



The Real Tenancy Test - tenancy rights in supported living

NDTi Housing and Social Inclusion Project
Discussion Paper Two

Subsidised by a Department of Health Section 64 Grant

A decorative graphic at the bottom of the page features a central yellow sphere with a gradient and a shadow, containing the word 'housing' in white, lowercase, sans-serif font. The sphere is flanked by two semi-circular shapes: a dark blue one on the left and a light blue one on the right, both with a white inner curve that frames the sphere.

housing

Contents

	Page
About the Housing and Social Inclusion Project.....	3
Part One: The Real Tenancy Test	
Summary.....	5
A tenancy agreement is in place.....	9
The tenant has control over where they live	10
The tenant has control over who they live with	11
The tenant has control over how they are supported.....	12
The tenant has control over what happens in their home	13
Part Two: Supporting Information	
Why the Real Tenancy Test?	14
Is tenancy type important?.....	16
Is a secure tenancy always necessary?	17
Supported living or supported housing?	18
Mental capacity and tenancy	21
Deprivation of Liberty safeguards	22
Supporting people to understand tenancy rights.....	22
Frequently asked questions.....	23
Appendix I: The Real Tenancy Test Questions	26



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About the Housing and Social Inclusion Project

Many local authorities have changed services from residential care to supported housing for people with learning disabilities. Much of this change has focussed on achieving wider access to welfare benefits and having a tenancy. The aim of supported living to achieve choice, control and community inclusion has been much less of a focus. The result has been a focus on the housing 'mechanics' and as a consequence housing rights are often denied in practice, institutional practices continue in supported living and community inclusion and networks are not achieved by people.

This three year Department of Health subsidised project, led by the National Development Team for Inclusion (NDTi), will address the need to include community inclusion at the heart of housing planning and design by increasing knowledge, understanding and developing materials to:

- Design and implement a move from residential care to separate housing and support arrangements based on an aim of community inclusion
- Develop and implement effective tenancy agreements and include staff training on housing rights
- Train support providers to deliver support that promotes community inclusion
- Use an evaluation tool, 'The Inclusion Web' that enables providers and commissioners to quantify the impact of new practices around community inclusion.
- Understand the economic implications of the move from residential care to supported living models

The outcomes and learning from this project will be disseminated through a series of discussion and good practice papers, a national conference, national programmes for housing and social inclusion and regional learning disability and housing networks.

Project Partners:

- Bradford Metropolitan District Council
- Essex County Council

- Gloucestershire County Council
- Halton & St Helens PCT & Councils
- London Borough of Islington
- North Tyneside Council
- Sandwell Metropolitan Borough Council
- Slough Borough Council



Part One - The real tenancy test

Summary

The Real Tenancy Test is a quick test to be used in supported living and tenancy based supported housing to determine if real tenancy rights are being met

More and more people with a learning disability have a tenancy. Some people with learning disabilities have the same rights, choice and control in their homes as all tenants should, but many people with learning disabilities have tenancies in housing and support services where they do not enjoy real rights, choice and control. This is usually because although they may have a legal and binding tenancy agreement, their home operates more like a traditional residential care service, where a care provider runs the home and commissioners 'place' people in their home. The Real Tenancy Test is designed to get a quick understanding of whether a tenancy in supported living gives real tenancy rights. The Real Tenancy Test should not be used for tenancies in a temporary supported housing service.

The Real Tenancy Test says that for the tenancy to be genuine, it should meet 5 key standards

It is designed to help give a quick understanding of whether a tenancy for a person with a learning disability gives real tenancy rights or not. It says that for the tenancy to be genuine, the following should be happening;

1. A tenancy agreement is in place
2. The tenant has control over where they live
3. The tenant has control over who they live with
4. The tenant has control over who supports them and how they are supported
5. The tenant has control over what happens in their home

The Real Tenancy Test asks 11 key questions to determine whether the tenancy is genuine and gives guidance to ensure that the tenants has real tenancy rights

Those 11 key questions are as follows:

1. Has a tenant been moved from their home because of a decision by the support provider or commissioner?
2. Has anybody been placed in the home without consultation with existing tenants because the support provider or commissioner needs to fill a vacancy?
3. Did the tenant have no other choices when moving in to their home?
4. Is there a tenant who wants to move on but is not getting support to do so?
5. Has a tenant moved into the house without consultation with tenants?
6. Is there a tenant that is clearly unhappy living with another tenant?
7. Is a tenant expected to move if their support needs to change?
8. Is support provided at times prescribed by the support provider rather than the tenant?
9. Are tenants having a restricted access to any part of their home, other than co-tenants private space?
10. Is there equipment such as telephone line, office equipment and files owned by the housing or support provider in the tenant's home?
11. Do the landlord or support provider staff have free access and hold keys to the tenant's home?

These 11 key questions will enable landlords and support providers to identify whether a tenancy is genuine or not. If the answer to any of these questions is 'yes' then it is possible that arrangements are either breaking the law or best practice in relation to tenancies and we strongly recommend that people undertake more detailed investigations to consider the action they need to take. The second part of these materials gives more guidance and practical examples to help with follow-up action so that a landlord and support provider can ensure that the tenancy gives the tenant real rights and control over their home.

The Real Tenancy Test incorporates CQC guidance for support providers of domiciliary care to meet legal requirements under the Care Standards Act 2000¹

¹ Office of Public Sector Information, *Care Standards Act 2000*
http://www.opsi.gov.uk/acts/acts2000/ukpga_20000014_en_1

The Care Quality Commission (CQC)² has issued guidance so that inspectors can distinguish between what is and is not a genuine tenancy where a support provider is providing domiciliary care. For landlords not providing genuine tenancies to tenants who have domiciliary care, there is a risk that the CQC can insist that the home is registered as a care home.

For supported living arrangements where one or more tenants receive domiciliary care, a landlord and /or support provider can use The Real Tenancy Test to help determine whether arrangements support a genuine tenancy as defined by CQC.

The Real Tenancy Test is also a good practice resource.

For providers of supported housing where tenants do not receive domiciliary care, the Real Tenancy Test can be used to enhance good practice in giving tenants genuine rights, choice and control in their home. The Real Tenancy Test does not apply to supported housing schemes where the arrangements are not long term.

The Real Tenancy Test only focuses on the tenancy and does not take all quality issues for housing and support into consideration. To check the quality of the service there are other excellent tools that complement The Real Tenancy Test such as Reach Standards in Supported Living³ and Hands Off, It's My Home⁴ that complement the quality assurance frameworks for Supporting People and Domiciliary Care Services.

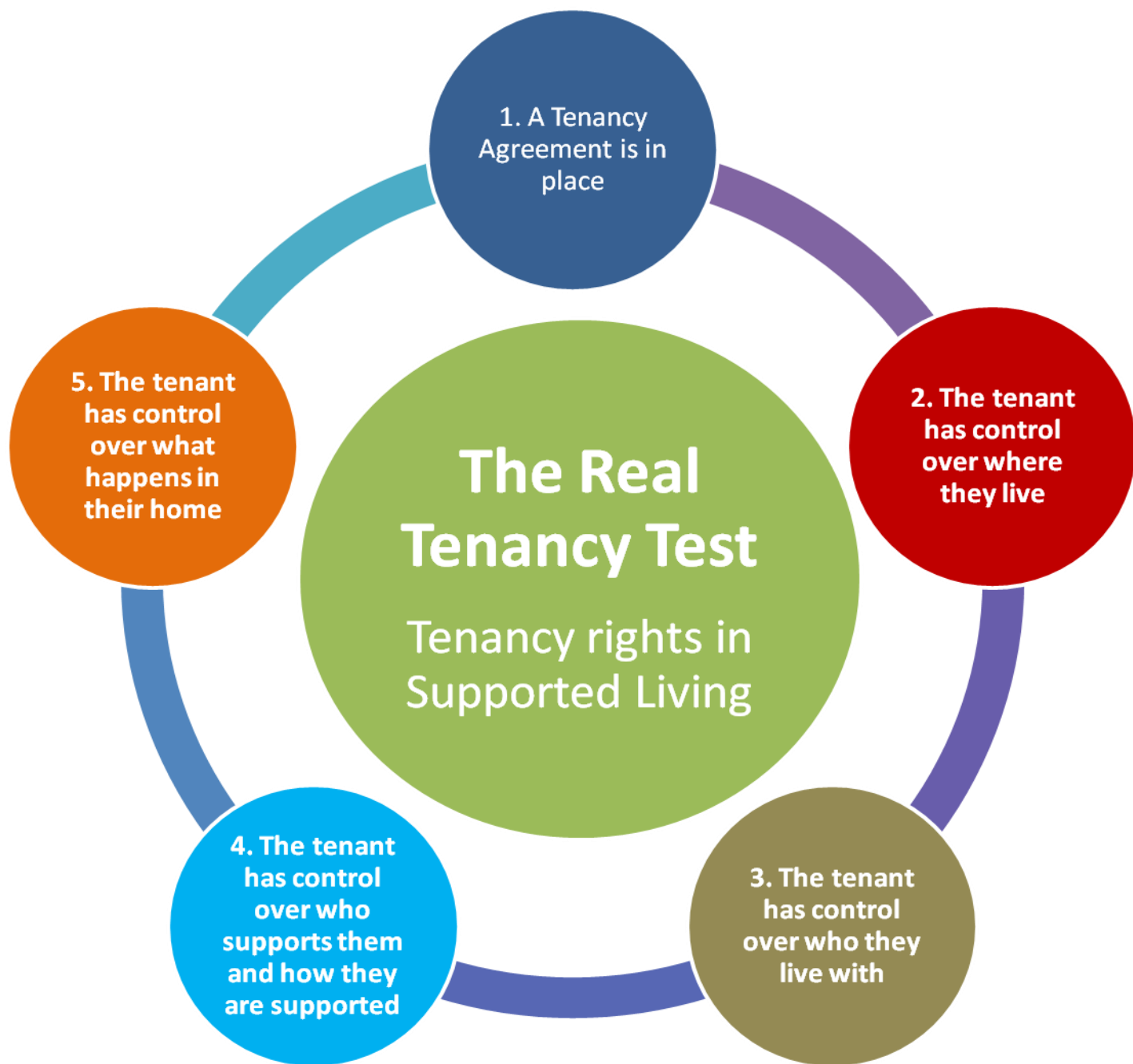
The Real Tenancy Test does not give legal guidance and this should be sought for individual situations.

Tenancy law is complicated because there are several different types of tenancies that may vary depending on the landlord and when they were issued and individual advice should be sought. For providers of domiciliary care, the Real Tenancy Test gives a framework that enables landlords and providers to consider how to meet the requirements outlined by the CQC to be accepted as a genuine supported living arrangement. For individual situations, clarification should be sought directly from the CQC.

² Care Quality Commission 2010
[www.cqc.org.uk/ .../20081203_Assessing_whether_a_Care_Service_Needs_to_be_Registered_Policy_and_Guidance_052-08.doc](http://www.cqc.org.uk/.../20081203_Assessing_whether_a_Care_Service_Needs_to_be_Registered_Policy_and_Guidance_052-08.doc)

³ Paradigm, *Reach Standards in Supported Living* 2006 www.paradigm-uk.org

⁴ Sly, *Hands Off, It's My Home* 2008
http://www.housingoptions.org.uk/general_information/gi_resources.html



1. A Tenancy Agreement is in place

What real supported living looks like	What needs to be in place	The Real Tenancy Test Questions
<ul style="list-style-type: none"> • The tenants' legal rights are observed, for example they are not moved on unless they are clearly asking to do so or their landlord evicts them due to grounds prescribed under the relevant Housing Act • The existence of a tenancy agreement does not in itself determine that the tenancy is legitimate. What is just as important is that tenants have the same choice and control over their home as non-disabled tenants would. • Support staff are always aware that they are working in the tenants home and are respectful of the tenants' rights, choices and control over their home 	<ul style="list-style-type: none"> • The landlord and support provider should know about the Mental Capacity Act and relevant housing law in relation to issuing a tenancy. • The tenancy and support agreement is easy to understand and the tenant (or a representative) understands the tenancy • Support staff understand the tenancy agreement and the rights of the tenant and get training and guidance that is clear about how to support people in their own home 	<ol style="list-style-type: none"> 1) Has a tenant been moved from their home because of a decision by the support provider or commissioner? 2) Has anybody been placed in the home without consultation with existing tenants because the support provider or commissioner needs to fill a vacancy? <p>If the answer to any of the above questions is yes, it is likely that tenant/s are not experiencing genuine tenancy rights</p>

2. The tenant has control over where they live

What real supported living looks like	What needs to be in place	The Real Tenancy Test Questions
<ul style="list-style-type: none"> • Person centred planning and approaches to help people think about where they want to live have been used. • People get support to think about the type of house and location that is important to them. • For people who do not communicate with words, using person centred approaches to think about what is important to them about where they want to live. • Families, friends and advocates are involved in the planning process. • The person has not been simply 'placed' because there is a vacancy 	<ul style="list-style-type: none"> • Provide information about housing choices that people and families can understand. • Make sure care managers, housing advisors and provider organisations know about the range of housing choices available. • Regularly review and ask tenants whether they want to move on and make this part of a service agreement. • Collect evidence of how people have chosen where they live, especially from people who do not use words to communicate (this may be required by CQC if registration status is being challenged) 	<p>3) Did the tenant have no other choices when moving in to their home?</p> <p>4) Is there a tenant who wants to move on but is not getting support to do so?</p> <p>If the answer to any of the above questions is yes, it is likely that tenant/s are not experiencing genuine tenancy rights</p>

3. The tenant has control over who they live with

What real supported living looks like	What needs to be in place	The Real Tenancy Test Questions
<ul style="list-style-type: none"> • The tenant has chosen who they want to live with (if anyone) or the type of people they want to live with. • For people who do not communicate with words, using person centred approaches to think about who they like living with or what type of person they like to be with/don't like to be with. • If people find they do not like who they live with, they are supported to think about whether they want to move on. • Tenants are regularly asked if they are happy or unhappy with who they live with. 	<ul style="list-style-type: none"> • Commissioners and providers have a process for enabling people to make genuine choices about who they live with, such as a housemates notice board, events and introductions to potential sharers. • The landlord and support provider create a person centred process for supporting current tenants and potential tenants to choose housemates. • Providers and commissioners create flexibility in shared housing so that people can more easily move on if they need to. • Landlords and support providers may need to provide evidence of how choices about who people live with were made if registration status is being challenged by CQC 	<p>5) Has a tenant moved into the house without consultation with tenants?</p> <p>6) Is there a tenant that is clearly unhappy living with another tenant?</p> <p>If the answer to any of the above questions is yes, it is likely that tenant/s are not experiencing genuine tenancy rights</p>

4. The tenant has control over who supports them and how they are supported

What real supported living looks like	What needs to be in place	The Real Tenancy Test Questions
<ul style="list-style-type: none"> • The tenant/s have genuine control over how they are supported and who supports them. • Person centred planning and support planning is used to determine choices made and to support changes • Recruitment and rota planning is based on individual tenant need/choice. • The tenant has real control over their finances, with or without support • Ultimately, if a tenant does not want a particular member of staff or the provider to support them, they do not have to. It is their home. 	<ul style="list-style-type: none"> • Housing and support is contracted separately and support is not a condition of the tenancy. CQC will request evidence of this if registration status is challenged. • There is a support contract in place that states that the tenant has a right to change support provider • Support providers need to move towards a system of individualised funding to meet the needs of personal budget holders and create flexibility in how they provide support 	<p>7) Is a tenant expected to move if their support needs to change?</p> <p>8) Is support provided at times prescribed by the support provider rather than the tenant?</p> <p>If the answer to any of the above questions is yes, it is likely that tenant/s are not experiencing genuine tenancy rights</p>

5. The tenant has control over what happens in their home

What real supported living looks like	What needs to be in place	The Real Tenancy Test Questions
<ul style="list-style-type: none"> • The tenant is not denied or restricted access to any part of their home that they have a right to as stated in the tenancy agreement. • Tenant/s choose how the house is furnished and decorated where permitted in the tenancy agreement. • It looks like the tenant/s home and reflects tenants' personalities, rather than a place of work. • There are agreements in place if support staff need to hold keys. • The landlord does not hold keys and does not visit the property excessively unless necessary (the tenancy agreement should outline this) so that the tenant experiences 'quiet enjoyment' of their home and clearly enjoys their personal space • Tenants answer their own phone, door and open mail (with support if necessary) 	<ul style="list-style-type: none"> • The person's home is called a person's home and not called a 'supported living scheme', therefore, language in contracts, agreements and training and induction should reflect the fact the person's home is not the service. The service is the support provided • There is not an office and unnecessary paperwork and equipment owned by the support provider in the home. • The support provider provides separate office space for staff meetings etc. • Support providers and landlords do not have mail addressed to the tenants home 	<p>9) Are tenants having a restricted access to any part of their home, other than co-tenants private space?</p> <p>10) Is there equipment such as telephone line, office equipment and files owned by the housing or support provider in the tenant's home?</p> <p>11) Do the landlord or support provider staff have free access and hold keys to the tenant's home?</p> <p>If the answer to any of the above questions is yes, it is likely that tenant/s are not experiencing genuine tenancy rights</p>



Part Two – Supporting Information

Why the Real Tenancy Test?

It is estimated that 15% of people with learning disabilities in England rent or own their own homes as compared to 70% of the general population who rent or own their own homes.⁵ Fifteen percent of people with learning disabilities with their own homes is a small number in comparison with the general population, but this number is a significant increase in recent years as a result of the introduction of the Supporting People programme in 2003.

Supporting People encouraged the development of tenancy related housing schemes by introducing new funding to support people in their own homes. This encouraged the development of supported housing, extra care housing and floating support for many groups of people that needed support to live independently including people with learning disabilities and offered a real alternative to residential care.

The picture for people with learning disabilities accessing Supporting People funding generally looks different to other groups. For some people with learning disabilities, Supporting People funding has, as envisaged, meant being able to access floating support to live in their own home as a tenant or owner, or get their own flat in a supported housing or extra care scheme. However, the main response to the opportunity presented by Supporting People by learning disability commissioners and providers was to de-register existing care homes and issue people with tenancies. Whilst this was a valid way to enable people with learning disabilities to live in their own homes, it has resulted in many care providers becoming landlords or having to work with landlords and a new type of housing based service emerging that is neither an ordinary home, supported housing (as we know it), or a care home.

For most people with learning disabilities, getting a place to live is about settling down (for a period of time at least) in a home where you can learn, grow and get on with your life. Most people with learning disabilities are not in crisis seeking temporary accommodation and are simply looking for a place to live for the next phase of their life.

⁵ Department of Health, *Valuing People Now* 2009 <http://valuingpeople.gov.uk/>

Shared supported housing funded by Supporting People for most groups of people (people with mental ill health, homeless, in domestic violence situations etc) is often designed to be a more temporary solution either in periods of crisis or as a halfway solution before moving to a permanent home. This temporary environment does not

The supported housing structure, funding and regulation that is used for temporary housing has been adopted in some housing based schemes for people with learning disabilities that are supposed to be settled and permanent living environments. This means that for some housing based services, people with learning disabilities have an insecure tenancy when they should have a secure tenancy. For other people that do have a secure tenancy, particularly in former care homes, there is often a lack of clarity around tenancy rights and the rights people should enjoy as tenants are not experienced in everyday lives.

The test of a 'real tenancy' is very clear and was established by the House of Lords in 1985. The test is that someone has a tenancy (as opposed to a licence) if they have the following three things;

- 1) Exclusive possession (even of part of a property such as a bedroom) – the right to exclude others, including the landlord from the premises;
- 2) Of an identifiable premises
- 3) For a known period

This House of Lords decision means that you have a tenancy as opposed to a licence, irrespective of what is written (or not written) on the paper agreement you have (or don't have) if you have those 3 things. Someone can be a tenant even if they do not have an agreement or haven't signed their agreement if they have the above 3 things and the landlord is accepting rent.

The Alternative Futures case⁶ established that the existence of a tenancy in itself did not necessarily mean that a tenancy in supported housing and supported living arrangements is genuine and what is just as important as having a genuine tenancy agreement is what the tenant experiences in terms of rights and control in their home.

Given these two judgements, the Real Tenancy Test offers a simple and clear way, regardless of the type of housing and support provided, for people involved in commissioning, providing or receiving housing and support to take a broad overview on whether people's housing rights are being properly respected or whether the arrangements are really a 'sham' tenancy and might be open to challenge.

⁶ Care Quality Commission 2008 www.cqc.org.uk/

Is tenancy type important?

There are several types of rental agreements that give tenants varying degrees of rights and vary depending on the type of housing and landlord. The main types of rental agreements are as follows;

- Starter tenancy - usually in a self contained housing association or council property for the first 12 months before being given an assured or secure tenancy
- Secure tenancy - the most secure and only provided in self contained council rented property
- Assured tenancy - the most secure outside of council provision and usually only provided in self contained housing association property
- Assured shorthold - usually provided in private rental properties and shared housing association properties (such as supported housing)
- Licence agreement - usually given in temporary housing or residential care and gives less protection from eviction

For more detailed information about rental agreements Shelter⁷ has an excellent website.

The type of tenancy you have is important because of the security of tenure it gives. If you have a Secure or Assured tenancy, you have the peace of mind that you cannot be made to leave your home unless you have broken the tenancy agreement and/or proper legal proceedings have taken place and a court has agreed that your landlord should be granted possession of your home.

If you do not have security of tenure, you have less right to remain in your home and can be asked to leave without having breached the tenancy agreement either through expiry of a fixed term or serving a valid notice to quit, and the courts have no or limited discretion on granting possession in such cases.

The type of tenancy people have makes a difference in how they feel about their home. Having security of tenure makes tenants feel more settled and able to get on with life. Having temporary housing or an insecure tenancy increases uncertainty and this makes it difficult to really feel able to settle down and plan for the future.

Tenancies are usually straightforward for people with learning disabilities if living in self contained accommodation such as renting a council or housing association flat, living in an extra care scheme or renting directly from a private landlord. Where tenancies become more complicated is when housing and support is organised together in supported housing

⁷ Shelter, The housing and homeless charity,
http://england.shelter.org.uk/get_advice/renting_and_leasehold/renting_agreements

or supported living services. For the purposes of this paper, the term 'Supported Housing' is used to describe a tenancy based scheme where support is a condition of the tenancy. The term 'Supported Living' is used to describe a housing and support arrangement where the housing is not provided together with support and arrangements are separate, although the full and real definition of supported living is wider and also relates to the control people have over their lives.⁸

Is a secure tenancy always necessary?

In supported housing, some people with a learning disability are given a licence or a less secure tenancy even if the intention is that their home is a long-term arrangement. It may also be that regardless of having an insecure tenure, the reality in terms of how organisations operate is that the person would not be unfairly evicted. Therefore, even if security of tenure does not exist in theory or by law, practice dictates that many people with learning disabilities are in reasonably secure housing arrangements.

There are also however, many examples of organisations that move people on for wider organisational reasons such as financial or service efficiencies/savings. People with learning disabilities are also regularly asked to move from their home because their support package is not working. For these reasons, it is simply not acceptable to fudge the tenancy arrangement on the basis that most providers would do the right thing. People with learning disabilities need the same kind of security in their homes that the majority of the tenant population enjoy.

In some supported housing arrangements, it is necessary to issue less secure tenancies, such as in temporary housing or housing that is for rehabilitation purposes where the type of housing and support provided means that it is expected that people move on regularly and others move in who need a service.

The Tenant Services Authority (TSA)⁹ makes clear that '*Registered providers shall offer and issue the most secure form of tenure compatible with the purpose of the housing and the sustainability of the community.*' So if a person with a learning disability is moving into their own home, sharing or not, and the intention is that they settle in and live in it as a permanent home, there are no circumstances where it is acceptable to issue a tenancy that is not secure.

⁸ Wood and Greig. *Supported Living: Making the Move* NDTi 2010

⁹ Tenant Services Authority, 2010
<http://www.tenantservicesauthority.org/server/show/ConWebDoc.20175>

Issuing a tenancy with more security or a licence with less security is dependent on the type of housing. There are some housing situations that require a licence but with most supported housing options, a secure tenancy should be issued.

In shared housing and support services that provide domiciliary care and are registered with the CQC, it is particularly important that tenants have their rights as tenants fully met because of the risk otherwise that CQC will consider that it should be registered as a care home. This does not simply mean that tenants are issued with secure tenancies but that the housing and support service must operate in a way that reflects those rights and ensures that tenants have full control of their home.¹⁰ As stated in the CQC assessment criteria this includes totally separate arrangements for housing and support that are not reliant on each other to run a service.

The following is a summary of the types of housing and support services and whether a tenancy or licence should be issued;

- In all self contained housing options, including extra care and properties rented from a council, housing association or private landlord a tenancy should be given with the type dependent on the landlord
- In registered care homes, a licence is necessary
- A licence is also necessary when living in the same home as your landlord and this includes Shared Lives (formerly adult placement) schemes.
- Supported housing and other shared supported living options that are offering a permanent home should offer an assured shorthold tenancy and each person living in the home should be given a separate tenancy agreement
- A temporary housing and support service can issue a tenancy or a licence depending on the nature of the service.

Supported Living or Supported Housing? A person's home or a service?

There are three main types of landlords that provide housing;

- Registered Providers (RP's) are mainly housing association and council housing providers who will be subject to regulation by the Tenant Services Authority from April 2010 (though profit making landlords can now register).

¹⁰ Housing Options, 2009

http://www.housingoptions.org.uk/general_information/gi_latest_news.html

- Some very small housing associations and housing providers are not registered as a social landlord but operate as a charity or not for profit organisation. Some of these organisations also provide support.
- Private landlords are sometimes individuals or companies that rent out housing to make a profit.

When a person rents their own self-contained home through any type of landlord, even if they have support needs, tenancy rights are usually straightforward and clear in that the person has definite control over their home. It is usually when housing is shared that tenancy rights become less clear to housing and support providers as well as the tenants themselves.

In some of these services there is a fine line between what constitutes housing with support and what constitutes a registered care home. The residential care model is legally defined in the Care Standards Act 2000¹¹ as an establishment that provides accommodation and personal care which is defined as assistance with bodily functions such as feeding, bathing, toileting when required.

The Care Quality Commission (CQC) has issued guidance to its inspectors to determine whether a home is in fact a supported living model or whether it should be registered as a care home. To be considered supported living according to the CQC, the following criteria should be met;

- *the separate providers of accommodation and care do not need to co-ordinate their work and are not accountable to each other,*
- *people who use the service have real choice, e.g. they can change their care provider without jeopardising their accommodation rights,*
- *people using the service have exclusive occupation and can deny entry to others, even carers,*
- *the tenancy can be assigned to someone else,*
- *occupants can remain even if they no longer need a care service,*
- *there are separate contracts for the care and the accommodation*

¹¹ Office of Public Sector Information, *Care Standards Act 2000*
http://www.opsi.gov.uk/acts/acts2000/ukpga_20000014_en_1

The concept of Supported Living was first brought to the UK by the NDTi in the early 1990's and nowadays has a set of principles that are defined in the Reach Standards in Supported Living¹²:

- I choose who I live with
- I choose where I live
- I have my own home
- I choose how I am supported
- I choose who supports me
- I get good support
- I choose my friends and relationships
- I choose how to be healthy and safe
- I choose how to take part in my community
- I have the same rights and responsibilities as other citizens
- I get help to make changes in my life

The Reach Standards in supported living broadly align with the CQC guidance and are based on people with learning disabilities having their own homes and having control over who they live with, who supports them and how they are supported. An example is that a person supported to live in their own home would not expect a housing or support provider to have an office in their home or to have mail other than their own delivered to their home, yet this is common practice in many peoples' homes regardless of tenancy type.

What we see in many services that have emerged in recent years that are called supported living or supported housing is that regardless of whether people have a tenancy or licence, they may not experience the rights, choice and control that the general tenant population experience.¹³

What generally exists is a mix of services and landlords that are not clear about what they are providing. Some say they are offering a permanent home yet do not offer security of tenure. Some offer security of tenure yet not a real home where tenants enjoy rights and control. We need to be much clearer about what is being offered and what people get. A person's home should not be a service owned by a provider and a temporary service

¹² Paradigm, *Reach Standards in Supported Living* 2003 www.paradigm-uk.org

¹³ Joseph Rowntree Foundation, 2007 www.jrf.org.uk/

should not be considered a person's home. The reality of the arrangement is of course more important than what it's called but clearer definitions of the various housing and support services would be helpful to housing and support providers as well as tenants.

Mental capacity and tenancy

Mental capacity and tenancy is a grey area and there is legislation that works for and against people with learning disabilities that lack capacity. Many people with learning disabilities who are deemed to lack capacity have been denied a tenancy on this basis. The law unhelpfully states that if the landlord knows that the tenant lacks capacity, then the agreement is voidable by the tenant. The law also says that people who are deemed to lack capacity should also be able to contract for necessities and that includes housing.

The Mental Capacity Act¹⁴ gives a helpful framework for working through some of the issues around a person with a learning disability entering into a tenancy arrangement;

- We must always start with the assumption of capacity. Most people understand the basics of a tenancy agreement which come down to having to pay money and look after your home in return for being able to live there in peace and enjoyment. There is no need to have an in depth understanding of tenancy law to have a tenancy as indeed is the case for most of the population.
- Any decision must be taken in the person's best interest. It is not acceptable to simply state that because a person does not understand the basics of a tenancy that they should not have one. It would be difficult to argue that a person with a learning disability should have to accept a housing arrangement such as residential care just because they lack mental capacity, when in residential care the person would not enjoy the rights and benefits of having their own home.

The Mental Capacity Act also has statutory guidance for people who lack capacity to enter into a contract for goods and services. There is no clarification to date on whether housing comes under goods and services. Many landlords however, accept that in practice there is little risk in issuing a secure tenancy to a person who lacks capacity and do so more and more. The law does however need clarification as this leaves landlords in an unclear position and people with learning disabilities at risk of being denied a tenancy. Housing Options¹⁵ offers a useful factsheet on Mental Capacity and tenancy.

¹⁴ The Public Guardian, *The Mental Capacity Act 2005*
<http://www.publicguardian.gov.uk/mca/mca.htm>

¹⁵ Housing Options http://www.housingoptions.org.uk/general_information/gi_factsheets/fs_22.pdf

Deprivation of Liberty Safeguards in tenancy based housing

The Deprivation of Liberty Safeguards (DOLS) has been introduced into the Mental Capacity Act 2005 by the Mental Health Act 2007.¹⁶ The safeguards provide a framework for approving deprivation of liberty (DOL)¹⁷ for people who lack the capacity to consent to treatment or care in either a hospital or care home registered under the Care Standards Act 2000.¹⁸ The guidance states that *the safeguards do not apply to people living at home. It will only be lawful to deprive somebody of their liberty elsewhere (for example, in their own home, in supported living arrangements other than in a care home, or in a day centre) when following an order of the Court of Protection on a personal welfare matter. In such a case, the Court of Protection order itself provides a legal basis for the deprivation of liberty.*

What constitutes a deprivation of liberty is not straightforward and depends on individual circumstances. A common example in supported living that indicates there is a deprivation of liberty would be homes with locked doors specifically to prevent people leaving and/or high staffing ratios relying on staff to prevent the person leaving. Situations where people do not have door keys may also indicate a deprivation of liberty but if a tenant does not have a door key because they are unable to use one, good person centred planning and approaches can determine how best the person would manage getting in and out of their home and who can hold keys on their behalf. An Order under s16 Mental Capacity Act 2005 is required to deprive a person of their liberty in supported living settings. For more information go to the Public Guardian website.¹⁹

Supporting people with learning disabilities and staff to understand tenancy rights

Whilst tenancy type is important, what is just as important is how it works in practice and how people with learning disabilities are able to exercise real control of their homes and lives.

¹⁶ Office of Public Sector Information, *The Mental Health Act 2007*
http://www.opsi.gov.uk/acts/acts2007/ukpga_20070012_en_1

¹⁷The Public Guardian, *Deprivation of Liberty Safeguards* www.publicguardian.gov.uk/docs/draft-dols-code.pdf

¹⁸ Office of Public Sector Information, *Care Standards Act 2000*
http://www.opsi.gov.uk/acts/acts2000/ukpga_20000014_en_1

¹⁹ The Public Guardian <http://www.publicguardian.gov.uk/docs/draft-dols-code.pdf>

Making sure that the tenancy agreement itself is easily understood by tenants, families and staff is a good starting point. There are many examples of how a tenancy agreement can be made easily understood using plain English, symbols, photographs and pictures.

What is also important is helping tenants, families and staff understand what their rights as tenants are in practice. People with a learning disability, families and professionals are used to operating within a service culture where professionals have control of the service and our support systems often do not operate in a way that gives people real control over their home. This manifests in practices that mirror those in a registered care home where the home is actually in the control of the support provider even though it is a tenancy. The Housing and Social Inclusion Project will be pulling together examples of good practice in relation to this at a later stage of its work.

Frequently asked questions about genuine supported living

Tenants currently living in a shared house have been living together for many years. They were never originally given a choice about who they lived with, but they say they want to live together now. Does this mean it is not a real tenancy?

Most people do not know the type of person they do and don't like living with until they have tried and it is normal to live in several situations before deciding on what you want. Many people with learning disabilities have never had the chance to change who they live with and if they have lived in services for some time, they may not even have awareness that it is possible to choose who you live with. It is important to listen to what tenants say but also ask the right questions to find out if they are really happy living with housemates and not just saying what they think is the 'answer others want to hear'. Observing how housemates respond to each other is also an important way of finding out if they are really choosing to live together.

It is not acceptable for people with learning disabilities to be made to live with others who impact negatively on their lives through physical, sexual and verbal abuse as well as noise and other 'low level' forms of annoyance because it suits the provider and commissioner for people to stay living together, but if tenants show that they genuinely want to live with someone, even if the original choice was not made to do so, it is still a genuine choice.

When given a choice, a tenant wants to live with (for example) a family member but the family member does not want to live with the tenant. Does this mean the tenant is not being given a choice of where they live?

Real choice does not necessarily mean unrestricted choices. Very few people are able to live exactly where and how they want in life. If the person needs to make compromises

about their choice based on money or housing availability, which is still a choice as long as they (or their family/representative) are in control of making those compromises.

However, sometimes we tell people that what they want is not a realistic choice based on our own lack of knowledge or unwillingness to explore possibilities or take risks, and this is equal to not enabling real choice and control.

If a real tenancy is based on the choice and control of the tenant, does this mean that people who do not use words to communicate cannot have a real tenancy?

People who do not use words still make choices by showing preferences, likes and dislikes and these choices are just as valid as those made with words. A choice of support provider may not be an active verbal choice but may be indicated by the person showing they like a member of staff, clearly enjoying life and those that know them well and care about them witnessing this. The Mental Capacity Act²⁰ is a legal framework that supports choice and decision-making and can be used to determine the choice and control a person has as a tenant if this is being challenged.

If the tenant does not understand the tenancy agreement, does this mean it is not a real tenancy?

For most people with learning disabilities, understanding the basics of the tenancy agreement (e.g. the tenant pays rent in return for specific accommodation and must look after the property) is sufficient to make it a legally binding agreement. This can be helped by providing simple tenancy agreements and using diagrams and pictures to explain.

For those people who do lack mental capacity to understand the basics of a tenancy agreement, this should not be a barrier to enabling a person in this situation to have their own home. The law is not clear in this area however, most landlords accept that there is little risk in practice by granting a tenancy to someone who lacks mental capacity and do so regularly. As a last resort, the Public Trust Office²¹ can appoint a receiver to handle the tenancy agreement.

What will happen if tenants who are sharing want different organisations to support them?

Most people getting support care most about the people directly supporting them, rather than the organisation itself and if support providers are able to be flexible and person centred, it is likely that the tenant/s will want continued support from them.

²⁰ The Public Guardian, *The Mental Capacity Act 2005*
<http://www.publicguardian.gov.uk/mca/mca.htm>

²¹ The Public Guardian <http://www.publicguardian.gov.uk/docs/draft-dols-code.pdf>

If it is necessary, split support provision is possible to achieve but will require providers to work together to ensure that both rights of individual tenants are respected and they provide agreed support to individuals.

A vacancy in a shared housing scheme needs to be filled to make the support financially viable. The tenants are very particular about the type of person they want to move in and are rejecting possible co-tenants. How much say should the existing tenants have?

Firstly, it should be absolutely clear in the tenancy agreement what the process is for getting a new tenant and how much say existing tenants have. Good practice for example might look like the following process;

- Tenants individually describe their ideal tenant and the qualities that would be unacceptable as a tenant (e.g. a smoker or someone who does not like pets may be completely unacceptable)
- Tenants jointly agree on what is desirable and what is essential for a housemate and draw up a simple criteria
- An agreed amount of time is used to find the right tenant
- If the right tenant is not found within agreed timeframe tenants can opt on a compromise on their ideal tenant and continue to search for an agreed amount of time
- If no suitable tenant can be found in an agreed amount of time, the tenants have a choice to either renegotiate the finances of their housing and support arrangement so that it is financially viable, accept a tenant that the landlord finds or give notice to quit and seek alternative housing.

Appendix I - Real Tenancy Test Worksheets

This Appendix is for you to take copies of and use to make notes on as you work through the Real Tenancy Test with individual services.

The Real Tenancy Test Questions	Notes / Comments	Possible Action
1) Has a tenant been moved from their home because of a decision by the support provider or commissioner?		

<p>2) Has anybody been placed in the home without consultation with existing tenants because the support provider or commissioner needs to fill a vacancy?</p>		
<p>3) Did the tenant have no other choices when moving in to their home?</p>		

<p>4) Is there a tenant who wants to move on but is not getting support to do so?</p>		
<p>5) Has a tenant moved into the house without consultation with tenants?</p>		

<p>6) Is there a tenant that is clearly unhappy living with another tenant?</p>		
<p>7) Is a tenant expected to move if their support needs to change?</p>		

<p>8) Is support provided at times prescribed by the support provider rather than the tenant?</p>		
<p>9) Are tenants having a restricted access to any part of their home, other than co-tenants private space?</p>		

<p>10) Is there equipment such as telephone line, office equipment and files owned by the housing or support provider in the tenant's home?</p>		
<p>11) Do the landlord or support provider staff have free access and hold keys to the tenant's home?</p>		