

# Practitioner article

## Lessons for Scotland? The tenancy deposit scheme experience in England and Wales

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# Shelter

## Lessons for Scotland? The tenancy deposit scheme experience in England and Wales

**Following the recent announcement of a planned tenancy deposit scheme for Scotland, Ian Potter from the Association of Residential Letting Agents (ARLA) looks at a similar scheme in England and Wales and the lessons that Scotland can learn.**

### Introduction

In October this year, Housing Minister Alex Neil, announced that a Tenancy Deposit Scheme would be introduced for residential private sector tenancies in Scotland, as provided for in the Housing (Scotland) Act 2006. What he did not say was what it would look like, who would run it, what it might cost.

This article will look at what has worked in England and Wales, where a similar scheme is now in its third year, and perhaps highlight some of the benefits and also the pitfalls for Scotland to avoid.

The ethos of this legislation across the UK is the same: to ensure a tenant in the private rented sector gets a fair deal when expecting his or her deposit to be returned. The first requirement to achieve this is obvious: the deposit needs to be available at the end of the tenancy. There is much anecdotal evidence of landlords having spent the money as their own and agents having misappropriated it or mis-used it expecting, because of the high turnover of tenants, to always be in a position to reimburse exiting tenants from the supply of new deposits.

### How does the system in England and Wales work?

The English system offers the landlord or agent three options, two insured schemes and one custodial. The custodial scheme was seen at the outset as the one most likely to be the largest, and certainly as the default scheme. If we look at the custodial scheme first, it does what it says on the tin, with deposits safeguarded for the duration of the tenancy. Under this scheme, the deposit must be sent to the scheme operator within 14 days of receipt by the landlord or agent and the tenant given all the relevant information including how the scheme works and contact details for the scheme operator.

One of the insured schemes operates on a business model which requires a landlord to register a deposit, pay an insurance premium which guarantees the money to be available at the end of the tenancy and provide the tenant with the certificate. The other insurance scheme is more suited to very large portfolio landlords and to agents who are members of

professional bodies which require a landlord or agent to take out client money protection insurance and to hold tenant deposits in bank accounts specifically operated for this purpose.

All schemes offer free independent Alternative Dispute Resolution (ADR) which looks at the evidence available as a desk top exercise to resolve a dispute between a landlord and a tenant without the need to go to court. If the ADR route is selected then the adjudicator's decision is final, however each scheme also has a complaints mechanism if a material error in the investigation of a case is felt to have been made.

### **What are the penalties for a landlord that does not conform?**

Tenants have the right to take legal action which results in the landlord, if found guilty, being required to pay the tenant a sum equivalent to 3 times the value of the deposit. There is now much low level case law supporting this although a few anomalies do exist. The other penalty is the inability to use Section 21 of the Housing Act 1988 to bring the tenancy to an end. This is the equivalent of Section 33 of the Housing (Scotland) Act 1988 and means that a landlord cannot repossess a property even through the courts unless there has been a breach of the tenancy. However, if a tenant is in breach of the tenancy agreement, Ground 8 for mandatory rent arrears is not lost. There is little case law on this as very often in that type of situation the tenant is happy to be leaving anyway.

### **Has the scheme in England and Wales worked?**

Almost £2 billion of funds are now being protected in a manner that they were not before, which affects well over 1.5 million tenants. It is recognised that some deposits which should be protected are not, either through ignorance or deliberate action on the part of the landlord or agent. Some landlords have merely increased rent, where the market has allowed and decided not to take a deposit to avoid having to take part in either the custodial or insurance schemes.

In the recent past there has been an issue of deposits being misappropriated, used to pay mortgages etc., which have had an impact on some of the insurers, and it remains to be seen how much of an appetite they have for this specialist market. Interestingly, in one of the insurance schemes, if the landlord has left the money in the hands of an unregulated agent (agents who are not members of professional bodies), where there is no client money protection, the insurer returns the deposit to the tenant and can then pursue the landlord for the funds.

The number of disputes being referred to the schemes is known to have escalated quite rapidly of late because some landlords and tenants appear to be taking the attitude that as ADR is free and available to use for all disputes, they will use it regardless. It seems very frivolous to refer a dispute for £4.20 which is believed to be the smallest amount disputed

so far. The agent who did so (on behalf of the landlord), would have found it cheaper to have settled the dispute themselves which would have been easy to do. One of the biggest problems is what happens when one party cannot be contacted to either agree the deductions or otherwise, and this area probably needs a revisit, and obviously some serious thought in Scotland. Are all residential tenancies to be covered?

## Legal differences in Scotland

In England and Wales the equivalent of a Short Assured Tenancy (SAT) now has legal differences as a result of the introduction of Tenancy Deposit Protection which will also require some serious thought. South of the border a deposit belonging to a residential tenancy could previously be held in more than one way, either by the landlord or landlord's agent or as 'stakeholder'. As in Scotland now, the landlord could demand the deposit from the agent and compliance with this request was required – the tenant then had to take a legal route, usually Small Claims, to recover any money they felt was taken unjustly. The landlord's legal right to do this has now been removed in England and Wales but still exists in Scotland and its existence will need to be taken into consideration as Scotland moves towards a tenancy deposit protection scheme. A further difference is that 'Stakeholder' has no legal status in Scottish Law although that is how all the schemes in England and Wales work. In this situation disputed funds cannot be released without the agreement of both parties. To illustrate, a deposit of £750 is held by the agent or scheme, the landlord wishes £500 for cleaning and a new carpet, the tenant is agreeable to £100. Stakeholder would allow the tenant to get the £250 undisputed immediately, the landlord to get the £100 immediately and the rest would be held in a 'quasi trust' situation until agreement was reached or until ADR takes place. It is not unusual to come across SATs with the expression stakeholder but interestingly most of the cases I have seen with this are where the agent then acts as landlord's agent at the end.

## Tenant and landlord experience

Has Tenancy Deposit Protection improved the experience for the tenant? Most probably, because tenants now have a relatively simple system to facilitate a 'fair deal'. Have landlords enjoyed the experience? At present probably not as much so, because some of the unfair practices they have traditionally got away with have been addressed. There are two prime examples to illustrate this:

### Inventories

On neither side of the border is an inventory and schedule of condition a legal requirement, in the opinion of the writer this is a very poor practice. A well prepared inventory and schedule of condition at the start of a tenancy as well as a well executed check of the property, agreed by the tenant can provide strong evidence if a landlord wishes to make a claim on a tenant's deposit at the end of the tenancy.

The general standard of inventory has been found wanting in the extreme, to the extent that in one of the schemes used by landlords over 90 per cent of the awards have been in favour of the tenants. The inventory has not been the only reason for that, of course.

### **Unfair withholding due to wear and tear**

The practice of some, but definitely not all landlords, who expect to replace a carpet because of a small stain or burn or to redecorate the whole room at the cost of the last tenant when the landlord had not done so themselves for many years has also contributed. In other words, no reasonable allowance being given for fair wear and tear, or for the item being 'fit for purpose'.

### **Conclusion**

Like any other new scheme there are lots of positives, a few negatives, some things still 'on trial'. Tenancy deposit protection does provide a definite opportunity to improve the consumer experience; however it must always be seen to be transparent, proportionate and affordable.

### **Further information**

For further information, contact [practicescotland@shelter.org.uk](mailto:practicescotland@shelter.org.uk) in the first instance.