This article will appear in the April 2012 issue of the Letting Update Journal (LUJ) and we are taking this opportunity to send it out to as many letting agents as possible. We want to help you to avoid getting caught out by the draconian penalties built into this new legislation so please take the time to read this article an digest the implications. Get it wrong and it could cost your business thousands of pounds.

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We trust you will enjoy this article and we hope to welcome you as a new subscriber.

The Localism Act 2011

The most important legislation for over 30 years?

The Localism Act is about transferring power from central government to local government, communities and individuals, and untying the hands of local government. It covers a variety of issues including planning, community rights and housing. Incorporated into this legislation is a single section introducing changes to the Housing Act 2004 in respect of tenancy deposits.

Background?

The Housing Act 2004[1] introduced deposit protection for assured shorthold tenancies (AST) from 6 April 2007. Additional regulations[2] defined the content of the prescribed information.

It took a couple of years before any deposit cases were heard in a court of record (High Court, Court of Appeal or Supreme Court). Eventually, a series of cases made it through the courts providing interpretation of the deposit legislation.

The first significant judgment was the Hannells Lettings case[3] where the court held that late protection of the deposit in the custodial scheme was sufficient to comply with the law and avoid the penalty of three times the deposit.

The next major judgment was in the Universal Estates case[4], where the argument was not so much about the 14 days in the law (already decided in the Hannells case), but about whether "the initial requirements of a scheme", taken from section 213(4), require the compliance with the 14-day rule. For example, The Dispute Service (TDS), in its 6th edition of the rules, include in paragraph 8.2 a clarification that the 'initial requirements' for its scheme means that 'within 14 days' certain actions must be completed. It then goes on to describe giving the prescribed information to the tenant (by inclusion in the tenancy agreement) and entering information on the web database.

The court decided that the 'initial requirements' of an authorised scheme,

for the purposes of the penalty, could not include when an action had to be carried out, only what action had to be carried out. Having said that, it is important to understand that failure to comply with any scheme rule may still leave the landlord or agent open to a penalty, even if not the three times deposit penalty specified in the Housing Act.

The original legislation

A study of the original legislation (see table on page 17) shows that the original draftsman was very careful to make sure that the penalty did not relate to a section in which a number of days was mentioned. The penalty applied to section 213(4) and 213(6)(a).

Therefore the legislation would tend to say that the judgments about the 14 day period were right, it should be considered in the light of why the legislation was introduced. There were two reasons for the legislation: to make sure a tenant got the deposit back and, if there was a dispute, an independent adjudicator could judge on the fairness of the decision.

So, if the landlord or agent protected the deposit (or gave the tenant the prescribed information) on day 15, on day 30 or even on day 100, which of these two benefits had the tenant lost? None; as long as it was done, albeit late, the tenant had the benefit of the legislation.

In the Gladehurst Properties case[5] the court decided that once the tenant had left the property, the tenant could no longer take the landlord to court for non-compliance with the legislation. Indeed the most likely time a tenant will discover that the deposit is not protected, or need independent adjudication, is after the tenancy has ended!

The Gladehurst judgment is hard to justify in the legislation. Schedule 10 (paragraph 2(c) for example) talks about return of the deposit to 'the tenant', when clearly the deposit would not be due to be refunded until 'the tenant' was no longer 'the tenant' but 'the ex-tenant'. Correct or not, it was a judgment, binding on all county courts.

More cases

Suurpere v Nice[6] was interesting in that it was not about deposit protection but it was about the provision of prescribed information. The landlord had not, themselves, given this information to the tenant. They sought to rely on the information provided by the custodial scheme, in which they had protected the money.

The court decided that the information given by the scheme was not sufficient for a variety of reasons.

Firstly, the legislation says the landlord (the definition of which includes the agent) has to give the prescribed information[7]. Secondly, the legislation requires the landlord to certify that the information is correct to the best of their knowledge or belief. Clearly, if the information is given to the tenant by the scheme, the landlord has not certified it as true. There was also argument about some of the information being incomplete. See the inset table for the legislation prescribing the content of the prescribed information (see table below).

As the landlord had not given the prescribed information they were liable to the penalty of three times the deposit. This is an important decision, as compliance with the prescribed information is much more complex than the protection of the deposit. For example, many agents and landlords are not

Prescribed information relating to tenancy deposits

2. - (1) The following is prescribed information for the purposes of section 213(5) of the Housing Act 2004 ("the Act")—

(a) the name, address, telephone number, e-mail address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit;

(b) any information contained in a leaflet supplied by the scheme administrator to the landlord which explains the operation of the provisions contained in sections 212 to 215 of, and Schedule 10 to, the Act;

(c) the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to the tenant at the end of the shorthold tenancy ("the tenancy");

(d) the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy;

(e) the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit;

(f) the facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation; and

(g) (g) the following information in connection with the tenancy in respect of which the deposit has been paid—

(i) the amount of the deposit paid;

(ii) the address of the property to which the tenancy relates;

(iii) the name, address, telephone number, and any e-mail address or fax number of the landlord;

(iv) the name, address, telephone number, and any e-mail address or fax number of the tenant, including such details that should be used by the landlord or scheme administrator for the purpose of contacting the tenant at the end of the tenancy;

(v) the name, address, telephone number and any e-mail address or fax number of any relevant person;

(vi) the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy; and

(vii) confirmation (in the form of a certificate signed by the landlord) that—

(aa) the information he provides under this sub-paragraph is accurate to the best of his knowledge and belief; and

(bb) he has given the tenant the opportunity to sign any document containing the information provided by the landlord under this article by way of confirmation that the information is accurate to the best of his knowledge and belief.

including the post tenancy contact address in the prescribed information, therefore leaving themselves open to a claim that they have not complied with the prescribed information requirements. Likewise, all three schemes include information for tenants in varying degrees and the information in such a leaflet is part of the prescribed information. If not given to the tenant, they could argue that they do not have the full prescribed information and are therefore, entitled to a penalty. Under the old rules this was not too serious as the landlord could simply give the required information before the court hearing and thus avoid a penalty.

The changes

Section 184 of the Localism Act 2011[8], introduces a range of very significant changes to the original legislation. The old and new versions can be compared in the inset table (page 17).

Section 213

The first change is to amend the references in section 213(3), section 213(6)(b) and Schedule 10 paragraph 5A(9)(b) from 14 days for an action, to 30 days. This means that the law now allows 30 days to protect the deposit and give the prescribed information. In itself, this change is of little severity to landlords and agents as it makes the obligations less onerous, however, as we shall see below, it does now make time of the essence.

Section 214(1)

The next change is in section 214(1), which deals with the penalty of three times the deposit for failure to protect the deposit or failure to give the prescribed information.

The draftsman of the original legislation was very careful to make sure the penalty was attached to section 213(4) and 213(6)(a), neither of which include the statement about the 14 days. This is the legal basis behind the Hannells and the Universal Estates judgments in that it did not matter if the deposit was protected or the prescribed information was given after the 14 days, provided it was done before a court hearing.

Indeed, if the objective was to get the deposit protected and give the tenant access to impartial adjudication, both were achieved regardless of protection being done on day 10, 15 or 50.

The revision to the legislation means that the penalty has now been associated with section 213(3) (protecting the deposit) and section 213(6) (about giving the prescribed information and including 213(6)(b), previously excluded but stating the 30 days in the amended version).

The effect of this change is to make time 'of the essence'. In other words if an agent or landlord fails to protect the deposit within the 30 day period or give the prescribed information in 30 days, completing the action after 30 days will no longer avoid a penalty. This will clearly make systems and procedures to ensure compliance much more important.

There is little ambiguity around protecting the deposit. The landlord receives the money and has, under the new rules, 30 days in which to ensure it is properly protected with one of the approved schemes. The more tricky area will be around the provision of the prescribed information and this is the really important part. The penalty in the law is exactly the same for not complying with the prescribed information as it is for not protecting the deposit, as the landlords in the Suurpere v Nice case discovered.

Section 214(1A)

Following the Gladehurst judgment the amendments to the Housing Act 2004 inserts a new section 214(1A) to clarify that the reference to a tenant seeking a penalty includes an ex-tenant. Whilst this would appear to be very fair and logical, it does have a rather unfortunate consequence of allowing any tenant who has not had the right prescribed information to lodge a claim, even if the deposit has been refunded.

Section 214(2)

Section 214(2) is amended in much the same way as section 214(1) to make the test of compliance within the specified period of 30 days. This section is also amended to clarify that this rule applies if the tenancy is ongoing.

Section 214(2A) is new and simply brings in much the same rules as 214(2) but specifies it is for situations where the tenancy has ended and therefore subsections 3A and 4 apply, whereas if the tenancy is still active, sub sections 3 and 4 apply.

Section 214(3A)

Section 214(3A) simply states that the court can order the person holding the deposit to repay it. Unlike section 214(3), section 214(3A) does not give the court the power to order the deposit be paid into a scheme if the tenancy has ended. This will presumably mean there is no chance of adjudication on it, although it would not appear to prevent a civil claim during the penalty hearing.

Section 213(3A) contains another subtle word change in that it now refers to ordering "all or part" of the deposit refunded to the tenant. This indicates the possibility for the landlord or agent to argue that at least some of the deposit should be retained if there is provable damage or rent arrears.

Section 214(4)

One of the court's complaints about the deposit penalties has been that it had no discretion to order different penalties for deliberate avoidance as opposed to an innocent mistake. Section 214(4) is now amended so that instead of a fixed penalty of three times the deposit, the penalty will now be between one and three times the deposit, the actual figure being at the judge's discretion. Clearly, if swift action is taken to comply with the legislation if a fault is pointed out, this may form an important part of a defence if trying to get the lower penalty. Do not forget, if the tenant can show there was a failure to comply, there is no avoiding the penalty. The best that can be hoped for is to keep it to a minimum.

Another subtle change is that in section 214(4) the word 'also' has been removed. Under the original wording of the legislation, if the court ordered the landlord or agent to repay the deposit or pay it into a scheme, the law said the court 'must also' order the penalty. There was, therefore, an argument that if the deposit had been refunded to the tenant, the court could not order it repaid to the tenant (as they already held the money).Therefore, where the legislation said the court 'must also' award the penalty, there could be no penalty as there was no deposit repayment award. The removal of the word 'also' simply clarifies that the award can be for the penalty without being for the deposit refund.

Localism Act Changes Table

Old	*New*
213 Requirements relating to tenancy deposits	
(3) Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 14 days beginning with the date on which it is received.	(3) Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 30 days beginning with the date on which it is received.
(6) The information required by subsection (5) must be given to the tenant and any relevant person— (a) in the prescribed form or in a form substantially to the same effect, and (b) within the period of 14 days beginning with the date on which the deposit is received by the landlord.	(6) The information required by subsection (5) must be given to the tenant and any relevant person— (a) in the prescribed form or in a form substantially to the same effect, and (b) within the period of 30 days beginning with the date on which the deposit is received by the landlord.
214 Proceedings relating to tenancy deposits	
(1) Where a tenancy deposit has been paid in connection with a shorthold tenancy, the tenant or any relevant person (as defined by section 213(10)) may make an application to a county court on the grounds — (a) that the initial requirements of an authorised scheme (see section 213(4)) have not, or section 213(6)(a) has not, been complied with in relation to the deposit; or	(1) Where a tenancy deposit has been paid in connection with a shorthold tenancy, the tenant or any relevant person (as defined by section 213(10)) may make an application to a county court on the grounds — (a) that section 213(3) or (6) has not been complied with in relation to the deposit, or
	(1A) Subsection (1) also applies in a case where the tenancy has ended, and in such a case the reference in subsection (1) to the tenant is to a person who was a tenant under the tenancy.
(2) Subsections (3) and (4) apply if on such an application the court — (a) is satisfied that those requirements have not, or section 213(6)(a) has not, been complied with in relation to the deposit, or	(2) Subsections (3) and (4) apply if on such an application in the case of an application under subsection (1) if the tenancy has not ended and the court — (a) is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit, or
	(2A) Subsections (3A) and (4) apply in the case of an application under subsection (1) if the tenancy has ended (whether before or after the making of the application) and the court— (a) is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit, or (b) is not satisfied that the deposit is being held in accordance with an authorised scheme, as the case may be.
	(3A) The court may order the person who appears to the court to be holding the deposit to repay all or part of it to the applicant within the period of 14 days beginning with the date of the making of the order.
(4) The court must also order the landlord to pay to the applicant a sum of money equal to three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.	(4) The court must order the landlord to pay to the applicant a sum of money not less than the amount of the deposit and not more than three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.
215 Sanctions for non-compliance	
(1) 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) the initial requirements of such a scheme (see section 213(4)) have not been complied with in relation to the deposit.	(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.
(2) 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.	(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 a county court has been made under section 214(1) and has been determined by the court, withdrawn or settled by agreement between the parties.

Section 215

Section 215 is amended by having a new subsection 215(2A) which clarifies that possession via a section 21 notice may be sought if the deposit has been refunded, deductions have been agreed or the court claim for a penalty has been concluded or withdrawn.

Section 215(1) is amended to make reference to this new subsection. As with the three times the deposit penalty, the section 21 notice paragraph has been amended to make the 30 day time period a strict requirement. The consequence of this is that if the deposit is protected late, a landlord cannot serve a valid section 21 notice until section 215(2A) has been complied with, until they have refunded the deposit, agreed deductions (unlikely at the point of serving a section 21 notice) or been through the court process for the penalty.

If the tenant does not initiate the court process seeking the penalty of three times the deposit and the landlord wants possession, the only way an agent may be able to serve notice will be to refund the deposit in full and therefore lose the benefit of holding the money. If the landlord loses money as a result, it would seem reasonable and likely that the landlord would expect the agent to make up the loss (plus the penalty on top, as the tenant can claim this even after the tenancy has ended).

Section 215(2) is amended to make it subject to the section 215(2A) mentioned above and to make it clear that the section 21 notice can be served once the prescribed information has been correctly served, even if served outside the 30 days.

Serious protection

Whilst the change from 14 to 30 days gives a little longer to comply and could be seen as to the advantage of the landlord or agent, the bulk of the changes undoubtedly increases risks around deposit protection.

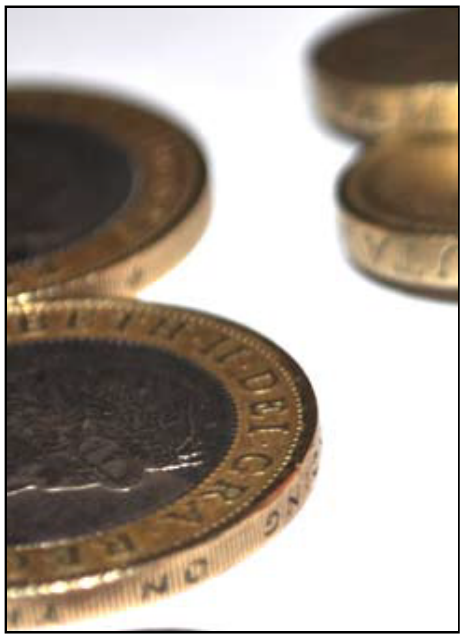
Unfortunately, the changes also eliminate most of the court of record judgments, so that new cases will have to come to court before we know how the new laws will be interpreted. In the next article we seek to explain some of the practical implications of these changes and what might happen in a variety of situations where the new rules are broken.

References:

1. Housing Act 2004, Chapter 34 www.legislation.gov.uk/ukpga/2004/34
2. The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 SI 2007 No 797 www.legislation.gov.uk/uksi/2007/797/made
3. *Draycott and Draycott v Hannells Lettings Limited* trading as Hannells Letting Agents [2010] EWHC 217 (QB)
4. *Tiensia v Vision Enterprises Limited trading as Universal Estates* and *Honeysuckle Properties v Fletcher, McGrory and Whitworth* [2010] EWCA Civ 1224
5. *Gladehurst Properties Limited v Hashemi and Johnson* [2010] EWCA Civ 604
6. *Suurpere v Nice* [2011] EWHC 2003.
7. Housing Act 2004 section 213(5) www.legislation.gov.uk/ukpga/2004/34section/213
8. The Localism Act 2011 Chapter 20 www.legislation.gov.uk/ukpga/2011/20/contents/enacted

The Localism Act 2011

Practical consequences



The changes to tenancy deposit protection legislation will change the way deposit protection works and how penalties are applied. This article considers those changes and the effects they may have on landlords and agents.

Practical consequences

Having seen the changes, the obvious question is, what are the practical effects of the changes?

Whilst the 30-day change appears to be to the agent's or landlord's advantage, overall the changes will leaves those collecting deposits in a less favourable position than they were under the original legislation.

Firstly, there is no avoiding a penalty if the deposit is protected late or the prescribed information is not accurately completed within the time scale. This may pressurize landlords and agents to settle claims out of court to minimise the legal costs involved.

Secondly, there will be great potential for 'class actions'. For example, if a tenant wins a claim for, say inadequate prescribed information, then every other tenant of that agency may have the same claim. If the first tenant won in a court of record (High Court or above)

then the others can be almost certain of winning at county court level.

The effect is that every single tenant in the last six years and subject to the six year litigation rule contained in the Limitation Act 1980, section 9, which only allows claims up to six years after the event giving rise to the reason to claim, will be able to claim a penalty for each tenancy and renewal they have held over that period. This might lead to some horrific claims.

Take an agency with 200 properties conducting renewals each six months. With an average deposit is £900 the calculation could be like this:

Hypothetically, 200 properties might have had 12 six-monthly lets or renewals in six years. That is 2400 tenancies. If each one had an average deposit of £900 then the deposits collected would be £900 times 2400, giving a minimum penalty of a staggering £2,160,000, and that assumes the lowest possible penalty. If the penalty was awarded at the highest rate it would be in excess of £6 million. Would it be stretching it too far to say that at least the potential of this is the most serious threat to agents in the last 30 years?

With this sort of money claimable (don't forget this money goes back to a tenant so they have a vested interest in catching the landlord out), it will not take long for the 'no win no fee' market to grow into this area. If there are large sums available, the attraction of claiming increases.

"If the penalty was awarded at the highest rate it would be in excess of £6 million. Would it be stretching it too far to say that at least the potential of this is the most serious threat to agents in the last 30 years?"

Claims under deposit protection fall under the Civil Procedure Rules part 56 as a 'Part 8' claim (www.bit.ly/civrules). The effect of this is that in a Part 8 action, the winning party is entitled to recover all their costs of the action, not just the more limited costs available through the small claims court. The costs of defending the action could be very considerable and this sort of action is much more attractive to legal firms and claimants.

The 'injustice' of this new rule is that the tenant might have left the property in reasonable condition but with minor issues, however, they still had their deposit returned in full. Years later they can come back and make a claim against the agent for the penalty. Can this in any sense be a balanced or fair approach?

A single tenant who had 12 six monthly renewals on a tenancy with a £900 deposit could have a claim worth between £10,800 and at its worst, £30,000! Allowing the claim after the deposit has been settled or refunded makes a substantial difference in the potential penalty. Whilst it seems fair to allow an ex-tenant to make a claim, why has this not been limited to those who have not had their deposit refunded? Did those writing the rules actually foresee such extreme consequences for what could be fairly minor infractions?

The dangers

Protecting a deposit for a property is not too onerous and provided the landlord or agent are familiar with the rules of whichever scheme they use, compliance is about recognising when protection is needed and having a checklist to ensure correct procedures are followed.

Surrender and re-grant

If fairly robust systems are in place to monitor new tenancies and renewals, then the most tricky part will be where some action on the part of the landlord and tenant effect a 'surrender and re-grant by operation of law'. This is a legal phrase that simply means that the only way the law can make sense of the situation is to regard the old tenancy as surrendered and a new one granted, even if no physical paperwork has been signed.

A simple example of this would be issuing a letter agreeing to 'extend' a fixed term tenancy. It is not possible to extend a fixed-term tenancy and any attempt to do so will effect a surrender of the current agreement and replace it (i.e. re-grant) a new tenancy starting at that point in time and running until the new end date.

Another example could be following notice. If the tenant serves notice and then decides to stay, this will create a new tenancy and not revive the old one. In both these situations it would be easy to miss the need to ensure the deposit is correctly protected and the requisite prescribed information given.

The protection of the deposit is not really a problem with the custodial scheme as they already hold the money. The Dispute Service (TDS) scheme works by basically covering all the deposits for a member unless the member opts out (see rule 4.1 in the 6th edition of the scheme rules). MyDeposits has a different way of working and different scheme rules. With MyDeposits, deposit protection is bought for each tenancy and the scheme rules require a purchase of new protection for each new tenancy (see scheme rules 4th edition rule C1.7). Failure to comply with this could leave the agent/landlord unprotected and liable to a penalty. MyDeposits' rules already say that a deposit cannot be protected after more than 14 days (presumably to be changed to 30 days when the change happens). The MyDeposits rules require new protection for a renewal tenancy so it may be possible to fall foul of the protection rules too.

Prescribed information

More problematical will be the issue of the prescribed information (the salient points of the prescribed information regulations can be found on page 15). The first area of common failure is in paragraph 2(b) where it is prescribed (the law requires) that information provided by the scheme in any leaflet must be given to the tenant. MyDeposits and TDS schemes both have specific documents containing information to be provided to the tenant in compliance with this requirement. The Deposit Protection Service (DPS) does not have a specific document but a look at its own prescribed information template will show that it says 'see attached terms and conditions', so clearly the tenant could claim that this document should have been provided.

Another common area for non compliance is the issue of the post tenancy contact details. This is not necessarily where the tenant plans to live after the tenancy (which is almost certainly unknown at this point), but rather the details at which the scheme or landlord can contact the tenant after the tenancy has finished. The first failure here is that many agents and landlords are not even asking this question on the tenancy application. Is the question in your application form?

Essentially paragraph (g)(iv) could be seen as asking for two sets of details for the tenant: current and post tenancy ones. Omitting this detail is a breach of the rules.

A call to action...

Sadly these amendments were put into the Localism Bill late in the process when it was in the House of Lords. Similar changes proposed in the House of Commons were defeated. Therefore, this part of the act has had less scrutiny that it really deserves.

Ideally the Government would recognise its mistake and be big enough to put up its hand and make amendments to it. Although this is the best option to lobby for, this is not very likely. We do not need an immediate amendment as it is not until after the rules have been in force for some time that the biggest dangers arise. This change would ideally be to clarify that, like the section 21 penalty, if the deposit was returned, agreed deductions made or a court judgment awarded or abandoned, then no penalty would be payable. This would immediately remove the danger from the majority of ex-tenants and from renewals.

The next best option is to get greater clarity on what will constitute a fatal error in the prescribed information. For example, if it was expressed as only counting if it disadvantaged the tenant significantly or caused them loss, this would be an improvement.

Changes are not likely unless there is substantial lobbying of ministers and MPs. We are inviting you to send a simple letter or email to your MP and ask for this to be changed to avoid placing your business at risk by an innocent mistake. MP's do listen to their own constituents and as a local business and valuable part of the community they should take some notice of you!

You can find the details of your local MP at **www.theyworkforyou.com** and you can send them an online message or compose your own email. Grant Shapps, the Housing Minister and the person responsible for this area, can be emailed directly on **grant.shapps@communities.gsi.gov.uk**.

It is important to understand that the failure to give this information could give rise to a claim that some of the prescribed information regulations have not been met and therefore the landlord or agent is in breach and the tenant is entitled to a penalty. This could apply to anything in the regulations which is not provided to the tenant.

Relevant person

Paragraph (g)(v) asks for the details of any 'relevant person'. A relevant person is defined in the Housing Act 2004 section 213(10) as "a relevant person' means any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant". Notice that there is no obligation on the tenant to declare that the deposit is being provided by a third party.

The most likely third parties are probably relatives, local authorities or friends. To avoid falling foul of this part of the legislation, it will be essential to ask the tenant who is providing the deposit and act accordingly. If there is a relevant person then the legislation means they must be given a copy of the prescribed information (as required by Housing Act 2004 section 213(6)) and the details of the relevant person must be included in the prescribed information as required by paragraph (g)(v) of the prescribed information regulations.

Clearly asking who is providing the deposit should be one of the standard questions on any tenancy application form. These are common failings in the prescribed information that may in the future cause great loss if not addressed carefully and thoroughly.

What to do about this?

This may cause more landlords and agents to reconsider if they should look at alternatives to collecting a deposit when letting. This might be an insurance policy or it might be greater use of guarantors or some other solution. However, many will continue to collect a deposit and if doing so for an assured shorthold tenancy. Having robust systems in place to ensure compliance with the legislation will be essential.

Examples

So how might this work in practice? The following are hypothetical examples of single case claims and how they might affect a landlord or agent. Each case will be judged on its own merits and the decision of two different judges on the same facts may vary. It cannot therefore be said that these are 'factual', rather suggestions to explain how this might work.

Example 1

The deposit is protected and the complete prescribed information is given within the allowed 30 days from the receipt of the money (note, not the start of the tenancy).

In this situation there should be no problems and no penalty can be claimed.

Example 2

Either the deposit is not protected or the complete prescribed information is not given until day 31 or afterwards. The tenant makes the claim, which gets to court while still the tenant.

In this situation the court would have to order the person who appears to be

holding the deposit to repay it or protect it (technically this could be an order for the custodial scheme to repay the deposit). In addition they must order that the 'landlord' (the legal definition includes the agent) pay the penalty to the applicant. However, excluding other factors, with only a short delay, the likely penalty would be at the bottom end of the range, say one times the value of the deposit (plus the legal costs if it actually goes to a court hearing; these could exceed the value of the claim).

Example 3

As Example 2, but the tenant makes the claim after the end of the tenancy. In this situation the landlord could claim for rent arrears or damages to be deducted from the deposit before it is refunded. Curiously the landlord is in a better position here than if the claim is made during the tenancy (in that they can claim for part of the deposit). Therefore, it is in the tenant's interest to claim sooner rather than later and not wait until after the tenancy ends to 'see how it works out'. Clearly after the tenancy has ended there is no option to order it to be paid into the scheme.

In addition, the court will have to order a penalty and again, since the protection was soon after the due date, this is likely to be at the lower end of the scale, say, one times the value of the deposit, plus costs.

Example 4

The tenant left last year and the agent did not refund the deposit and only did so when the tenant commenced court action. At the hearing the agent is able to satisfy the judge that there were serious rent arrears and damage to the property. The judge decides that the tenant is not entitled to any of the deposit back, but still awards a penalty of two times the

deposit (this is at the discretion of the judge). The judge could have ordered the whole deposit refunded so the total could be up to four times the deposit.

Example 5

The tenant leaves, having been in serious breach of the tenancy agreement and trashed the property, owing months of rent arrears. Five years later the tenant takes the agent to court. They claim that, although the deposit was protected and the prescribed information was given at the same time, as the tenants were given housing assistance from the council, the deposit was paid by the council. The council are not listed on the prescribed information, which is defective and they seek a penalty of three times the value of the deposit. The judge may be sympathetic and only award the minimum penalty, but has to award at least one times the value of the deposit.

In the future, it may be prudent to retain deposit protection evidence for at least six years to be able to defend claims from tenants who have left some years ago.

"Who is providing the deposit should be one of the standard questions on any tenancy application form. These are common failings in the prescribed information that may in the future cause great loss if not addressed carefully and thoroughly."

Example 6

In a student let house the tenants move in during August. They leave without arrears or damage after 12 months and their deposit is returned. Three years later the agent receives a claim for three times the deposit as the father of one of the students, who paid the deposit on the student's behalf, was not given a copy of the prescribed information. If proven, the court will not make any award about the deposit as it was already repaid, but the court will have to award a penalty of at least one times the deposit. Note that the 'relevant person' can make a claim themselves and does not rely on a claim by the tenant. It is not clear from the legislation whether both tenant and 'relevant person' can claim.

Example 7

The agent protects the deposit after two months. As the protection was not within the 30 days required, they cannot serve the section 21 notice without refunding the deposit. Therefore, the agent will either have to refund the deposit with the tenancy still running or wait for the tenant to take them to court for the penalty. Even if they refund the deposit, it will not stop the tenant taking them to court for the penalty afterwards.

Example 8

The deposit is protected but the prescribed information is not provided. The landlord cannot serve a section 21 notice until the prescribed information is given (Housing Act 2004 section 215(2)). Even after the prescribed information is given there is still a liability to a penalty.