gov.uk/articles/tenancy-deposit-scheme-information-tenants

6 Ongoing issues and tenancy deposit reform

Tenancy deposit protection (TDP) has been praised by letting agents as an "effective barrier" to exploitation.[58] The Chief Executive of TDS, writing for the Residential Landlords Association (RLA) in 2017,[59] argued that not only do the schemes avoid costly and time-consuming court appearances, but they have also led to increasingly professional contracts and inventory check-ins.[60]

Generation Rent, a private rented sector campaign group, published a consultation in May 2014 in which they said that TDP had "vastly improved the ability of renters to retrieve their deposit at the end of a contract".[61]

However, several perceived problems have been identified with the schemes and support for TDP within the sector is not comprehensive. The RLA commissioned Michael Ball, Professor of Urban and Property Economics at the University of Reading's Henley Business School, to conduct research into the private rented sector. His report, The impact of regulation on the private rented sector, was published in 2014 and concluded:

> Tenancy deposit schemes are poor value for money - costing the sector more than £275m a year in fees and administration, when only £7m is returned to tenants annually in deposits judged to have been unreasonably withheld.[62]

6.1 Non-compliance and lack of enforcement

Despite the mandatory nature of TDP schemes for all ASTs, there is some evidence to suggest that a significant minority of landlords refuse to cooperate. According to a 2016 survey carried out by the Centre for Economics Business Research commissioned by Money.co.uk, as many as one-in-six landlords had not protected deposits at that time.[63] The results of the survey, which were widely reported, suggested that a lack of enforcement and reliance on tenants taking their landlords to court for failing to use TDP,

[58] 'Investigation: How are the tenancy deposit schemes performing?', The Negotiator, 27 January 2017
[59] The RLA has now merged with the National Landlords Association to form the National Residential Landlords Association (NRLA).
[60] Residential Landlords Association, Tenancy deposit schemes 10 years on, 21 May 2017 (now archived)
[61] Generation Rent, The Renters' Manifesto: a consultation document, 19 May 2014
[62] RLA Press Release, 29 April 2014 (now archived)
[63] '284,000 landlords risk being fined over tenancy deposits', Hillyer McKeown, 2016

allowed some landlords to ignore the law with impunity.[64] A 2020 report from Safer Renting at Cambridge House and the University of York, Journeys in the shadow private rented sector, highlighted how some landlords and letting agents deliberately flout housing law, including with regards to tenancy deposits, and set out recommendations for policymakers to tackle criminality in the sector.[65]

Hillarys, an interiors company, surveyed 2,588 people whom had left a rented home in 2016-17 and found "widespread scepticism" about TDP. 81% of those responding said landlords/agents had "searched" for a reason not to return the deposit.[66] 68% thought the landlord had not provided a good reason for withholding the deposit.[67]

Heather Wheeler, then Minister at MHCLG, responded to a PQ on delays in returning tenancy deposits on 30 October 2018:

> **Heather Wheeler:** Under the Housing Act 2004, all deposits taken with assured shorthold tenancies since 6 April 2007 must be protected in a Government-approved tenancy deposit scheme within 30 days. In the vast majority of cases the deposit can be returned promptly as the landlord and tenant are able to agree deductions from the deposit. Deposits should be returned within 10 days of the tenant requesting it if held in the insured scheme, and within 10 days of the landlord and tenant agreeing deductions in the custodial scheme. It can take longer if they cannot agree and need to use the free dispute resolutions services provided by the deposit schemes. Only 1.5 per cent of cases go to formal dispute. The YouGov survey referenced in the news release asked about the worst experience tenants had ever had and so is not representative of the normal experience for tenants.
>
> The current system works well but we are reviewing whether improvements can be made to the deposit protection model through the Tenancy Deposit Protection Working Group. Nationwide is a member of the Working Group which will look at the process at the end of tenancy and dispute resolution, as well as exploring whether deposit passporting can improve affordability by helping tenants who have to pay a deposit to their new landlord before they receive their current deposit back.[68]

[64] 'Landlords hold £½bn deposits illegally', The Times, 28 January 2016

[65] Cambridge House and University of York, Safer Renting: Journeys in the shadow private rented sector, Spencer, R. et al, August 2020

[66] 'Research reveals exactly why tenants lose all or part of their deposits', Letting Agent Today, 5 June 2017

[67] Ibid.

[68] PQ 183961 [on Tenancy Deposit Schemes], 30 October 2019

6.2 Insurance-based TDP: loopholes and abuses

Press reports have highlighted a problem that can arise where a landlord/letting agency is expelled from an insurance-based TDP. For example, in 2014 Guardian Money reported on a case involving the London based agency, Unida Place.[69] The agency reportedly registered its tenants' deposits with MyDeposits. Unida Place was, allegedly, expelled by MyDeposits for failing to provide certain information, including proof that tenants' deposits were kept in a separate client account. Once expelled, the tenants of Unida Place could not use the scheme to recover their deposits – the expulsion meant that their deposits were no longer protected.

A landlord/agency in this situation is required to re-protect the deposits paid but if they fail to do so the only avenue open to affected tenants is legal action. For this reason, Generation Rent has suggested that insurance-based schemes should be banned or reformed to ensure that deposits are protected for the life of the tenancy rather than the landlord's membership of the scheme.[70]

There have also been reports of landlords refusing to pay back insurance-protected deposits. A BBC investigation in February 2017 found over £1 million in deposits had been taken illegally by letting agents. 14 agents were convicted for this reason in 2016.[71]

6.3 Affordability and transferability of deposits

There are concerns about the difficulties prospective tenants face in raising a deposit and that money can be held for a considerable period without attracting interest.

The cap on deposits which was introduced in England from 1 June 2019 is aimed at tackling the affordability of security deposits. There are also several existing affordability initiatives that seek to address the challenge of tenants providing a cash deposit when they start a tenancy or move to a new one, including:

- **local authority rent deposit, bond or guarantee schemes** – provide either cash to help with a deposit or a written guarantee to the landlord that the scheme will cover unpaid rent or damage up to a certain amount.

[69] 'Rogue landlords exploit deposit protection loophole', Guardian Money, 19 June 2014
[70] Generation Rent, The Renters' Manifesto: a consultation document, 19 May 2014
[71] '£1m raided from tenants' deposits by letting agents', BBC News, 13 February 2017

- Some landlords and agents offer tenants the option of using a **deposit replacement product** as an alternative to a traditional tenancy deposit. There are a range of product models, with some structured as insurance products.[72]

- **employer-backed loans** - some employers offer their employees the option of an interest-free rental deposit loan. Repayments are deducted from the employee's salary.

However, availability of these schemes varies across the country.

TDP schemes can act as a barrier to those who rely on the return of the money to pay a deposit on a new tenancy. Generation Rent argues that the Alternative Dispute Service can be slow and that renters are not receiving their deposits in time to use for their next property. As a result, some tenants may opt not use Alternative Dispute Resolution to avoid repayment delays.[73] This issue was raised by Lord Kennedy during the Lords Report Stage of the Housing and Planning Bill 2015-16. Lord Kennedy sought to amend the Housing Act 2004 to force the Government to review the role of deposits in the market.[74]

The Government's Tenancy deposit reform: a call for evidence (2019) highlighted the potential consequences of tenants being unable to afford a second deposit:

> We are concerned that some of the most vulnerable tenants might be using high cost credit to fund a second deposit, risking them falling into debt. We also want to know whether being unable to afford a deposit on a new tenancy could be a barrier to people moving to find better homes, or to be closer to family (for example to help with child care). Barriers to moving could also be having an impact on labour mobility. Further, it may be that tenants who are unable to move put up with poorer conditions in their property.
>
> Ultimately, if deposit affordability means tenants who move out of a property are unable to secure a new tenancy then it could increase the risk of someone becoming homeless.
>
> … We want to better understand the issues that tenants are facing so that we can target solutions to address this.[75]

[72] Nb. A landlord or agent cannot require a tenant uses a deposit replacement product but may allow it as an option without contravening the Tenant Fees Act 2019.

[73] Generation rent, It's not their money: Reforming tenancy deposit protection, 21 July 2014

[74] HL Deb 11 April 2016 c105

[75] MHCLG, Tenancy deposit reform: a call for evidence, 27 June 2019, paras 2.4 to 2.6

The Residential Landlords Association[76] has suggested that deposits should be held in trusts which can be easily transferred from one tenancy to another. This would be similar to a custodial scheme, but such a trust would also behave like a bank account that can be topped up. This would enable tenants to save up larger deposits for a more expensive tenancy or a mortgage deposit.[77]

In March 2018, Generation Rent published Rethinking Tenancy Deposits which proposed a new approach to making better use of tenants' assets tied up in deposits:

> This paper proposes a different future for deposits: a modified version of the existing custodial deposit system where funds are held on the tenants' behalf, and actively managed by an accredited third party, with any net returns from those funds paid back to tenants at the conclusion of the tenancy, on top of the security deposit. This system would treat tenants' deposits as tenants' assets and give them a return, while reducing the administrative burden on letting agents and landlords that comes with holding and managing these funds. At the end of the tenancy the landlord would maintain the opportunity to make a claim for damage or unpaid rent and the tenant would have the chance to challenge such a claim.
>
> A crucial element of the modified system would be to allow a portion of the deposit to be released by the landlord upon payment of the final month's rent, to allow the tenant to transfer it to a new tenancy.[78]

Other commentators have proposed alternatives to the current tenancy deposit protection schemes. These have included:

- Abandoning monetary deposits altogether. One major landlord announced in May 2017 that it would return all its deposits, subject to tenant referencing checks or guarantors.[79]

- Deposit passporting – whereby some of a tenant's deposit is transferred (either notionally or physically) from the first to the second landlord without first being returned to the tenant. This could enable tenants to move without having to provide an additional deposit to their new landlord.

[76] The RLA has now merged with the National Landlords Association to form the National Residential Landlords Association (NRLA).

[77] The RLA's Manifesto: Cutting up front costs, RLA, 7 June 2017 (now archived)

[78] Generation Rent, Rethinking Tenancy Deposits, Wilson Craw, D. and Seiferling, M., March 2018

[79] 'Major UK landlord scraps rental deposits', Delancey Press Release, 24 May 2017

ARLA Propertymark (Association of Residential Letting Agents), in response to the Government's 2017 consultation on banning letting agent fees, also suggested alternative financing for deposits, including:

- Local authorities being given a statutory duty to provide interest free loans to those unable to afford a deposit.
- Mandatory duties being placed on employers and public bodies to provide loans.
- The Government acting as a universal guarantor for all tenancies. ARLA Propertymark argues that this would be cost-neutral for the Government "as the costs of recovery against such tenants could be included in any Money Order secured".[80]

The Housing, Communities and Local Government Select Committee, during its pre-legislative scrutiny of the Tenant Fees Bill 2017-19, recommended that the Government should encourage innovation in the deposit free renting sector by assessing the merits of alternatives to traditional security deposits and reporting their findings to the Committee.[81]

In response, the Government said it would "explore the merits of deposit alternatives and reply to the Committee within six months."[82] In a follow-up letter to the Committee Chair, the Minister for Housing and Homelessness, then Heather Wheeler, reported that the Government had established a **Tenancy Deposit Protection Working Group**, formed of representatives of tenants, landlords and agents, the TDP schemes and Nationwide Building Society. The Group's remit was to identify potential improvements to the current TDP system, as well as the merits of alternative innovative approaches to deposit protection.[83] The Working Group was expected to report in autumn 2019.[84]

6.4 Landlord concerns

If a tenant cannot be contacted at the end of a tenancy, or abandons the property, there are procedures for claiming all or part of a deposit held in a scheme.

[80] Response to the Department for Communities and Local Government (DCLG) Consultation on the Banning of Letting Agent Fees paid by Tenants, ARLA Propertymark, May 2017
[81] HC 583, 29 March 2018
[82] Cm 9610, May 2018, para 39
[83] Letter to the Chair of the HCLG Committee from Heather Wheeler, Minister for Housing and Homelessness on Innovation in tenancy deposit protection, 5 November 2018
[84] MHCLG, Tenancy deposit reform: a call for evidence, 27 June 2019, p8

Even if a landlord successfully makes a claim in this way, a tenant may still return to dispute the claim. There are two reasons for this: first, either party can always go to court to claim all or part of a deposit, rather than use an ADR. Second, scheme providers do not provide ADR indefinitely, the Tenancy Deposit Scheme promises to hold deposits for three months after the end of the tenancy, with the possibility of extension in some circumstances.[85] The Tenancy Deposit Scheme points out that a tenant could return years later to claim a deposit through the courts. A time limit of 6 years normally applies to a tenant's ability to reclaim a deposit.[86]

Some landlords have expressed frustration at the timescales involved in this process.[87] This led to attempts to amend the law for custodial schemes during the Housing and Planning Bill's progress through Parliament (see section 3).

6.5 Tenancy deposit reform

The Government is considering whether improvements can be made to the TDP process in England to the benefit of both tenants and landlords.

The Ministry of Housing, Communities and Local Government (MHCLG) launched a call for evidence on Tenancy Deposit Reform in June 2019, building on the work of the Tenancy Deposit Protection Working Group:

> This call for evidence seeks to understand the barriers tenants face providing a second deposit when moving from one tenancy to the next. It looks at what can be done to speed up the return of deposits to tenants at the end of the tenancy.
>
> It considers whether existing initiatives to address deposit affordability are meeting tenants' needs and whether the market can offer improved products. It also explores innovative approaches that could be taken to help tenants move more easily, including allowing tenants to passport their deposit between tenancies.[88]

Submissions were accepted up to 5 September 2019. The Government is currently analysing the consultation responses.

In the Queen's Speech December 2019, the Government announced that "a new lifetime deposit", to assist tenants when moving from one tenancy to the

[85] What should the deposit holder do if they can't contact one of the parties at the end of the tenancy? TDS, March 2013

[86] Ibid.

[87] For instance, see: 'Tenancy Deposits: What to do if Your Tenant Abandons Your Property', Landlord News, 1 August 2016.

[88] MHCLG, Tenancy Deposit Reform: Call for Evidence, 27 June 2019

next, would be taken forward through a Renters' Reform Bill 2019-20.[89] The Bill was not introduced in the 2019-21 parliamentary session.

The Queen's Speech 2021 confirmed the Government's commitment to a "Better Deal for Renters" and its intention to:

> Outline proposals for a new 'lifetime' tenancy deposit model that eases the burden on tenants when moving from one tenancy to the next, helping improve the experience of those living in the private rental sector.[90]

A White Paper setting out a package of reforms to the private rented sector is expected in autumn 2021, with legislation to follow in due course.

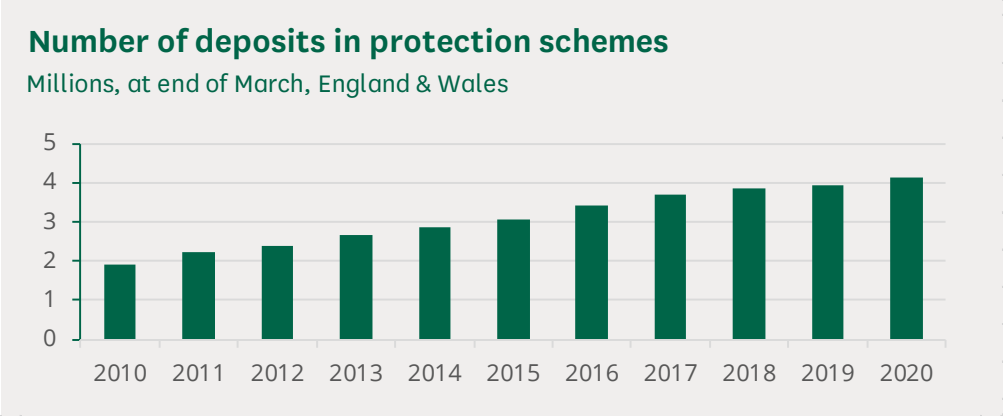
[89] Prime Minister's Office, 10 Downing Street, Queen's Speech 2019: background briefing notes, 19 December 2019, p46

[90] The Prime Minister's Office, Queen's Speech 2021: background briefing notes, 11 May 2021, p113

7 Statistics

7.1 Number and value of deposits protected

Statistics published by the Tenancy Deposit Scheme (TDS)[91] look at trends in the number and value of deposits protected by the three operators since the mandatory scheme was introduced. As the chart below shows, the number of deposits protected in England and Wales rose from 0.9 million at the end of March 2008 to 4.1 million at the end of March 2020. During the same period, the total value of deposits protected rose from £0.89bn to £4.31bn.



Source: Tenancy Deposit Scheme, Statistical briefing 2019-20, September 2020

It is worth noting that deposit protection legislation only covers assured shorthold tenancies, although most private tenants in residential buildings in England and Wales will be subject to such an agreement.

The average value of a protected deposit has fluctuated somewhat. It was £958 in England and Wales at the end of March 2008 before sinking to a low point of £880 in 2010.[92] It then reached a high of £1,110 in 2018 and has since decreased slightly to £1,040 at the end of March 2020.[93]

Tenancy Deposit Schemes were introduced in Scotland in 2012 and in Northern Ireland in 2013 (see section 5 above).

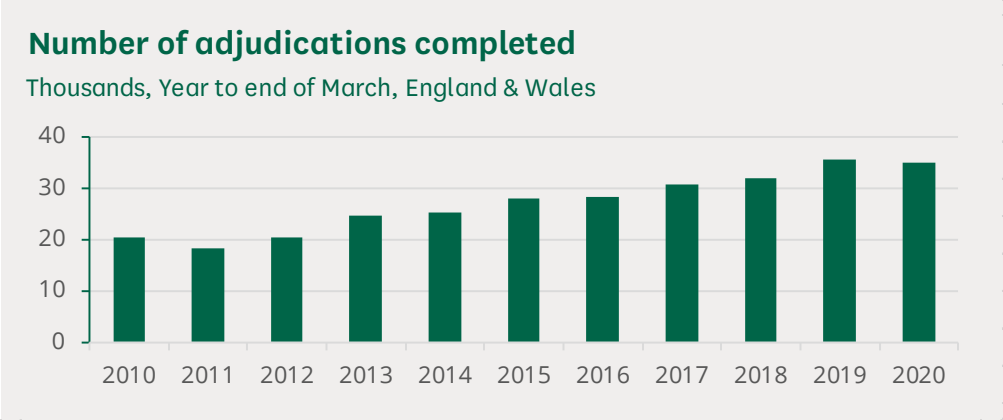
[91] Tenancy Deposit Scheme, Statistical briefing 2019-2020, September 2020
[92] Tenancy Deposit Scheme, Statistical briefing 2017-18, January 2019
[93] Tenancy Deposit Scheme, Statistical briefing 2019-2020, September 2020

In Scotland, the number of deposits protected rose from around 116,800 in March 2013 to around 222,000 in March 2020. The value of deposits protected in March 2020 was around £158m.[94]

In Northern Ireland, the number of deposits protected rose from around 17,500 in March 2014 to around 60,600 in March 2020 (worth around £37m).[95]

7.2 Disputes

There were 34,993 disputes leading to adjudication in England and Wales in 2019-20, according to figures published by the Tenancy Deposit Scheme (TDS).[96] The number of disputes increased sharply in the years following the introduction of the legislation, as shown in the chart below.



Source: Tenancy Deposit Scheme, Statistical Briefing 2019-20, September 2020

The report from TDS notes that the number of disputes represents a small proportion of all deposits protected (0.84% in 2019-20).[97]

According to TDS, the main causes of disputes in their own scheme in 2019-20 were cleaning (cited in 42% of disputes), damage (41%), redecoration (39%), gardening (23%) and rent arrears (14%).[98]

[94] SafeDeposits Scotland, Statistical briefing 2019-2020, September 2020
[95] Tenancy Deposit Scheme Northern Ireland, Statistical briefing 2019-2020, September 2020
[96] Tenancy Deposit Scheme, Statistical briefing 2019-2020, September 2020
[97] Ibid.
[98] Ibid.

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