ANNEXE C – LEGAL ANNEXE

The law relating to the lettings market is complex and there is a lot of it. It comprises both housing law, which is generally outside OFT’s remit, and law which provides economic and general fairness protection that is, ‘consumer protection law’. In addition where an agent is involved it is important to bear in mind the law of Agency.

This annexe provides a brief overview of legislation, rules and guidance that may apply in the context of the lettings market. It also includes links to legislation and any guidance on the law, where this exists. We would encourage tenants, landlords and agents to make use of these links to existing documents.

Two documents that landlords and tenants might find particularly helpful are the guides published by the Department for Communities and Local Government on housing law.

1) Assured and Assured Shorthold Tenancies – A guide for tenants

2) Assured and Assured Shorthold Tenancies – A guide for landlords

Whilst DCLG makes it clear that these documents do not provide an authoritative interpretation of the law or cover every scenario, they do explain the most important features of tenants’ and landlords’ rights and responsibilities in England and Wales.

Both documents include important information on things identified in the OFT intelligence Report such as landlords’ duties in relation to the property (including repairs), security deposits, access to the property and ending a tenancy. Please note that the documents were published in 2007, so they do not reflect any changes in law made since then.

Strictly speaking the Business Protection from Misleading Marketing Regulations 2008 (BPRs) for the most part provide protection for businesses who are misled by another business (they deal with comparative advertising to consumers as well as businesses, but not advertising generally). However for ease of reference we include this law in the definition of ‘consumer protection law’.

For example, the documents state security deposits have to be registered within 14 days, but it is now 30 days.
The ‘tenant’ guide provides information on:

- introduction to assured and shorthold tenancies
- differences between an assured and a shorthold tenancy
- how a tenancy is agreed
- landlord and tenant responsibilities and rights
- what happens when a tenancy ends?
- when can I be asked to leave the property?
- rent increases and varying the terms of a tenancy
- succession rights, joint tenancies, subletting
- housing benefit
- harassment and illegal eviction.

The landlord guide provides information on:

- introduction to assured and shorthold tenancies
- the differences between an assured and a shorthold tenancy
- how to set up a tenancy
- landlord and tenant responsibilities and rights
- what to do when a tenancy ends
- how to end a tenancy
- increasing the rent and varying the terms of a tenancy
- succession rights, joint tenancies, subletting
- housing benefit
- tax on rental income.

The documents are accessible on the gov.uk website:


The legal framework applying to the lettings market

In conducting our review of the lettings market, we have identified that tenants, landlords and agents may at times be unclear on how their relationships with each other are governed. The main areas we want to highlight here for people to be aware of are the laws of contract and agency.
The terms of the managing or letting contract

The legal relationship between the agent and the landlord is governed principally by the written contract agreed between them. Under the contract the agent will generally agree to perform a service, and the landlord will agree to pay for it. There will usually be a written contract, which both parties will sign, however additional documents (such as marketing/promotional material etc.) and oral statements made by the agent could form part of the contract and contain terms intended to be binding, even if they are not presented as such.

The legal relationship between the landlord and the tenant is governed principally by the tenancy agreement (which may also be referred to as a lease), which will set out the details of the property, the period of the lease and the amount of the rent to be paid. It is likely also to include duties that the tenant and the landlord agree to (such as how the tenant must treat the property, when either party can end the lease and so on). These are known as the terms of the tenancy agreement. We have published *Guidance on unfair terms in tenancy agreements*, which we would encourage tenants, landlords and agents to be familiar with. There may in some circumstances be separate agreements that are entered into between them, for example for specific provision of services.

In general we would not expect there to be any contractual relationship between the letting agent and the tenant, since generally the agent acts on behalf of the landlord and as the landlord’s representative. This means that in the context of marketing a property, the agent does not generally provide service to the tenant, and any money the agent receives from the tenant is on behalf of the landlord. However in some circumstances a letting agent and a tenant may enter into a contract, for example where the agent agrees to provide specific services to the tenant, such as finding a property that is not already being marketed by the agent, or introducing the tenant to a third party service provider. In such a situation we would expect both parties to be clear that they were entering into legally binding obligations.

Duties of an agent

A letting agent is generally the agent for the landlord, who is known as their principal. An agent owes several important duties to their principal:

- Duty to comply with lawful instructions. Such instructions are likely to be set out in the contract, but may be supplemented by separate correspondence or oral statements. There is no duty to obey if the instruction is to do something that is unlawful (either for the landlord or the agent).

- Duty of care and skill. This duty is similar to that implied by the Supply of Goods and Services Act 1982. It also requires the agent not to act negligently.

- Duty of loyalty. The agent’s responsibility is to represent the interests of their principal, and not to allow any other interest (their own, or someone else’s) to conflict with this. If a potential conflict of interest arises, the agent must make full and frank disclosure of this to their principal. This duty also restrains agents from making ‘secret profits’ – namely a financial advantage received by the agent, over and above the commission agreed with the principal that is not disclosed to the principal.

- Duty not to sub-contract. Agents who sub-contract remain responsible for the work that is done, unless the principal authorises the delegation.

It is possible for agents and principals to agree to contract out of these duties. However care needs to be taken that such exclusions are not unreasonable under the Unfair Contract Terms Act 1977, and where the landlord is a consumer, that the exclusion is not unfair contrary to the UTCCRs.

Landlords’ duties in relation to the property

We think there is often confusion amongst tenants and landlords about who is responsible for carrying out any repairs or improvements while a property is let out. There are a few areas that we think it is important to
highlight for tenants and landlords to take note of. Many of these points are covered in more detail in the DCLG guides we refer to above.

The condition and use of the property

The law does not require a property that is let to a tenant to be of ‘satisfactory quality’. In other words, broadly speaking, the property is taken ‘as seen’. This means:

- Even where a landlord has a written obligation under a tenancy agreement to repair and maintain the property or to keep it in good condition it does not impose an obligation to put it in a safe condition at the start.

- A landlord who lets a defective, dangerous or unsafe property on which he has done no work cannot be sued by the tenant for negligence. However, if the landlord designed or built the property he will owe legal duties as to its defects.

The landlord does not generally have any duty to carry out works on the property, unless there are duties set out in statute. We give more detail of these below.

At common law there is no implied warranty that the premises will be available for any purpose that the tenant may have in view. Therefore there is no implied warranty on the part of a landlord or agent that the premises may be legally used for any specific purposes even though let for such use.

Fitness for human habitation

Apart from what is specifically set out in the lease, or stated in pre-contract negotiations or literature, the only relevant legal duty as to the state of the property is that at the start of a tenancy for furnished premises under common law there is an implied condition in the tenancy agreement that the premises are ‘fit for human habitation.’ It is a minimum standard that applies only at the start of a tenancy for residential furnished premises.
In determining (for the purposes of the implied condition in furnished premises) whether a house is **unfit for human habitation**, factors the Courts will take into account are:

- repair
- stability
- freedom from damp
- internal arrangement
- natural lighting
- ventilation
- water supply
- drainage and sanitary conveniences, and
- facilities for preparation and cooking of food and for the disposal of waste water.

If the tenant is in any doubt as to whether the property is fit for human habitation, it may be appropriate to ask the landlord to give a ‘warranty’ to that effect before the tenancy agreement is signed (for example that the drains are in order).

A subsequent breach of that warranty then gives the tenant a potential claim for damages and also may entitle him to give up the tenancy within a reasonable time. Such a warranty through a statement is in addition to the terms of the tenancy and it does not matter that it is not contained in the written terms of the tenancy or was made orally.

**Repair duties set out in Statute**

Broadly speaking, legislation requires landlords to maintain, from the moment a tenancy begins:

- gas appliances under the Gas Safety (Installation and Use) Regulations 1998
- electrical appliances under the Electrical Equipment (Safety) Regulations 1994
- the fire safety of fixtures and furnishings that go with the tenancy following the Furniture and Furnishings (Fire) (Safety) Regulations
the structure and exterior of the property, under the Landlord and Tenant Act 1985.

We set out more detail on these duties below.

Nuisance

In some cases, the landlord could be responsible for a ‘Nuisance,’ based on interference with the use and enjoyment of land – for example, noises, smells or pest infestations. If premises are not kept in good repair, and this causes a nuisance, the landlord may be held liable. This is a fact sensitive matter, so if in doubt specialist advice should be sought.

Quiet enjoyment and access by the landlord or agent

Every lease contains either an express or an implied term for what is known as ‘quiet enjoyment’, which means that the tenant can use the property in a lawful way without interference.

Quiet enjoyment usually applies to stop the landlord from going into the property without permission unless in an emergency, but it could also require the landlord to take positive steps to deal with problems interfering with the tenant’s enjoyment of the property.

The general right to quiet enjoyment is reinforced by the Housing Act 1988 which creates an offence where the landlord or any person acting on his behalf (including an agent):

- unlawfully deprives the residential occupier of any premises of his occupation of the whole or part of the premises or

- attempts unlawfully to deprive the residential occupier of any premises of his occupation of the whole or part of the premises.
Protection from eviction

If the landlord wishes to regain possession of the property at any time, there are laws which set out how this must be done—in particular where the tenant does not wish to leave. The Protection from Eviction Act 1977 requires landlords in these circumstances to obtain a court order.

The Housing Act 1988 lays down special rules about grounds for possession and the notices that need to be given in order to get a court order.

Notice to quit

During the fixed period of a tenancy, the landlord may not generally ask the tenant to leave, unless there is a ground for possession (such as non-payment of rent).

Where the period of a tenancy comes to an end, the tenant is allowed to continue living in the property, paying rent, under what is known as a ‘periodic tenancy’.

If the landlord wants to ask the tenant to leave during a periodic tenancy, he needs to give a notice in writing that contains the information required in the Housing Act 1988, and gives the tenant at least four weeks before possession is required. This ‘notice only’ method of regaining possession is not available where the landlord has not properly protected the tenant’s security deposit.

Where a tenant wishes to leave the property during a periodic tenancy, he must also give a written notice, which gives at least 28 days’ notice and must expire on the first or last day of a period of the tenancy (that is, the rent period). The landlord may, however, agree to waive those requirements.

The insolvency of the tenant, landlord or agent

Where a tenant is insolvent there are often a number of potential breaches of the tenancy together with unpaid rent which would entitle the landlord to end the tenancy (this is known as forfeiture). Notwithstanding any other breaches (for example arrears of rent) the
landlord is also usually able to forfeit on the ground that the tenant has become insolvent. To forfeit the tenancy is such circumstances the landlord or agent must comply with the Law of Property Act 1925.

Where the landlord becomes insolvent and the tenancy is still continuing the tenant can often achieve full or partial reimbursement against the insolvent landlord (in liquidation or administration) by withholding rents and service charges however, tenants should seek legal advice before taking such steps.

As regards agents, where the directors of the company know or ought to conclude that there is no reasonable prospect that the company would avoid going into insolvent liquidation then there is a duty to:

- cease the trading of the business or
- take appropriate steps such as placing the company into administration or liquidation or
- proceed only with the consent of the company’s creditors (using a formal method such as a voluntary arrangement).

A director of a lettings agent company can be made personally liable for any additional debts that the company incurred after the date he ought to have concluded that there was no reasonable prospect that the company could avoid insolvent liquidation.

**SELECTED AND OTHER LEGISLATION AND RELATED GUIDANCE**

**Accommodation Agencies Act 1953**

This Act does not apply to Northern Ireland.

This Act prohibits an agent from advertising a property to be let without the authority of the owner of the house.

In addition the Act further prohibits certain specific practices of an agent namely:
i) demanding or accepting monies from members of the public in respect of supplying them with a list of properties available to rent and
ii) demanding or accepting monies in respect of registering the name of any person seeking the tenancy of a house.


Business Protection from Misleading Marketing Regulations 2008 (BPRs)

These Regulations prohibit businesses from advertising in a way that misleads traders, and set out the conditions under which comparative advertising is permitted.

www.legislation.gov.uk/uksi/2008/1276/introduction/made

Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008

These Regulations give cancellation rights in respect of a contract for goods or services made during a visit (solicited and unsolicited) by a trader to a consumer’s home or place of work. Traders must give a consumer a ‘Notice of Right to Cancel’ thereby providing the consumer with a seven day cooling off period to cancel the contract without incurring a penalty.

www.legislation.gov.uk/uksi/2008/1816/contents/made

Companies Act 2006

This Act requires businesses to:

i) display a sign with its name and specified other information at specified locations
ii) to include its name and specified other information in specified documents and communications and
iii) to provide its name and specified other information to those who request it in the course of business.
Consumer Protection (Distance Selling) Regulations 2000

These Regulations protect consumers when they enter into contracts with the supplier at a distance and without the face to face contact. The Regulations give consumers a right to:

i) receive clear information about the supplier, the goods or services and the sale before deciding to buy
ii) receive this information in writing
iii) a cancellation period of seven working days and
iv) protection from payment card fraud.

The Consumer Protection from Unfair Trading Regulations 2008

These Regulations prohibit businesses from engaging in ‘unfair commercial practices’ when they are dealing with consumers. Businesses must not give misleading information to consumers, for example false or deceptive advertisements or statements, where this causes or is likely to cause the average consumer to take a different transactional decision. In addition businesses must not mislead consumers by failing to give them the information they need in order to make an informed decision, called material information, where this causes or is likely to cause the average consumer to take a different transactional decision.

Supply of Goods and Services Act 1982

This Act requires agents and landlords, when providing services, in the course of a business, to carry them out with reasonable care and skill.
The Unfair Terms in Consumer Contracts Regulations 1999

These Regulations protect consumers against unfair terms (often terms that reduce their statutory or common law rights or that seek to impose unfair burdens on the consumer over and above the obligations of ordinary rules of law) in contracts they make with traders.

www.legislation.gov.uk/uksi/1999/2083/contents/made

HOUSING LAW

Housing is a devolved issue and there is different legislation in each of the devolved administrations.

The Defective Premises Act 1972

This Act only covers England and Wales and imposes obligations upon the landlord to the tenant in relation to the maintenance or repair of the premises, where the landlord has a duty or a right to carry out repairs.


Furniture and Furnishings (Fire) (Safety) Regulations 1988

These Regulations impose requirements upon landlords in relation to domestic furniture and the fire resistance requirements. They must check on the fire safety of fixtures and furnishings that go with the tenancy. These duties apply from the moment the tenancy begins.


The Gas Safety (Installation and Use) Regulations 1998

These Regulations impose obligations upon landlords in certain tenancies to ensure the safe installation, maintenance and use of gas systems, including gas fittings, appliances and flues mainly in domestic and commercial premises.
Landlords are responsible for the safety of some services within the property. They must inspect and maintain gas appliances under the above Act and electrical appliances under the Electrical Equipment (Safety) Regulations 1994.


The Housing Act 1988

This Act creates Assured and Assured Shorthold Tenancies, and lays down the rules for creating and ending such tenancies. It covers England, Wales and Scotland.

The general right to quiet enjoyment is reinforced by this Act which creates an offence where the landlord or any person acting on his behalf (including an agent) unlawfully deprives (or attempts to deprive) the residential occupier of any premises of his occupation of the whole or part of the premises.


The Housing Act 2004

This Act only applies to England and Wales.

Chapter 4 of the Housing Act 2004 introduced a compulsory scheme under which private landlords granting assured shorthold tenancies must safeguard security deposits paid.

There is no obligation for the landlord or agent to require a security deposit but, where one is taken, they must register it with an authorised protection scheme.

There are two types of authorised scheme:

- custodial schemes whereby the landlord pays the deposit into a deposit protection scheme. There is presently one such scheme - the Deposit Protection Scheme

- insurance based schemes: the landlord or agent keeps the deposit but pays a premium for an insurance policy against which the tenant can
claim if the deposit is not properly returned. There are currently two such schemes: Tenancy Deposit Solutions Ltd and The Tenancy Deposit Scheme.

Within 30 days of receiving the deposit the landlord or agent must give certain prescribed information to the tenant and to any relevant person (that is, the person who actually paid the deposit). The prescribed information is:

- contact details of the scheme administrator where the deposit is held
- information provided by the scheme administrator to the landlord explaining the requirements of the HA 2004 in relation to deposits
- the procedures for recovering the deposit at the end of the tenancy, including the procedures applying if either the landlord or tenant cannot be contacted
- the procedures applying where there are disputes about the amount to be returned and the facilities available for resolving disputes
- information about the tenancy and the deposit: the amount paid, the address of the property and the contact details of the landlord and the tenant which will be used by the administrator of the scheme at the end of the tenancy
- the circumstances in which all or part of the deposit may be retained by the landlord
- confirmation by the landlord that the information given is accurate to the best of his or her knowledge or belief and that he or she has given the tenant the opportunity to sign to confirm that the information is accurate to the best of the tenant’s knowledge and belief.

Where a deposit has been paid and any of the above requirements have not been met, or the scheme administrator has not confirmed that the deposit is being held in accordance with the scheme, an application may be made to the county court.
This Act also introduced the requirement for landlords with houses in multiple occupancy (HMOs), mainly blocks of flats, to be licensed under the Management of Houses in Multiple Occupation (England) Regulations 2006. The Regulation requires that the HMO manager keeps a property in good repair, a statutory version of what many local authorities already provide as guidelines.

HMO requirements include fire precautions, adequate water supply, drainage, waste disposal, maintenance of commons fixtures and appliances. Where landlords cannot be licensed because of bad character etc, local authorities can issue a 12-month temporary management order (TMO) on a property.

In essence the local authority assumes management of the property, namely that it, collects rents, enforces tenancy conditions, and becomes responsible for repairs and for new lettings. A final management order (FMO), which lasts for a maximum of five years, could, in addition, be issued. Landlords cannot evict tenants to avoid their property being subject to multiple occupancy licensing provisions, under the Act. The Act also provides for other selective licensing with attached conditions.

www.legislation.gov.uk/ukpga/2004/34/contents

The Housing (Amendment) Act (Northern Ireland) 2011
The purpose of the Act is to enable better regulation of the private rented sector, provide new tools to tackle fuel poverty, clarify existing law in respect of homelessness and promote effective housing management in the social rented sector.

www.legislation.gov.uk/nia/2011/22/contents

The Landlord and Tenant Act 1985
This Act sets out the rights and responsibilities of both landlord and tenant in England & Wales. Section 11 of the Act sets out who is responsible for repairing a property whilst it is being rented. It generally applies to short tenancies of less than seven years.

Whilst landlords do not normally have obligations to maintain the state of the interior of a property to a particular standard (apart from the specific
duties in relation to appliances etc. above), this Act gives them a duty to

- repair and maintain the structure and exterior of a property and
- keep the installations in the property ‘in repair and proper working order’.

If there is a defective installation in the dwelling when the tenancy commences the landlord must put it in a state of repair and proper working order. It is no defence if an installation is not in working order because of a design defect.

Landlords cannot avoid the LTA 1985 by providing in the tenancy agreement that the repairing obligations fall on the tenant or by seeking to exclude its application. Any attempt to contract out of the LTA 1985 is void.

The ‘structure and exterior’ does not mean the entire dwelling house or the entire constructed building but consists of those elements of the overall dwelling house which give it its essential appearance, stability and shape. It includes:

- drains, gutters and external pipes
- the outside parts of the dwelling
- the external walls
- partition walls between the dwelling and another house or flat
- partition walls within the flat
- the roof (including skylights)
- external joinery
- external doors
- windows including glass, sashes and necessary window furniture
- paths and steps that are part of the immediate access to the dwelling.

The following are not part of the structure and exterior:

- internal doors
- internal glazing
- internal joinery such as skirting boards and architraves
- floor coverings
- internal plaster.
Installations include:

- basins, sinks, baths and toilets
- radiators
- gas fires
- fitted electric fires or heaters (including large storage heaters) but not moveable plug-in electric fires or heaters
- boilers within the premises
- water tanks within the premises
- water and gas pipes and electrical wiring
- under-floor heating vents.

‘Installations’ does not include fixtures and fittings for sanitation apart from basins, sinks, baths and toilets. This means that installations such as showers or bidets will not be the landlord’s obligation unless specified in the tenancy agreement.

However, if there is no installation there is no obligation on the landlord to provide one.

The landlord and the landlord’s agent are also given a statutory right to enter the premises for the purpose of viewing the condition and state of repair on giving the tenant 24 hours’ notice in writing (section 11(6) of the LTA 1985).

www.legislation.gov.uk/ukpga/1985/70

Occupiers Liability Act 1957

This Act only covers England & Wales.

This Act confers upon the landlord a common duty of care to all visitors to the property except to the extent that he lawfully restricts liability. The duty of care is to take such care as is reasonable in all the circumstances to ensure that a visitor will be reasonably safe when on the premises for the purpose for which he or she was invited.

The OLA prohibits any attempt by a landlord or agent to exclude or restrict the landlord’s obligations to visitors in the terms of the tenancy agreement.
Where the tenancy sets out a right to enter the property for repairs or maintenance on the landlord or agent then the landlord or agent has a positive duty to ensure that their failure to carry out that repair or maintenance does not cause personal injury or property damage.

[www.legislation.gov.uk/ukpga/Eliz2/5-6/31/contents](www.legislation.gov.uk/ukpga/Eliz2/5-6/31/contents)

**Private Rented Housing (Scotland) Act 2011**
This Act aims to improve standards of service for consumers in private rented housing and enable continued sustainable growth in the sector. It includes measures to: strengthen the regulation of the private rented sector, improve the working of the private sector tenancy regime; address more effectively the problems caused by rogue landlords; and deal with the worst effects of overcrowding.

**Protection from Eviction Act 1977**

This Act only applies to England & Wales.

Section 3 of the Act prevents an owner of a residential premise from recovering possession against certain occupiers of residential premises after the end of the tenancy or licence without a court order.