

Raising the annual rental threshold for assured and assured shorthold tenancies - FAQs for website

Q. When will the change come into effect?

A. The Statutory Instrument raising the annual rental threshold for assured, including assured shorthold tenancies to £100,000, "The Assured Tenancies (Amendment) (England) Order 2010 - SI 2010 No. 908" was laid on 25 March and the change will come into effect on 1 October 2010.

Q. Why is implementation being delayed until 1 October?

A. This will give landlords the opportunity to prepare for the change.

Q. What are the implications for tenants?

A. Tenants will have the benefits of the protection of the Housing Act 1988. In particular, new tenants will have the benefit of tenancy deposit protection.

Q. What are the implications for landlords?

A. Deposits for new tenancies now within the threshold will need to be protected with one of the three government-approved tenancy deposit schemes. Landlords will also need to comply with the full legal framework associated with assured shorthold tenancies. This includes having the option of using accelerated Court procedures for possession. They will also be able to use "off-the-shelf" tenancy agreements. In addition, they will have to follow the procedures in the Housing Act 1988 when proposing rent increases.

Landlords with existing common law tenancies which will become assured shorthold tenancies when the rental threshold is increased, will not need to protect their tenants' deposits in a recognised scheme immediately, although we would recommend that it is good practice to do so. They will, however, need to protect the deposit if the tenancy is renewed on or after 1 October, or if a new deposit is taken. We do not consider that deposits taken before 1 October will need to be protected as these were not taken in connection with a shorthold tenancy and therefore do not meet the criteria for protection specified in the Housing Act 2004. Ultimately, however, it is for the courts to decide when deposits should be protected and we are unable to give a definitive interpretation of the legislation or speculate on how the courts might find in any particular case.

Q. What are the implications for letting agents?

A. Letting agents should check their existing tenancies, including those managed on a "let-only" basis and ensure that landlords are aware of the change and its implications. Existing contracts may need to be reviewed and varied to accommodate the change to an assured shorthold tenancy.

Q. Why is the legislation "retrospective"?

A. The legislation does not provide for any transitional arrangements. It is not "retrospective" as such, but will affect all existing and new tenancies from 1 October. Any tenancies that would have been assured shorthold tenancies but for the rent being above £25,000 will become assured shorthold tenancies from 1 October if their rents are below £100,000.

The new rental threshold will therefore affect the existing rights of those landlords and tenants who have already taken out tenancy agreements as well as those entering into new agreements on or after 1 October. We consider the increase is prospective rather than retrospective because it will not affect the rights of tenants and landlords prior to its commencement.

Q. How can landlords seek possession of their properties?

A. Our intention is that the "new" ASTs should mirror existing ASTs. The same procedures for possession etc will therefore apply from 1 October.

Q. What if a landlord serves notice to quit before 1 October?

A. Where a landlord correctly serves notice to quit on a common law tenant, which expires on/after 1st October, it is our view that this would not be effective to terminate the tenancy. This is because by the time the notice expired the tenancy would have become an AST. We advise either serving notice to quit to expire at the latest on 30th September 2010 or serving a section 21 notice after the threshold is in place.

It is our reading of section 21(5)(a) however, that the court will not make an order for possession less than six months after the grant of an AST. This is the Department's view and only the courts can give definitive guidance.

Q. Will there be transitional arrangements where notice to quit was served before 1 October, but the tenant has not moved out?

A. If a landlord has properly served notice to quit on a tenant occupying a common law tenancy and the notice has expired before the new threshold comes into force, it will still be valid. A correctly served notice to quit terminates this type of tenancy. If the tenant refused to leave the landlord would need to obtain a court order.

Q. What will happen to tenancies entered into before 28 February 1997?

A. Prior to changes introduced on this date, if a landlord wanted to grant an assured shorthold tenancy rather than an assured tenancy, they had to serve notice on the tenant before the tenancy commenced. If a tenancy began before 28 February 1997, the tenant could not have been served with this notice, and will become fully assured on the coming in to force of the changes.

Q. Won't these changes interfere with landlords' property rights?

A. Landlords can only seek possession from assured tenants by using one of the grounds for possession in the Housing Act 1988. There is no automatic right to possession. However, as the change will not take effect until 1 October, landlords will have time to prepare. Also, as landlords can charge a market rent for assured tenancies, the property will still be generating a considerable income.

Q. What if they haven't served the relevant notice for the prior notice grounds?

A. If tenancies become fully assured, rather than assured shorthold, on the introduction of the new threshold, landlords will not be able to recover possession without a ground. These grounds are set out in Schedule 2 to the Housing Act 1988. Some require notice being served on the tenant, prior to the commencement of the tenancy, that the ground may be relied upon. In several cases, the court has power to dispense with service of this notice where it is just and equitable to do so. The courts will be aware that landlords will not have been able to do this and will take this into account. We anticipate this will affect a minority of tenancies, as the majority will become assured shorthold and the landlord will be able to use the notice only ground to recover possession, on expiry of any fixed term.

Q. What about landlords' human rights?

A. Landlords whose tenants become assured shorthold tenants as a result of the change may suggest that being deprived of their ability to recover their property unencumbered interferes with their rights under Article 1 of Protocol 1 of the European Convention on Human Rights. However, our view is that raising the threshold to bring all tenancies, except those with the very highest rents, under the protection of the Housing Act 1988, restores the position intended in the original legislation, which was to exclude only those tenancies at the very top end of the market. We consider any interference with human rights to be proportionate to the aim pursued.

Q. How will this change affect leaseholders?

A. Changing the rental threshold for assured and assured shorthold tenancies will have no immediate impact upon leaseholders.

However, we recognise that consideration needs to be given to whether amendments are required to the formula within the Local Government and Housing Act 1989 which is based upon the existing rental threshold of £25,000. This formula determines whether security of tenure and the ability to remain as an assured tenant are available to long leaseholders at the end of their lease term.

Q. Will leaseholders coming to the end of their lease be in a worse position as a result of the difference between the £100k used for AST and £25k used to establish security of tenure?

A. The position of such leaseholders remains the same since the existing formula which determines whether they have the benefit of the security of tenure provisions within the Local Government and Housing Act 1989 remains in place.

However in respect of such leaseholders it should be remembered that legislation has made it easier for leaseholders to extend their lease or buy their freehold which will enable them to take a greater stake in their home and these rights are increasingly being exercised. We would then not expect there to be many leaseholders who would be in the position of finding that their

leases have reached the end of their term and therefore need to rely on this particular legislation.

Security of tenure where a long lease comes to an end provides important protection for those leaseholders who will have had a significant stake in the property having paid a premium for the lease on which a 'low' rent was payable. We wish to ensure that security continues.

Q. Will the leasehold legislation be amended?

A. No decision has yet been taken. We would, of course, consult on any proposed changes.

Q. What about the Landlord and Tenant Act 1987 and the Leasehold Reform Act 1967 which also refer to assured tenancies and the annual rental limit?

A. We are aware that representations have been made in respect of this legislation. We do not believe that any amendments are required to the Landlord and Tenant Act 1987 as a result of the changes being introduced to the rental threshold for assured tenancies. No decision has yet been taken on what, if any, amendments may be required to other legislation such as the Leasehold Reform Act 1967. We would of course consult on any proposed changes.

NB:

Landlord and Tenant Act 1987 – Landlords selling the freehold of a block of flats must offer it to leaseholders and regulated tenants in the first instance.

Leasehold Reform Act 1967 – Rights for leaseholders of houses to buy the freehold or extend their lease.

Q. Will the change apply to Wales?

A. No, the change only applies to England. The Welsh Assembly Government is considering its position as part of its wider work on the private rented sector.

Q. How will the change be publicised?

A. There has already been considerable interest in the proposals. We will continue to work with those in the sector to raise awareness of the change.

Our intention is that new assured shorthold tenants should have the same protection as existing tenants. It is not our intention that landlords should be caught out. We cannot, of course direct the courts, but we will be issuing guidance so that they are aware of the situation.