



REPRESENT ● INFORM ● SUPPORT

# The Real Tenancy Test

Tenancy rights in supported living in Wales  
A Self Assessment Tool



March 2013

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# STATEMENT OF PRINCIPLE

We believe people with a learning disability, and others who reside as tenants in supported living settings, should be able to exercise the same rights and responsibilities, and enjoy similar levels of choice and control over their home environment as any other tenant regardless of their need for care and support services.



## Introduction

In September 2010 the National Development Team for inclusion (NDTi) in England published [The Real Tenancy Test](#) as part of a Department of Health subsidised project addressing issues of choice, control and community inclusion for people with learning disabilities living in supported living settings.

In 2012, Cymorth Cymru commissioned an adaptation of this document designed to contextualise it for providers, commissioners and other interested parties working within a specifically Welsh environment. The document which follows is the outcome of this work. **We strongly recommend that users read and consider the whole document before starting to use it.**

**The generosity of the NDTi in giving ready permission for this adaptation of their work is gratefully acknowledged.**

Since the introduction of the Supporting People Programme in 2003 it has become increasingly common for people with learning disabilities to live in supported living settings (supported housing plus social and/or personal care) rather than residential care. Much of this change however has focussed on achieving wider access to welfare benefits and the practicalities of simply having a tenancy. Many working in this sector now question whether the potential of supported living to offer real tenancy rights and responsibilities, and to enhance choice, control and community inclusion has been as well developed as it might have been.

Whilst recognising that considerable progress has been made, there is a growing awareness that more needs to be done to ensure that all tenants with learning disabilities are able to enjoy the full rights, responsibilities, choice and control in their homes as do any other tenants. Work in this direction is ongoing amongst a number of agencies and organisations including the Welsh Government<sup>1</sup>, local authorities, housing associations and support/care providers, as well as tenants and service user representative groups. The Wales Alliance for Citizen Directed Support (WACDS)<sup>2</sup> is a multi-agency group with a particular focus on the development of real choice and control amongst both people who access services and the communities in which they live.

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<sup>1</sup> [Welsh Government Independent Living Project](#)

<sup>2</sup> [Wales Alliance for Citizen Directed Support](#)

## Part One - The real tenancy test

### Summary

**The Real Tenancy Test is a quick test which can be used in supported living and tenancy based supported housing to indicate the extent to which real tenancy rights are being delivered. It is designed to be used by support providers, landlords and commissioners as a self assessment tool to help them understand how their approaches and practices work for, or against, the exercise of real tenancy rights by their tenants and service users, and to indicate how improvements may be made where needed.**

Whilst some people with learning disabilities have the same rights, choice and control in their homes as all tenants should, there are others who have tenancies in housing and support services where they do not enjoy real rights, choice and control. This can be 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. It should not be used for tenancies in a temporary supported housing service.

It is also not intended to be regarded as a set of minimum standards, or to be used as a measure of quality of service.

### Mental Capacity

The Mental Capacity Act 2005, and its [Code of Practice](#) guidance requires an assumption that all adults have the capacity to make their own decisions. Where there is a doubt, the Act provides frameworks to decide if a person has the capacity to make specific decisions, and to make best interests decisions on their behalf if they do not.

Whilst many people in supported living tenancies will have the capacity to understand and manage their tenancy (with support as necessary) it is recognised that there will be some who may lack, or lose, the capacity to make specific decisions related to their tenancy. See also page 21 for more information on mental capacity and tenancy.

Even where it is established that a person lacks capacity to make a tenancy related decision the principles of the Real Tenancy Test can be applied to the making of best interests decisions, under the MCA frameworks, on their behalf.

The Real Tenancy Test says that for the tenancy to be real and genuine, it should comply with 5 key principles:

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 tenant has real tenancy rights:**

1. Has a tenant been moved from their home due to a decision of 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. Was the tenant offered no choices other than to accept the tenancy?
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 an agreed consultation process with existing tenants, or against their express wishes?
6. Is there a tenant that is clearly unhappy living with another tenant?
7. Is a tenant expected to move if their support needs change?
8. Is support provided at times prescribed by the support provider rather than the needs and preferences of the tenant?
9. Are tenants having restricted access to any part of their home, other than co-tenants private space?
10. Is equipment such as telephone line, office equipment or files owned by the housing or support provider not required by regulation ([Standard 16 National Minimum Standards](#)), or not essential for the proper and safe delivery of service, kept 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, support providers and commissioners to identify whether a tenancy is 'real' and genuine or not. If the answer to any of these questions is 'yes' then it is possible that arrangements may be 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. Part 2 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 CSSIW guidance for providers of domiciliary care and support to meet legal requirements under the Care Standards Act 2000<sup>3</sup>**

The CSSIW<sup>4</sup> has issued guidance to inspectors in considering whether arrangements in supported living settings meet the criteria for a genuine tenancy and therefore fall outside the registration requirements. If tenancy and support arrangements fail to meet these criteria there is a risk that the CSSIW 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 and meet the criteria for non- registration as defined by CSSIW.

**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 such as Reach Standards in Supported Living<sup>5</sup> that complement the quality assurance frameworks for Supporting People and Domiciliary Care Services. The All Wales Community Living Network also offers a Supported Living Quality Checklist<sup>6</sup>.

**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

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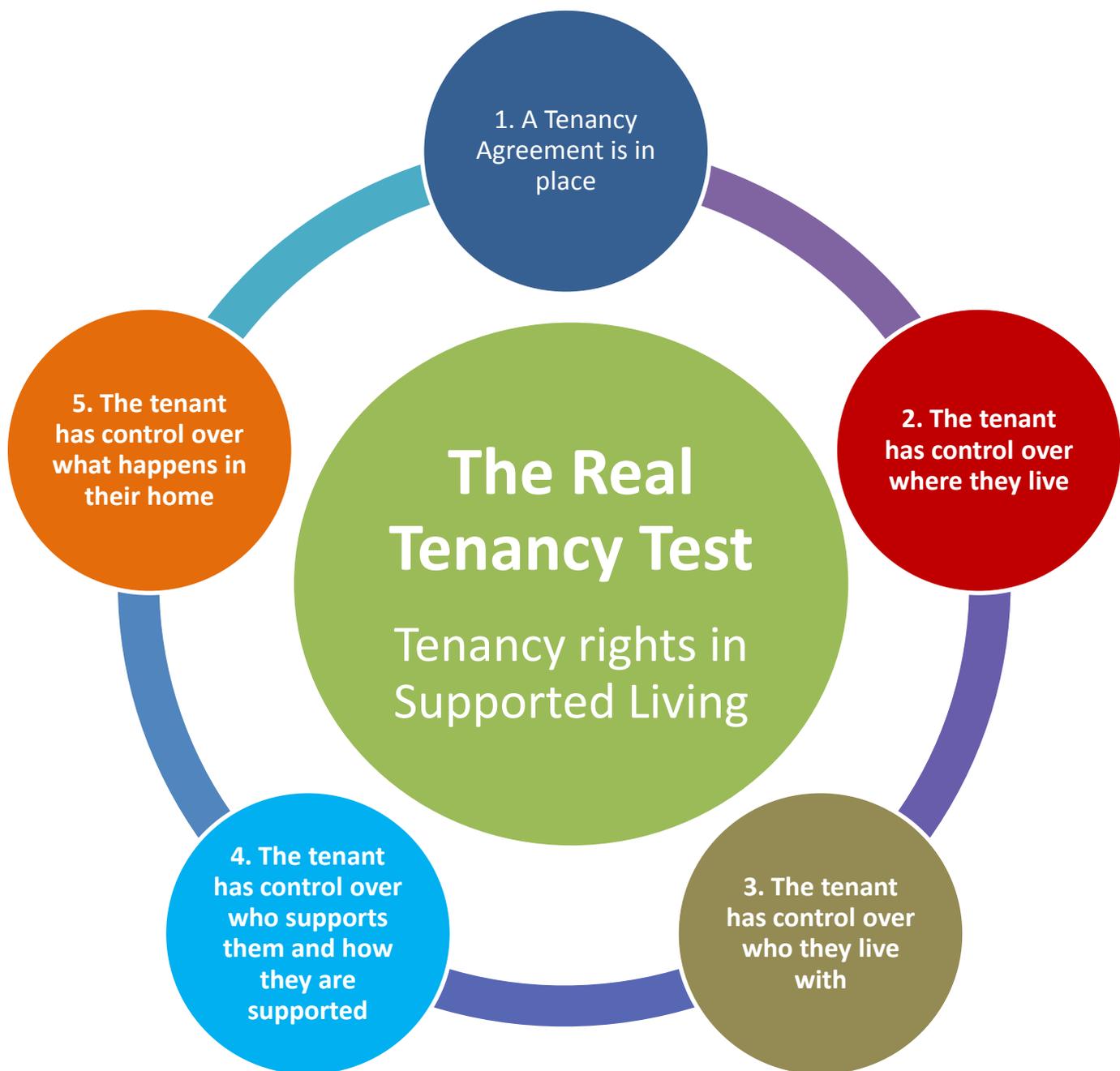
<sup>3</sup> CSSIW [Regulations and Minimum Standards for Domiciliary Care Agencies in Wales](#)

<sup>4</sup> Care and Social Services Inspectorate Wales 2003 – [| The Care Standards Act 2000 and extra care and supported housing](#)

<sup>5</sup> Paradigm, *Reach Standards in Supported Living* 2006 [www.paradigm-uk.org](http://www.paradigm-uk.org)

<sup>6</sup> Learning Disability Wales 2009 [Supported Living Quality Checklist](#)

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 CSSIW to be accepted as a genuine supported living arrangement. For individual situations, clarification should be sought directly from the CSSIW.



## 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"> <li>• The tenant’s legal and contractual rights are detailed in a written tenancy agreement and 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.</li> <li>• The existence of a tenancy agreement does not in itself determine that the tenancy is legitimate. It is just as important that tenants have the same control over their home as non-disabled tenants would.</li> <li>• Support staff are always aware that they are working in the tenant’s home and are respectful of the tenant’s rights, choices and control over their home.</li> <li>• There is a direct and personal relationship between landlord and tenant.</li> </ul>	<ul style="list-style-type: none"> <li>• The landlord and support provider should know about the Mental Capacity Act and relevant housing law in relation to issuing a tenancy.</li> <li>• The tenancy and support agreements are easy to understand, available in the tenant’s first or preferred language, and the tenant (or an appropriate representative) understands the tenancy.</li> <li>• 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.</li> <li>• Tenants are offered a range of rent payment options including as a minimum those usually available to the other tenants.</li> <li>• The landlord grants and issues tenancies directly (not through the support provider).</li> </ul>	<p>1) Has a tenant been moved from their home due to a decision of the support provider or commissioner?</p> <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><b>If the answer to any of the above questions is yes, it is possible that tenants are not experiencing genuine tenancy rights.</b></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"> <li>• Person centred planning and approaches to help people think about where they want to live have been used.</li> <li>• People get support to think about the type of house and location that is important to them.</li> <li>• For people who do not communicate with words, person centred approaches are used to help them think about what is important to them about where they want to live.</li> <li>• Families, friends and advocates are involved in the planning process.</li> <li>• The person has not been simply 'placed' because there is a vacancy.</li> </ul>	<ul style="list-style-type: none"> <li>• Provide information about available housing choices in a format and language that people and families can understand.</li> <li>• Make sure care managers, housing advisors and provider organisations know about the range of housing choices available.</li> <li>• Regularly ask tenants whether they want to move on, provide every assistance for those who wish to do so and make this part of the service agreement.</li> <li>• 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 CSSIW if registration status is being challenged).</li> </ul>	<p>3) Was the tenant offered no choices other than to accept the tenancy?</p> <p>4) Is there a tenant who wants to move on but is not getting support to do so?</p> <p><b>If the answer to any of the above questions is yes, it is possible that tenants are not experiencing genuine tenancy rights.</b></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"> <li>• The tenant has chosen who they want to live with (if anyone) or the type of people they want to live with.</li> <li>• For people who do not communicate with words, person centred approaches are used to help them think about who they like living with or what type of person they like to be with/don't like to be with.</li> <li>• If people find they do not like who they live with, they are supported to resolve the relevant issues where possible, or to think about whether they want to move on.</li> <li>• Tenants are regularly asked if they are happy or unhappy about living with the other tenants.</li> </ul>	<ul style="list-style-type: none"> <li>• 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.</li> <li>• The landlord and support provider create a person centred process for supporting current tenants and potential tenants to choose housemates.</li> <li>• Providers and commissioners create flexibility in shared housing so that people can more easily move on if they want to.</li> <li>• 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 CSSIW.</li> </ul>	<p>5) Has a tenant moved into the house without an agreed consultation process with existing tenants, or against their express wishes?</p> <p>6) Is there a tenant that is clearly unhappy living with another tenant?</p> <p><b>If the answer to any of the above questions is yes, it is possible that tenants are not experiencing genuine tenancy rights.</b></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"> <li>• The tenant has genuine control over how they are supported and who supports them.</li> <li>• Person centred planning and support planning is used to determine choices made and to support changes.</li> <li>• Recruitment and rota planning is based on individual tenant need/choice.</li> <li>• The tenant has real control over their finances, with or without support.</li> <li>• 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.</li> </ul>	<ul style="list-style-type: none"> <li>• Housing and support is contracted separately and support is not a condition of the tenancy. CSSIW may request evidence of this if registration status is challenged.</li> <li>• There is a support contract in place that states that the tenant has a right to change support provider.</li> <li>• Support providers are moving towards a system that can accommodate individualised funding to meet the needs of personal budget holders and create flexibility in how they provide support.</li> </ul>	<p>7) Is a tenant expected to move if their support needs change?</p> <p>8) Is support provided at times prescribed by the support provider rather than the needs and preferences of the tenant?</p> <p><b>If the answer to any of the above questions is yes, it is possible that tenants are not experiencing genuine tenancy rights.</b></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"> <li>• 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.</li> <li>• Tenants choose how the house is furnished and decorated as permitted in the tenancy agreement.</li> <li>• It looks like the tenant's home reflecting their personality, rather than a place of work.</li> <li>• If it is essential for support staff to hold keys, there are agreements in place with tenants about how and when they may be used.</li> <li>• 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.</li> <li>• Tenants answer their own phone, door and open mail (with support if necessary).</li> </ul>	<ul style="list-style-type: none"> <li>• The person's home is called a person's home and not a 'scheme' or 'project'. Language in contracts, agreements and training/induction reflects the fact the person's home is not the service. The service is the support provided</li> <li>• There is not an office, nor non-essential paperwork or equipment owned by the support provider in the home. Tenant's formal consent for the keeping of essential files and equipment has been obtained and is regularly reviewed.</li> <li>• The support provider provides separate office space for staff meetings etc. away from the tenant's home.</li> <li>• Support providers and landlords do not have their mail addressed to the tenant's home.</li> </ul>	<p>9) Are tenants having restricted access to any part of their home, other than co-tenant's private space?</p> <p>10) Is equipment such as telephone line, office equipment or files owned by the housing or support provider not required by regulation, or not essential for the proper and safe delivery of the service, kept 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><b>If the answer to any of the above questions is yes, it is possible that tenants are not experiencing genuine tenancy rights.</b></p>

## Part Two – Supporting Information

### Why the Real Tenancy Test?

Welsh Government Circular 008/2010-Accommodation and Support for Adults with a Learning Disability<sup>7</sup> renewed the commitment to the objective in the 2007 Statement on Policy and Practice for Adults with a Learning Disability that:

*“authorities should make a range of accommodation options available to people with a learning disability so that they have as much freedom as anyone else (our emphasis) to choose where they live, with whom they live and the level of support they need to enable them to continue to live in the community”.*

*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 as well as a degree of choice.

However, it has not, in many instances, led to the level of choice, freedom and control for people with learning disabilities envisaged in successive Welsh Government documents such as those referenced above. It should be noted here that, at the time of writing, the changes to the *Supporting People Programme* consequent upon implementation of the 2010 Aylward Report<sup>8</sup> have yet to have a significant impact and that commissioners and providers of supported living services need to familiarise themselves with and follow the Guidance<sup>9</sup> issued as a result of the Aylward Review.

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 care providers becoming landlords or having to work with landlords and a new type of housing based

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<sup>7</sup> WAG Circular 008/2010 <http://wales.gov.uk/docs/cssiw/publications/101012wagcircularen.pdf>

<sup>8</sup> Aylward Report 2010 <http://wales.gov.uk/docs/desh/publications/101124housingupportpeoplefinalen.pdf>

<sup>9</sup> Welsh Govt Supporting People Guidance - <http://www.cymorthcymru.org.uk/docs/guidance-supporting-people-programme-grant-guidance-27.07.12.doc>

service emerging that may be considered to be neither an ordinary home, supported housing (as we usually understand 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 seeking temporary accommodation and are simply looking for a place to live for the next phase of their life.

Shared supported housing funded by *Supporting People* for other 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.

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 can lead to some people with learning disabilities having 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 sometimes 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 relatively 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 a written agreement or haven't signed their agreement if they have the above 3 things and the landlord is accepting rent. Although a written document is not therefore essential for a legal tenancy to exist the Real Tenancy Test says that the terms and conditions of the tenancy, including the rights and responsibilities of both parties, should always be written down in a clear tenancy agreement and signed by both the landlord and, where possible, the tenant or their legally authorised representative.

The *Alternative Futures*<sup>10</sup> case established that the existence of a tenancy in itself did not necessarily mean that a tenancy in supported housing and supported living arrangements is

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<sup>10</sup> CSSIW 2003 [http://www.csiw.wales.gov.uk/docs/support\\_housing\\_Jan%2003v2\\_e.pdf](http://www.csiw.wales.gov.uk/docs/support_housing_Jan%2003v2_e.pdf)

genuine and what is just as important as having a 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.

## 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 at the time of writing are:

- Starter or probationary 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 local authority rented property.
- Assured tenancy - the most secure outside of local authority provision and usually only provided in housing association property intended to provide permanent or long term accommodation.
- Assured shorthold - usually provided in private rental properties and housing association properties (such as supported housing) which provide temporary or time limited accommodation.
- Licence agreement - usually given in temporary housing or residential care and gives less protection from eviction.

For more detailed information about rental agreements Shelter Cymru<sup>11</sup> has an excellent website. Reference should also be made to the Welsh Government's *Homes for Wales*<sup>12</sup> White Paper which has declared the intention "*within the lifetime of this Assembly*" to bring forward tenancy reform based upon the Law Commission's recommendations which is intended to simplify tenancy law and reduce and revise the number of available legal tenancies.

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.

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<sup>11</sup> Shelter, The People and Homes Charity in Wales, [Shelter Cymru : Advice Online](#)

<sup>12</sup> Homes for Wales 2012 <http://wales.gov.uk/docs/desh/consultation/120521whitepaperen.pdf>

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. However, arrangements can become more complicated to understand when housing and support is organised together in supported housing 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 provision of housing is not conditional upon receipt of care and/or 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<sup>13</sup>.

### **Is a secure tenancy always necessary?**

Sometimes 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, examples where people are 'moved on' for wider organisational reasons such as financial or service efficiencies/savings. People with learning disabilities are also sometimes asked (or even 'required') to move from their home because their support package is not working or an outside agency (eg Fire Service, LA or health staff) decide that their situation is 'inappropriate'. For these reasons, it is simply not acceptable to offer a less secure form of tenancy on the basis that most providers and other agencies 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

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<sup>13</sup> Supported Living Quality Checklist [Learning Disability Wales - Creating a Wales that values and includes every child and adult with a learning disability.](#)

support provided means that it is expected that people move on regularly and others move in who need a service.

The Welsh Government Regulatory Framework for Housing Associations Registered in Wales<sup>14</sup> makes clear, in Appendix 3, 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 the most secure available. Currently this means an assured tenancy and will mean the *"secure contract"* or its equivalent devised under the tenancy reforms referred to above.

In shared housing and support services that provide domiciliary care and are registered with the CSSIW, it is particularly important that tenants have their rights as tenants fully met because of the risk otherwise that CSSIW 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. This requirement that care/support and accommodation arrangements must not be reliant upon each other, and the importance of a secure tenancy, along with the level of choice and control exercised by the tenant is made clear in the Welsh Government's 2002 guidance circular to local authorities regarding registration requirements and supported housing<sup>15</sup>.

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<sup>14</sup> Welsh Government 2011 <http://wales.gov.uk/docs/desh/publications/111202housingregframeworken.pdf>

<sup>15</sup> NAFWC 32/02 <http://wales.gov.uk/pubs/circulars/2002/english/NAFWC32-02Comb-e.pdf?lang=en>

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

There are four main types of landlords operating in Wales:

- Registered Social Landlords (RSLs) which includes housing associations and community mutuals. These are regulated by Welsh Government.
- Local authorities holding housing stock whose housing function is audited and inspected by the Wales Audit Office.
- Some charities working with vulnerable people hold limited housing stock.
- Private landlords may be individuals or companies that rent out housing and must operate under housing and tenancy law as applied to their sector.

When a person rents their own self-contained home independently through any type of landlord, even if they have support or care needs, tenancy rights are usually straightforward and clear in that the person has definite control over their home. It is often when housing is shared and/or support/care is intensive (often 24 hour) and arrangements are facilitated through social services departments, that tenancy rights can 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 2000<sup>16</sup> 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 CSSIW has issued guidance to its inspectors (*see above*) to determine whether a home is in fact a supported living model or whether it should be registered as a care home. Taking this guidance, and the preceding WAG guidance, into consideration, the following criteria need to be met for a home to be considered a supported living setting;

- *The arrangements for provision of accommodation are separate from those for care, providers of each element do not need to co-ordinate their work to ensure adequate provision of services 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 (for example a surviving spouse).*

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<sup>16</sup> CSSIW, Care Standards Act 2000 | [Care for adults](#)

- *Occupants have a tenancy agreement and can remain in the accommodation even if they no longer need, or want, a care service.*
- *There are separate contracts for the care and the accommodation.*

The concept of Supported Living was first brought to the UK by the NDTi in the early 1990's and saw a major expansion in Wales during the hospital closures from the late '90s and the introduction of the *Supporting People* programme in 2003. Nowadays it has a set of principles that are defined in the Reach Standards in Supported Living<sup>17</sup>.

- 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 principles and practice outlined in these documents broadly align with CSSIW guidance and in the Welsh Government's Statement on Policy and Practice for Adults with a Learning Disability<sup>18</sup> 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.

Despite apparent wide acceptance of these principles what we see in some 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<sup>19</sup>.

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<sup>17</sup> Paradigm, *Reach Standards in Supported Living* 2003 [www.paradigm-uk.org](http://www.paradigm-uk.org)

<sup>18</sup> [Welsh Government | Statement on policy and practice for adults with a learning disability](#)

<sup>19</sup> Joseph Rowntree Foundation, 2007 [www.jrf.org.uk/](http://www.jrf.org.uk/)

What appears to exist is a mix of services and landlords that are sometimes 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 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 who 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 Act<sup>20</sup> 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.
- If necessary an application to the Court of Protection can be made for the Court to decide what is in a person's best interests regarding where they should live. The Court can also

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<sup>20</sup> Office of the Public Guardian, [Mental Capacity Act](#)

make an order authorising the taking of a tenancy by the individual even though they may lack capacity to understand the tenancy themselves.

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 Options<sup>21</sup> offers a useful factsheet on mental capacity and tenancy.

## Deprivation of Liberty Safeguards in tenancy based housing

The Deprivation of Liberty Safeguards (DOLS) provide a framework for approving deprivation of liberty (DOL)<sup>22</sup> 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. DOLS cannot be used to authorise a deprivation of liberty in any other setting. The guidance states that:

*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. Whilst factors such as locked doors, preventing a person from leaving, or denying them access to keys for the home may indicate that a DOL situation is arising there may also be legitimate reasons for such actions.

If it is thought that it is essential, in a person's best interests, to be deprived of their liberty in a supported living setting, and there is no other option for supporting or protecting the person, then it can only be authorised and made lawful by an Order made under s16 Mental Capacity Act 2005 by the Court of Protection. For more information go to the DOLS Code of Practice at the link below.

## 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.

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<sup>21</sup> Housing Options [http://www.housingoptions.org.uk/general\\_information/gi\\_factsheets/fs\\_22.pdf](http://www.housingoptions.org.uk/general_information/gi_factsheets/fs_22.pdf)

<sup>22</sup> Deprivation of Liberty Safeguards Code of Practice  
<http://www.wales.nhs.uk/sites3/Documents/744/Code%20of%20Practice%20E1.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 or Welsh, symbols, photographs and pictures.

What is also important is helping tenants, families and staff to 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 support systems often do not operate in a way that gives people real control over their home. This can manifest itself in practices that mirror those in a registered care home where the support agency is actually in control even though the occupants hold a legitimate tenancy. Support providers, landlords and commissioners need to be constantly vigilant that their practices are not becoming institutionalised and that real power and control remains firmly in the hands of tenants.

### **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 or 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, it 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 Act<sup>23</sup> 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, in the tenants first or preferred language, in alternative formats (eg Braille, DVD) and using diagrams or 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 Court of Protection can be asked, through the Office of the Public Guardian to appoint a Deputy to handle the tenancy agreement. (see link below)

**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.

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?**

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<sup>23</sup> Office of the Public Guardian, [Mental Capacity Act](#)

Firstly, it should be made absolutely clear in the tenancy agreement that tenants have the right to be consulted regarding the introduction of new tenants. The consultation process should be described in a separate detailed document that is negotiated and agreed between stakeholders (including the local authority where they are granted nomination rights). 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 or L.A. nominates 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 of 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) Was the tenant offered no choices other than to accept the tenancy?

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 a consultation process with existing tenants, or against their express wishes?

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 needs and preferences of the tenant?

9) Are tenants restricted access to any part of their home, other than co-tenant's private space?

<p>10) Is equipment such as telephone line, office equipment or files owned by the housing or support provider which are not required by regulation, or are not essential for the proper and safe delivery of service, kept 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>		