

CONSULTATION QUESTIONS

Chapter 1: General Provision about Tenancy Deposit Schemes

Question 1: Do you support the proposal that the tenancy types covered by a tenancy deposit scheme should be aligned with existing landlord registration legislation?

Please answer either Yes or No and explain your response.

Yes

Comments

No

The implementing regulations should include transitional provisions to ensure that all tenancies which exist at the time of implementation become subject to tenancy deposit protection at the end of their fixed term. It should not be possible to avoid tenancy deposit protection by contracting out of tacit relocation.

Question 2: Do you agree with the provisions relating to the date that the duty to comply should take effect for tenancies covered by tenancy deposit regulations?

Please answer either Yes or No and explain your response.

Yes

Six months is probably realistic if the schemes in England and Wales bid for Scottish approval. These schemes have 3.5 years of experience which will help them cope with this new work. It should be possible for other schemes to enter the market after the date for compliance.

No

Comments

Question 3: Do you consider that the sanctions are appropriate and proportionate to the action or inaction that prompts them?

Please answer either Yes or No and explain your response.

Yes

We support payment to tenants of an amount of no more than three times the deposit, in appropriate circumstances.

No

Comments

Question 4: Are there additional sanctions that you think would be more appropriate and effective? If so, how would they be enforced?

Any landlord who has not protected a deposit should also be prohibited from using section 33 of the Housing (Scotland) Act 1988 to recover possession, until such time as the deposit is protected.

Question 5: The regulations currently provide for sanctions to apply to the person who receives the deposit and fails to comply with tenancy deposit regulations. Do you agree with this? Please answer either Yes or No and explain your response.

Yes

It should be possible to sanction lettings agents. If a landlord advises their agent they intend using a custodial scheme the agent could facilitate this by providing the landlord with a cheque made payable directly to the scheme. This should mean the agent has avoided a breach.

No

Comments

Question 6: If your response to Question 5 is No, who do you think sanctions should apply to and in what circumstances?

Comments

Question 7: Do you think that the regulations should require a financial penalty to be imposed in all cases? Please answer either Yes or No and explain your response.

Yes

A mandatory fixed financial penalty ensures a degree of consistency across the court system and acts as a suitable deterrent to non-compliance.

No

Comments

Question 8: Should the court have discretion to decide on the amount of financial penalty? Please answer either Yes or No and explain your response.

Yes

Comments

No

As stated above, we prefer consistency. With HMO legislation there is evidence of landlords taking a chance that the fine for non compliance will be less than the cost of a licence. A similar situation could arise with Tenancy Deposit Protection.

Question 9: If your response to Question 8 is Yes, do you think there should be a minimum penalty e.g. at least an amount equal to the deposit?

Please answer either Yes or No and explain your response.

Yes

Comments

No

Comments

Chapter 2: Conditions for approval of a Tenancy Deposit Scheme

Question 10: The regulations permit a scheme to hold deposits in a designated interest bearing account. Do you have any views on whether other types of investment should be allowed?

Any type of investment should be repayable without any risk to the monies held and have sufficient liquidity to ensure any scheme is able to repay funds on demand. It is essential that any account being used to hold client funds are protected under the Financial Services Compensation Scheme in order to protect against the failure of any institution holding funds.

Question 11: Do you have any views on the provisions relating to the use of excess income accrued on deposits?

The consultation paper mentions fees paid by landlords being held in designated clients funds account. However, these fees would be a charge made to the landlord, usually for the insurance premium, and would not be refundable. They are part of the operating income of a scheme and should not be mixed with the client funds. Any surplus on interest could be treated as income of the scheme and should assist with keeping the operating costs, and therefore fees payable by landlords, as low as possible.

Question 12: Do you have any particular views on the requirement for schemes (particularly insurance schemes) to be available to all landlords?

It is unrealistic to expect insurers to accept all risks. Any insurance backed scheme will require a premium which reflects the potential risk of the deposit not being paid by the landlord at the point of repayment or dispute. This has been a problem faced by the insured schemes in England and Wales, and insurers have imposed criteria for scheme membership in order to minimise their exposure.

Question 13: Do you consider that both custodial and insurance scheme models afford adequate protection for tenancy deposits and should be permitted in the regulations?

Please answer either Yes or No and explain your response.

Yes

Yes, provided both types of scheme have correct levels of insurance.

No

Comments

**Question 14: The regulations currently only provide for fees to be charged in respect of insurance schemes. Do you think that fees should also be permitted for custodial schemes?
Please answer either Yes or No and explain your response.**

Yes

A custodial scheme is unlikely to cover its costs from interest alone and therefore should be permitted to make a reasonable charge.

No

Comments

Question 15: If your response to Question 13 is Yes, what would be an appropriate fee structure?

Adequate income is essential for the financial planning of all types of schemes. Legislation should not include a fee structure; this should be left to market forces to determine. Experience of schemes around the world illustrates this is the correct approach.

Question 16: What are your views on whether the regulations should specify an amount or maximum amount of any fee which may be charged and the impact this might have on a scheme's ability to be self financing?

We would not support regulation of the level of fees, however it may be possible to regulate the level of profit and reserve which a scheme can take. Costs of schemes change because of the fluctuating number of tenancies protected, complaints, and disputes. These do not remain static and therefore schemes must be flexible.

Question 17: If you think a specific amount or maximum amount of any fee charged should be set, what would be an appropriate level?

Not in favour for the reasons given above.

Question 18: What are your views on whether approved schemes should repay deposits to lead tenants if so used, or to individual tenants?

No. Using a lead tenant can create issues with misappropriation. It is possible that a lead tenant could have necessitated a deduction but unfairly shares this deduction with his co-tenants.

Chapter 3: Requirements relating to Dispute Resolution

Question 19: Are you content with the proposals that ADR should be provided and funded by approved tenancy deposit schemes or do you think there might be more effective and affordable alternatives?

We are content that ADR should be provided and funded by approved tenancy deposit schemes. The schemes are likely to be the most efficient and accurate means of the provision of ADR, albeit depending on the size and viability the function may be outsourced to an appropriate body. This also allows for a more accurate financial planning matrix for the scheme operators.

Question 20: Is the proposal to apply a lower limit of £15 for disputes an appropriate approach to ensuring that the costs of ADR are not disproportionate to the amount of deposit that may be disputed? Please answer either Yes or No and explain your response.

Yes. £15 seems a reasonable de minimis for amounts which tenants can dispute. A de minimis does not exist in the scheme in England and Wales and many commentators have suggested this is a flaw when claims for £4.95 are reported and must be adjudicated.

However, clarification is needed as to whether this de minimise also applies when a larger amount is disputed and a settlement is being negotiated, i.e. could tenants automatically be entitled to a £15 discount on a larger amount claimed by a landlord?

Question 21: Are you content with the proposal for ADR to be free of charge for tenants and landlords, at the point of access? Please answer either Yes or No and explain your response

Yes

Comments

No

We believe a scheme should be able to charge a landlord or tenant if the claim for all or part of the deposit, or the proposed deductions from the deposit, are found to be frivolous, particularly where one party may have been made a reasonable offer based on the evidence.

Question 22: If your response to Question 21 is No, what would an appropriate charging structure be, and who should the charge apply to?

Schemes should be able to set an appropriate charge reflecting the level of

work required for ADR. A minimum of £50 would seem to be appropriate at the current time. The charge should be set at a level which encourages parties to settle disputes, but which does not prohibit ADR.

Chapter 4: Miscellaneous

Question 23: Do you have additional views on how approved schemes should be publicised?

Awareness can be achieved through existing channels such as the landlord registration website, Scottish government website, and bodies such as the Citizens Advice Bureaux. Leaflets are also a positive proposal and this should promote tenant's and landlord's understanding of what landlords are required to do in order to comply with the legislation.

However, scheme administrators should not be required to publicise their scheme and its services widely to landlords, partly because of the difficulty of identifying unregistered landlords. We think it is unreasonable for schemes to have to spend members' funds to fulfil such a broad requirement. Government funded publicity should be considered. Having said that schemes will need to communicate with their own members, and may also choose to communicate with established groups of landlords and tenants.

Question 24: Do you support the proposals in relation to the requirement for a landlord to provide information about his or her registration status?

Yes.

Question 25: Are there any other circumstances in which you think it would be appropriate for a scheme administrator to share information with local authorities? For example, of sanctions and penalties applied to a landlord, or the outcome of adjudication found against a landlord.

Schemes may not be aware of sanctions and penalties imposed by courts. However, if schemes become aware of court sanctions and penalties it would seem appropriate for this to be shared with local authorities, in order to assist authorities with the administration of the fit and proper test.

However, we question whether information about adjudications should be routinely be shared with local authorities. We are concerned that the potentially disproportionate impact of this may be to inhibit landlords from making claims. For this reason we suggest a risk-based approach which would mean scheme administrators could provide this information if requested by a local authority, on a case by case basis.

Question 26: Do you agree with the proposals relating to the requirement for approved schemes to submit annual and quarterly reports to Scottish Ministers?

Please answer either Yes or No and explain your response.

Yes

The period of 30 days from the end of the year to provide an income and expenditure account is unreasonable. A better approach would be draft accounts after 60 days with audited accounts after 6 months. This would still exceed the timetable imposed by the Companies Act.

No

Comments

Question 27: Do you have any other ideas which might help address the problems encountered by tenants when their deposit is unfairly withheld? As part of this, what is your view on the desirability of banning the practice of taking of tenancy deposits in Scotland?

We are against prohibiting tenancy deposits as this would be a huge disincentive to landlords, many of whom have a genuine reason to withhold all or part of a deposit at the end of a tenancy. Such a step would be a charter for problem tenants to wreck havoc in a property, knowing a landlord would have a long and expensive battle to get any recompense. Tenants' desire to get a deposit back is strong, particularly if they require the funds for their next rented property. The system of deposits motivates responsible tenants to look after their rented property. Although deposits can be disputed, it is important to remember that in fact many deposits are returned amicably to tenants.

If you have any additional feedback on any element of the draft SSI please comment in the text box below.

We have additional feedback on the Annex E: Draft Partial Impact Assessment for Tenancy Deposit Regulations

QA.2

There are many people who manage a property for a friend or relative for no apparent remuneration. These individuals often do not consider themselves to be an agent but are effectively fulfilling the role of an agent. The obligation for Tenancy Deposit Protection must be clear to this group. It is debateable whether or not it is advantageous to link this obligation with the debate around what is an agent.

QA.3

There is potential for landlords to feel disadvantaged by the cost of

increased regulatory burdens. These costs include the preparation and management of robust inventories as well as the cost of Tenancy Deposit Protection. However, we do not view this negative impact as disproportionate given the need for consumer protection.

QA.4

See our response to Q A.3.

QA.5

The requirements should provide tenants with greater expectation of fairness in dealing with a deposit with a simple route to resolution without the need to go to court.

QA.7

No.