

Comparing the rights of private sector tenants in England with those in other jurisdictions

Examples of Good Practice

**A Report of the Centre for
Human Rights in Practice**

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Executive Summary

1. Overview

This report compares the rights of tenants in England in the private rented sector, with those of tenants in other jurisdictions in the UK, Europe, Australia and the United States of America. It finds that, in many crucial aspects, tenants' rights are less well protected in England than elsewhere. This inferior protection has serious implications for many peoples' ability to settle down and plan their future, particularly since more and more people are unable to afford to buy their own home in England. The report therefore makes recommendations for better protecting tenant's rights in England in the future.

2. Scope

This report compares some key aspects of the way in which the law regulates the relationship between landlords and tenants in different jurisdictions including:

- length and security of tenure
- tenants' rights to renew agreements
- landlords' rights to resume possession
- restrictions on the ability of landlords to increase rents
- and tenant's remedies for repairs

It also compares and contrasts the dispute resolution services that are available in different jurisdictions through which tenants can enforce their rights.

3. Key Findings

Key findings of the research include:

- In England the length of tenure for most tenants in private accommodation is 6-12 months. This is considerably shorter than most other jurisdictions compared. For example. Tenancies in Italy are typically contracted for 4-6 years and Germany operates tenancies with no fixed terms. (See para 1.09)
- Tenancies in England are renewed at the volition of the landlord. In many other jurisdictions, including New Zealand and Australia, tenants can automatically renew the tenancy once the previous agreement has expired if the landlord fails to give notice that the tenancy will be ending. (See para 3.05)
- In England, landlords can resume possession of a dwelling by giving just two months' notice ('notice to quit') allowing them to resume possession without giving any reason, once the first six months of the agreement has ended. Many other jurisdictions have longer notice periods and place

various restrictions and limitations on the landlord's ability to resume possession. For instance, over half of the states covered in Australia do not allow a landlord to resume possession without providing a valid reason until the end of the fixed term. Tenants in Germany are well protected under German law, meaning that the landlord's resumption of possession is likely to be subject to lengthy and costly court proceedings. Upon resumption, the landlord must also return the tenant's security deposit plus additional interest, which better supports tenants in their relocation from a financial perspective.¹ (See section 2.00)

- Rent increases in England are permitted only where there is a revision clause within the agreement. Other countries where longer tenancies are common do allow rent increases, but these are often capped. In New York, many dwellings are “rent-controlled units” and there are additional rent increase exemptions in place for senior citizens and those with a disability. (See para 4.07)
- If tenants withhold rent in England, regardless of the reason, the landlord can evict them. France, Germany and a number of states in the USA allow tenants to withhold rent so that they can pay for repairs to be carried out or if their home is not in a habitable state. (See para 5.04)
- In England, the Housing Ombudsman Service claims to resolve over 80% of landlord and tenant disputes, however this only covers 21% of privately rented dwellings. The remaining 79% of dwellings within the private sector rely on Tenancy Deposit Schemes; both require a form of membership and only cover certain areas of dispute. Scotland, Wales, France, Germany, New Zealand, Australia and Washington D.C and Washington State (USA) offer free conciliation services, without membership requirements, for all areas of landlord and tenant disputes. Also, more than 10 federal states in Germany have a mandatory pre-trial conciliation procedure for disputes of less than 750 EUR. These services cover disputes regarding contracts, obligations, possession and rent payments. (See section 6.00)
- Where alternative dispute resolution is unavailable, tenants may be subject to court proceedings which are costly and time consuming. In England, Legal Aid is available to help with the cost of legal advice and representation, although it is limited to those with a low income who do not have much savings (less than £8,000 as of November 2016) and have a “good chance of winning”. Legal Aid only covers disputes regarding eviction, serious disrepair, anti-social behaviour and harassment. (see more under Landlord's resumption of possession, section 2.00)
- The average Housing Ombudsman dispute can take up to 12 months for a decision to be made in England. The Ombudsman Service resolves disputes through early resolution or investigation by applying experience of complaints handling to reach an agreed solution. Other jurisdictions

have much quicker processes. In Australia's Capital Territory, their Civil and Administrative Tribunal aims to resolve all disputes within 14 days and several other Australian states use a tribunal as their resolution service which provides decisions on the same day as the hearing.

This report also covers further elements such as, subletting and repair obligations, "no pet" clauses providing a comparative perspective on the protections in other jurisdictions. In New Zealand, the prohibition of a service dog is considered indirect discrimination on grounds of disability as per s12 of the Residential Tenancies Act 1986 and the grounds listed in the Human Rights Act 1993.

4. Recommendations

Based on the findings from this study, it recommended that England re-thinks key areas of the tenancy system, in order to even the balance between tenant's and landlords' rights and obligations; including:

1. Providing stronger security, and increased length, of tenure.
2. Prohibiting landlords from resuming possession of properties, without good reason, until the end of the fixed term.
3. Creating rights for tenants to automatically renew their tenancy agreement.
4. Adopting limits to rent increases and exemptions from rent increases for particularly vulnerable groups.
5. Providing tenants with remedies for urgent repairs, such as reducing or withholding rent.
6. Creating a more efficient service for dispute resolution that is low-cost, speedy and is available to all landlords and tenants, without requiring membership of any organisation.
7. Increasing freedom for tenants to sublet their homes.
8. Clarifying tenants' repair obligations.
9. Creating mandatory inspections when tenants move in and out of the dwelling.
10. Ensuring "No Pet" clauses include exemptions for service animals (e.g. guide dogs) - Currently there are no clear definitions of what constitute pets.

1. Methodology for the Report

This report compares the rights of tenants in England in the private rented sector, with those of tenants in other jurisdictions across the UK, Europe, Australia and the United States of America. It concentrates on the situation of tenants in Assured Shorthold Tenancies in England, as these are the commonest form of tenancies.

Tenancies in England

The main types of tenancies in England are:

1. Assured Shorthold Tenancies (ASTs) – these are the most common form of tenancy with the majority of new tenancies being automatically ASTs. This type of tenancy is usually given for six months (although the landlord can offer a longer period) and after this agreement period, the landlord can commence eviction of their tenant without good legal reason.
2. Assured Tenancies – these provide much more security of tenure than ASTs as tenants have the right to stay in occupation of a property until the landlord obtains a court order for possession. This order is awarded if the landlord shows has a legitimate reason to evict the tenant, such as the tenant being in arrears with rent payments or breaching their agreement.
3. Leaseholds – these are seen as extremely long tenancies in that the leaseholder owns the landlord's property for a number of years; however, the property returns to the landlord when the lease ends. Leaseholders do have the right under the Leasehold Reform Act 1967 to buy the freehold of their property if they meet the qualifying requirements to do so. The average lease is usually for 99 or 125 years.

Selected jurisdictions: The jurisdictions within the following countries were chosen to compare with England in regard to tenant’s rights:

- Scotland
- Wales
- Northern Ireland
- France
- Italy
- Germany
- Canada
- New Zealand
- Australia
- United States of America

This selection was chosen to show differences between countries in the UK and with a range of comparable jurisdictions. Italy and Germany were chosen as EU countries with similar levels of economic development as the UK. Australia, New Zealand and Canada were chosen as Commonwealth countries, again with similar levels of affluence to the UK. The analysis of Australia has been broken down into the situation of landlords and tenants in different States, and, similarly, a selection of States was taken in the USA.

Research materials: This was a brief study carried out between February and June 2018. The sources used were readily and publicly available, and, because of time constraints, it was not always possible to refer to the primary sources. In some cases, legislation and caselaw were referred to, as well as a range of secondary sources, including academic articles, government websites, citizens advice websites and other publications.¹

Why is it important? The report shows the differences in tenant protection between England and other jurisdictions and identifies areas in which tenants in England would benefit from improved protection. Current legislation grants tenants with basic rights in England. It does not however uphold certain rights that are important for tenants to feel secure and stable within their home. The reasoning for differentiation between the UK and other jurisdictions is unclear, although it may be due to differences in cultures and attitudes. But the enhanced tenant protections in other comparable jurisdictions act as examples of the possible models that could be adopted in England to strengthen tenants’ rights. There are many justifications for equalizing the distribution of rights between landlords and tenants, including the implications for health, safety, and well-being that are caused by this imbalance. *References are available to these issues in the relevant chapters below.*

Tenants require protection from forced eviction and repossession from the landlord to be able to plan a future and settle down in their home; this is achieved by granting security of tenure for a substantial period, meaning they cannot be evicted without having materially breached their agreement. If the landlord evicts their tenant without good reason and fails to follow the correct procedure for giving notice and obtaining a court order, they will be

committing a criminal offence, but the offence will mean the tenant has their home.

Another protection needed by tenants to maintain a stable home is a right to renew the tenancy agreement at the end of a fixed term, which is currently only at the discretion of the landlord. Increasing a tenant's ability to renew would allow for those who have less security of tenure to retain their sense of stability as their length of tenure is extended at their own volition.

In a number of jurisdictions within the US, there are "first refusal" laws in place; giving tenants the right to buy their home (assuming they can raise the necessary finance) before the landlord can advertise to the public.

Tenants also need protection against the landlord's ability to increase the rent amount, especially important for those who may be unable to adapt to an increase such as senior citizens and those with disability. A tenant's ability to cope with rent increases depends upon many criteria, such as their income and outgoings. Landlords do not necessarily take these factors into account when increasing the rent. Landlords in England can also impose an increase at the end of a fixed term with or without the agreement of the tenant.

It can happen that a repair or defect needs remedying within a dwelling but the landlord does not fulfill their legal obligations to carry out the repair. Tenants currently do not have much protection against the landlord in this scenario and one option would be a right to withhold rent or alternatively a right to remedy the repair themselves to enhance the landlords' urgency to comply with their obligations. Tenants in England are currently only able to authorise repairs to be carried out by a third party that provides the cheapest quote for the works, and then recover the cost by deducting the amount from future rent

1 Length and Security of Tenure

1.01 What are length of tenure and security of tenure? The length of tenure is the period in which the tenant is contractually occupying the premises. Security of tenure is a right that allows tenants to occupy the property.

1.02 Why is it important? Increasing length and/or security of tenure means that the tenant has a place they can call home for a longer period of time and has a longer period without the worry of being forced to move and find a new home. Research has identified that these protections have wider benefits to tenants' wellbeing including in terms of finding a job, supporting children at school, mending relationships and addressing health issues. Shelter and Crisis, two housing charities that aid those who are facing homelessness, conducted a longitudinal study of private tenants in 2012 and found that the participants emphasised how much they value a stable home. The research showed that stability directly affects the ability to plan a future. Factors such as relationships with their landlord caused anxiety about settling down, especially for tenants with children.²

1.03 What is the situation in England? In England, leases for less than six months do not grant security of tenure unless the tenant has been in occupation of the premises for more than 12 months before the lease was created. Tenancies in England are likely to be assigned for either 6 or 12 months initially. The Housing Act 1988 introduced Assured Shorthold Tenancies, which can be as short as six months or as long as three years. This is the most common type of tenancy in England. It also provides less protection from repossession as landlords do not need to obtain a court order to resume possession meaning tenants have less protection and security compared to Assured Tenancies³ (See box on Page 7 for definitions of types of tenancies) It is therefore easier, by law, for landlords who assign Assured Shorthold Tenancies to resume possession of their property if they wish to or if they are required to by their mortgage lender.⁴ Landlords are required to serve a section 21 notice to evict tenants, although this can be invalidated by the following omissions made by the landlord:

- *Giving the section 21 notice before a period of 4 months has passed at the start of the tenancy.*
- *Use of an incorrect form when filing for the notice*
- *Giving less than two months' notice to the tenant.*
- *Failing to provide the tenant with a copy of the dwelling's current gas safety certificate; the latest version of the "How to Rent" leaflet or a valid energy performance certificate.*

1.04 The ending of an Assured Shorthold Tenancy has been found to be the most common precursor to homelessness and accounted for 31% of all homeless acceptances in England between September and December in 2016.⁵ Assured and shorthold tenancies were originally introduced to encourage

lettings by allowing landlords to charge a full market rent, unlike previous forms of tenancy. Shorthold tenancies also allow landlords to let their property for a short period only and to get it back if they wish after 6 months.

1.05 What is the situation in other jurisdictions? Many other jurisdictions offer much longer leases and the average time tenants spend in occupation of a dwelling is much higher. The security of tenure in a number of other jurisdictions favours the tenants' right to renewal over the landlord's right to repossession, making for a more stable home.

1.06 For example, in **Germany**, most tenancies are signed without fixed terms. The median tenancy since 2006 has been six years and the law provides very few exceptions to this, except for "tied" accommodation (i.e., housing provided by an employer). This means that tenants are much more secure and are statistically in occupation for a longer period of time in Germany than in England. Tenancies without fixed terms in Germany continue until either party serve the required notice to quit. It is also commonly found that landlords in Germany feel less security and require assurance that their tenants will not move out as opposed to tenants feeling less security.⁶

1.07 "Tacit Relocation" in **Scotland** acts as a form of security of tenure, allowing tenancies to renew automatically and "silently" at the end of a fixed term. The tenancy will therefore be renewed for the same amount of time as was originally agreed without the landlord's ability to decline, unless a notice to quit has been served. For example, if a tenant was to continue occupation after the end of a 6-month fixed term, the tenant will automatically renew their right to continue occupation for a further 6 months.⁷

1.08 In the **United States of America** security of tenure is a recognized right under common law for a period of either 6 or 12 months. Once a landlord accepts rent from their tenant after the original lease agreement has expired, a new periodic tenancy begins on a month-to-month basis until either party serves the required notice to terminate.⁸

1.09 **Italy** exercises two different types of tenancy; free market and assisted. Security of tenure for free market tenancies allows tenants to receive an extra four years for every four years they have been in occupation under the agreement. In assisted tenancies, the tenant receives two years for every three years of occupation under the agreement and this supports the likelihood of tenancies being granted for between 2-6 years.⁹

2.00 Landlord's Resumption of Possession

2.01 What is a landlord's resumption of possession? The right of a landlord to cut short the tenancy and resume possession of his or her property.

2.02 Why is it important for the tenant? Limitations on the situations in which landlords can resume possession and longer notice requirements allow tenants to feel more stable and secure within their home throughout the tenancy. This in turn reduces stress and negative impacts on tenants.

2.03 What is the situation in England? In England, a landlord can resume possession of a dwelling, without reason, by giving just two months' notice to an assured shorthold tenant, whose tenancy could be agreed for up to three years. The landlord is only unable to do so during the first six months of any agreement, which could originally have been expected to last three years.

2.04 What is the situation in other jurisdictions? **Wales** is the only other jurisdiction, out of 20 that were researched, that operates in the same manner.¹⁰

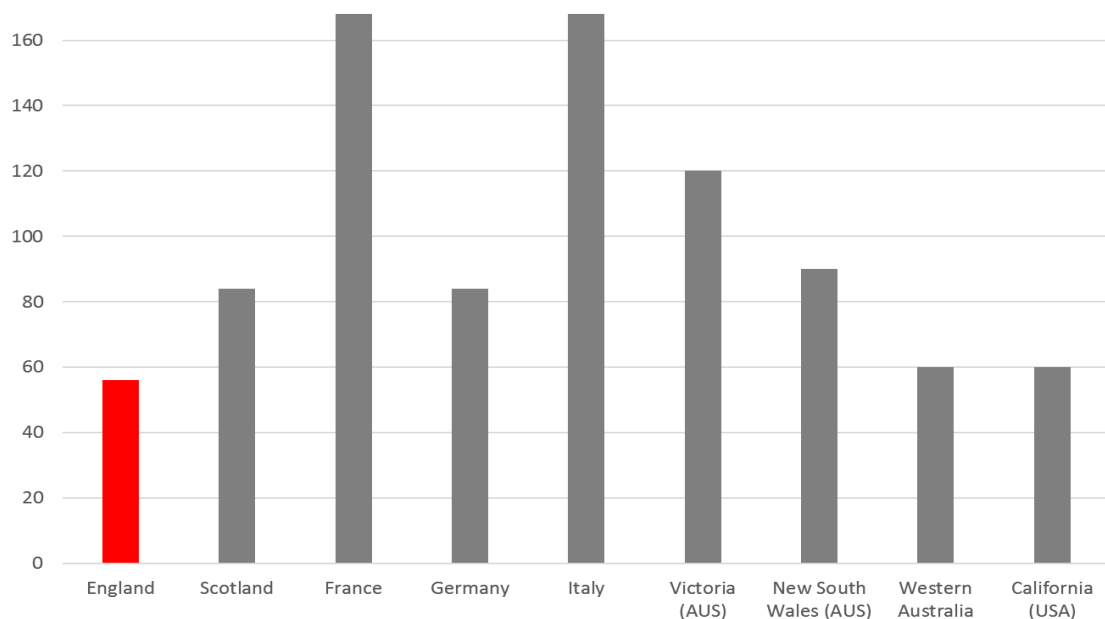


Table 1 shows the difference in the notice required by landlords to regain possession (days)

2.05 Other jurisdictions have much stronger limitations and notice requirements, for example, half of the states in **Australia** do not allow a landlord to resume possession without good reason (such as a breach in the agreement by the tenant) until the end of the fixed term. This gives tenants a sense of permanence for at least a minimum of the originally agreed period, rather than just the first six months.¹¹

2.06 At the end of tenancies in **Germany**, landlords have the right to obtain possession, but they must return the tenant's security deposit along with additional interest. Although this remedy does not allow for continuation of

occupation, it does enable tenants to secure a deposit and better support their relocation from a financial perspective.¹² In the US, the security deposit also must be returned at the end of the tenancy agreement.

2.07 In New Zealand, either party can apply to the tenancy tribunal to end a fixed term if there are unforeseen changes in their circumstances. The change must cause greater hardship to the applicant if the term is not reduced than if it is. This is most commonly used by tenants

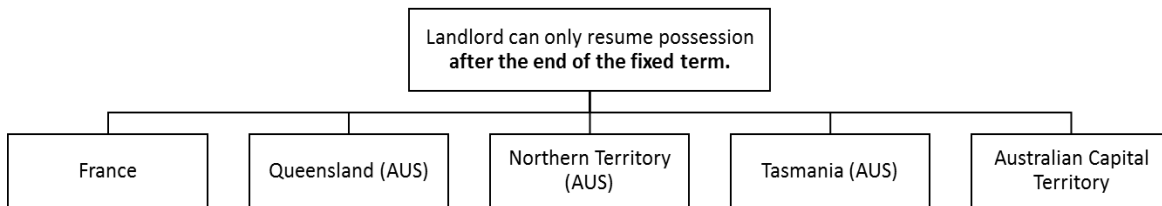


Table 2 shows jurisdictions that do not allow landlords to regain possession until the end of the fixed term unless it is for reasons such as a tenant’s breach of agreement.

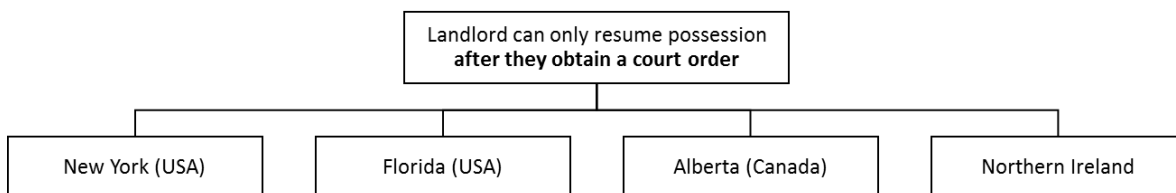


Table 3 shows jurisdictions that do not allow landlords to regain possession without a court order.

2.08 In England, legal representation for tenants who are unable to provide their own is available through Legal Aid, although this is very limited. Legal Aid is only available to those who meet the following criteria:

- *Tenants with a low income or those who receive certain benefits;*
- *Tenants who do not have much money in “savings”, investments or property;*
- *Tenants who are believed to have a good, strong chance of winning their case.*

2.09 Tenants who are not eligible for Legal Aid can seek help from pro bono solicitors, who will provide free services, or are advised to visit a local law centre to receive free legal advice. *See more information regarding alternative dispute resolution under section 6.00.)*

3.00 Tenant's Right to Renewal

3.01 What is the tenant's right to renewal? This is the tenant's right to a new tenancy agreement once the original agreement has expired.

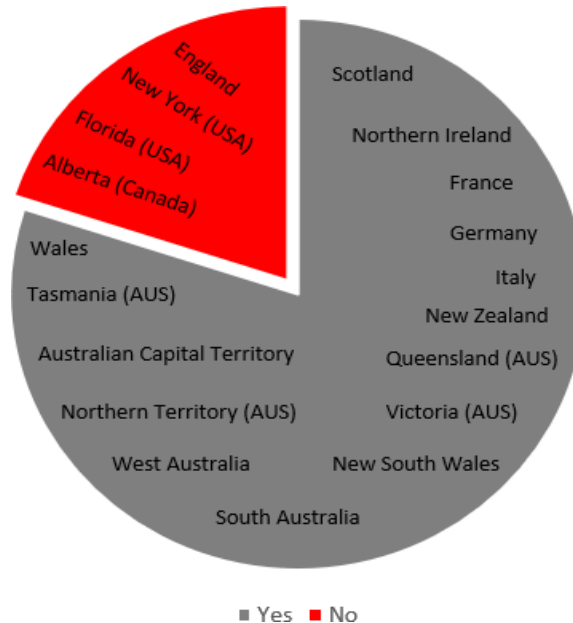


Figure 4 shows jurisdictions in which tenants have the right to renew their tenancy, and those which do not.

3.02 Why is it important? It increases the security tenants have over their home by giving them the right to extend their period of occupation.¹³

3.03 What is the situation in England? A tenant can only renew an existing tenancy agreement with the landlord's consent. It is therefore the landlord's decision whether a new agreement will be created,

3.04 What is the situation in other jurisdictions? A total of 15 other jurisdictions surveyed (at state or country level) allow tenants to automatically renew their tenancy agreement once it has expired; unless either party has served the required notice stating they do not wish to do so.

3.05 In New Zealand and Australia, a periodic tenancy has no set end-date and is ongoing until either party gives notice to quit. In New Zealand, this is 21 days' notice for tenants and 90 days for landlords, unless they are selling the property or have family due to move in, in this case 42 days' notice is required.¹⁴

3.06 Although tenants do not have the right to renew in **New York (USA)**, those in rent stabilized units must be *offered* renewal leases for one or two years, depending on the choice made by the tenant. Landlords must give written notice of lease renewal and if the tenant does not accept the renewal within 60 days, the landlord gains the right to refuse and can proceed in court to evict the tenant after their current lease expires.¹⁵

4.00 Restrictions on Rent Increases

4.01 What are rent increase restrictions? Limits on the ability of the landlord to increase the rent during the period of the tenancy.

4.02 Why are they important? They create security for the tenant who knows his or her rent will not increase to such an extent that he or she will no longer be able to afford to live in his/her home. Rent increases are common. The UK's largest specialist lettings insurance company, Homelet, asked a total of 3,726 landlords, in 2017, whether they were planning to increase the rent amount for their properties. Over 50% stated they were planning to increase the rent either in the next six months (17.9 %) or in the next year (33.5 %).¹⁶ Only 31% stated that they have no plans to increase the rent.

4.02 What is the legal situation in England? A landlord can only increase the rent if there is a "revision clause" in the tenancy agreement. For periodic tenancies, landlords can only increase the rent once a year. A landlord can only increase the rent in fixed term assured shorthold tenancies where it is agreed by the tenant. If the tenant disagrees with the increase, the landlord can still increase the rent at the end of the fixed term (which is usually 6-12 months in England). Government suggests that all rent increases, including those at the end of a fixed term, should comply with the average local rents, although this is not a legal requirement. A minimum of either one month's notice (periodic) or six months' notice (fixed term) must be given by the landlord.¹⁷

4.03 What is the situation in other jurisdictions? The landlord has the right to increase rents in many other jurisdictions during the period of the tenancy. This makes sense in jurisdictions where rental periods are often much longer. But the amount that rents can increase is often capped, and significant notice periods must be given to the tenant about any increases. For instance, the maximum that rent can be increased in **Germany** is 11% per year, and 3 months' notice must be given to the tenant of the intention to increase.

4.04 Rent increases in **France** are only allowed if a revision clause is included in the tenancy agreement, and they must also be based on statistical averages (price index) for rent amounts in surrounding areas.¹⁸

4.05 Rent controls are compulsory in **Italy** in temporary contracts. The amount payable is fixed through agreements amongst local representative landlords' and tenants' associations. The amount is also dependent on the kind of dwelling and its location, characteristics, age, conditions, services and parking areas.

4.06 Landlords in **Italy** can opt for a tax regime called "cedolare secca" which translates to flat rate tax. When landlords opt for this, in temporary contracts, their tax amount payable from rent received is reduced by 30% compared to other tax regimes. The positive outcome of this regime is that the landlord has less tax to pay on their rental income and the tenant can enjoy protection against rent increases. Other contracts, those that are not temporary and do not operate

this tax regime, can only implement rent increase clauses if local tenant and landlord associations allow it. In cases of assisted tenancies, the landlord cannot increase the rent by more than 75% of the average rate (which is published by the National Institute of Statistics). All rent increases will only become **valid** when they have been registered at the Agenzia delle Entrate (the tax office).¹⁹

4.07 In New York, increases in rent are not permitted for certain categories of persons including for persons older than 62 years-old and those with disabilities who have a “Notice of Award” such as social security disability income or disability-related Medicaid. There are also many “rent controlled” units which also prohibit rent increases.²⁰ In **New South Wales** (Australia) landlords are prohibited from increasing the rent for the first 2 years of the agreement.²¹

5.00 Tenants Withholding Rent

5.01 What is ‘withholding rent’? The ability of the tenant to refuse to pay rent to the landlord in specified circumstances without untoward consequences.

5.02 Why is it important? Allowing tenants to withhold rent or giving them a right to be reimbursed within a certain period, increases their confidence in being able to carry out their own repairs and not relying on the landlord to do so.

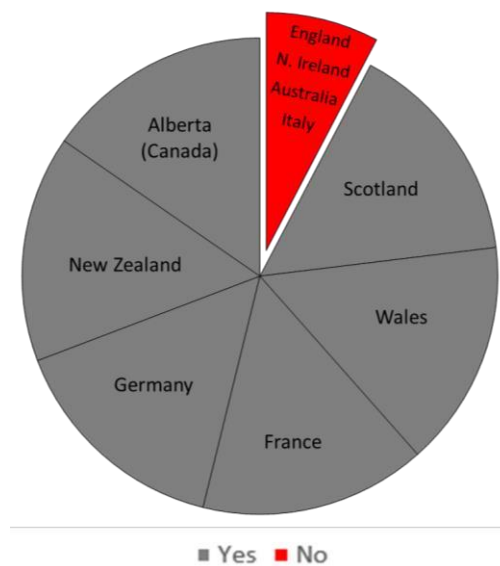


Figure 5 shows jurisdictions in which tenants have the right to withhold rent, and those in which they do not.

5.03 What is the situation in England? If a tenant withholds their rent in England, regardless of the reason behind it, the landlord is able to take the necessary steps to evict them. This is because the landlord’s obligations and tenant’s obligations are considered separate, meaning that if one party is in breach of their obligation(s) it does not release the other from their obligation(s). Upon failing to conduct a repair, requested by the tenant, landlords can be given a specified time to complete the works before a tenant has the ability to authorise a third party to do so. The third party, however, must be a reliable contractor who provides the *cheapest* quotation; restricting the tenant’s ability to ensure the repairs are carried out efficiently and, perhaps, effectively.²² Not only are tenants prohibited from withholding or deducting rent in England, they are also responsible for minor repairs within the dwelling. Whether a repair is “minor” or not is usually determined by the cost to repair, rather than the importance of repairing.

5.04 What is the situation in other jurisdictions? Some other jurisdictions

allow a tenant to withhold rent so that they can carry out repairs themselves. They also allow rent to be withheld because their home is not in a habitable state (as defined) and it is affecting their ability to occupy the dwelling for health and safety reasons. Such jurisdictions include **France, Germany and California.**²³

5.05 In Victoria²⁴ and Capital Territory²⁵ (Australia) if there is a dispute between the tenant and landlord, or the tenant is awaiting repairs, the tenant is able to pay their rent into the Tribunal's account pending dispute decisions or repair completion. There is a similar process in **France**, which is further discussed in the next section of this report.²⁶

5.06 In New Zealand, tenants can apply to the Tenancy Tribunal to be granted permission to withhold rent. In most cases, the lease will state whether withholding the rent is permitted or not; where it is permitted tenants can withhold rent if the landlord fails to comply with their obligations. The landlords omissions are usually covered by an abatement clause and if the tenant cannot withhold the rent, they can instead be entitled to a reduction which will continue until the breach is remedied.

6.00 Landlord and Tenant Dispute Resolution

6.01 What is landlord and tenant dispute resolution? Dispute resolution services can provide a quicker, easier and less costly way of resolving disputes in comparison to litigation. The most common types of resolution service are mediation and conciliation.

6.02 Why is it important? Alternative dispute resolution is important for both landlords and tenants for various reasons, mainly the cost and formality of court proceedings. It allows for both parties to discuss their reasons for dispute and come to an agreed resolution between themselves with the help of a third party. It also allows for more amicable outcomes in comparison to court orders and compensation.

6.03 What is the situation in England? According to the Housing Ombudsman Service (HOS), over 80% of all landlord and tenant disputes referred to them are resolved. The HOS addresses how landlords respond to their responsibilities per the tenancy agreement; they do not consider elements of anti-social behaviour, harassment or even the condition of the property.²⁷ A dispute will only be referred to the Ombudsman if eight weeks has passed since the end of the landlord's personal complaints procedure or if either party has contacted an MP. The landlord must be a member of the HOS for a complaint to be considered. As of March 2017 HOS had 2,471 landlords in membership, representing 4,761,158 rented properties. It can take up to **12 months** for a decision to be made.

6.04 It is compulsory for *social* landlords to have a membership and this constituted 3.9 million homes as of the English Housing Survey (2016-2017). On the other hand, it is voluntary for private landlords to become members of the HOS and the private rented sector accounted for almost 5 million homes as of the EHS (2016-2017) this would leave an estimated 4.1 million privately rented homes where the landlord is not be a member of the HOS and where tenants would have to rely on alternative dispute schemes.²⁸

6.05 Tenancy Deposit Schemes (TDS) are available in England for disputes regarding a tenant's deposit, including reimbursement and deductions. It usually offers free dispute resolution services to both landlords and tenants but this is only covering the tenant's security deposit. It is mandatory that the landlord places a tenant's security deposit in a government-backed deposit scheme for Assured Shorthold Tenancies, all other types of tenancy are not protected by the schemes.²⁹

6.06 What is the situation in other jurisdictions? A number of countries/states offer conciliation services to tenants and landlords **without** the requirement of a scheme membership including **Wales, France, Germany, New Zealand, Australia and Washington USA.**

6.07 In **Germany**, more than 10 federal states have established a *mandatory pre-trial conciliation* procedure which must be undertaken if the amount in dispute is less than 750 EUR.³⁰

<i>Dispute Resolution Schemes: Types of Dispute</i>	Rent/Service Charges	Ending a Tenancy	Possession Proceedings	Property Condition <i>Repairs / Improvements</i>	Wrongful Eviction
Housing Ombudsman UK	✓	✓	✓	✓	X
ACAT AUS	✓	✓	✓	X	✓
CDC FR	✓	✓	X	✓	✓
Pre-Trial DE	✓	✓	✓	✓	✓
Tenancy Services NZ	✓	✓	✓	✓	✓
Resolution Washington USA	✓	✓	X	✓	✓

Table 6 shows the types of common dispute covered in the ADR schemes across various jurisdictions.

6.08 The Housing Ombudsman Scheme, in England, aims to resolve disputes within 12 months and other Tenancy Deposit Schemes allow over a month just for an initial response from either party. Whilst they are undergoing this process, the tenant usually continues to pay their rent, in full, to the landlord and there is no alternative to this, even if the property is uninhabitable. **France**, on the other hand, offers a remedy to tenants in this situation by allowing them to pay their rent into a blocked account within the *Commission Départementale de Conciliation* whilst awaiting resolution. This provides tenants with much more protection whilst in dispute with their landlord and suspends their responsibilities to pay rent when living in a property that is insalubrious.³¹

7.00 Other Issues

7.01 There are a number of other areas where landlords and tenants can get into dispute which involve issues that are important to the tenant. These include restrictions regarding subletting, the imposition of repair obligations on the tenant and “no pet” clauses. These are discussed in turn below.

7.02 Subletting

7.02.1 In England, periodic tenancy landlords can refuse consent for the tenant to sublet part of their property for any reason. Fixed term tenancies, on the other hand, do not have the requirement of consent unless the agreement includes a clause regarding subletting. In instances where this clause is present, landlords still cannot refuse consent unless it is for good reason, this is usually the case for *assured shorthold tenancies*. The issue here lies with shorter tenancies in which the landlord is able to refuse consent for tenants to sublet.³²

7.02.2 Why is this important? Providing tenants with more freedom within their tenancy to sublet part of the property will open up potential for landlords as it appeals to a wider range of people, including those who travel frequently and wish to sublet whilst they are away. If tenants are typically away from the property for extended periods, the property will naturally become more of a target for criminal activity. Tenants who are likely to travel regularly would much prefer returning to a property in which they have already resided than ending and renewing the same lease multiple times as there is always a risk of the landlord refusing to renew after they have replaced the original tenant whilst they were travelling. Furthermore, allowing tenants to sublet will enable the landlord’s property to be occupied closer to 100% of the time, also students and those with a low-income would be able to obtain help with their rent payments as their subtenant can contribute when a spare room is rented out.³³

7.02.3 Unlawful subletting in England can result in an un-capped fine or two years imprisonment, or both. To compare this to social tenancies, it is a criminal offence to sublet without permission from a housing association or local authority landlord. It is also an offence to be “dishonest” about subletting, which ultimately includes any tenant that gains profit from the sublet.³⁴

7.02.4 Many subtenants have an assured shorthold tenancy, so they receive the same rights as other tenants and require equally as much increase in protections as mentioned throughout this report.

7.02.5 Landlords can only refuse consent to sublet if there is a prohibition clause within the tenancy agreement **in Northern Ireland**. If there is no such clause, the person that the tenant sublets to will be protected under the rights of the original tenant.³⁵

7.02.6 There are more landlord restrictions, in regard to subletting, **in South**

Australia. As well being unable to refuse consent without good reason, the landlord also cannot charge any extra rent or ask for an additional charge for their consent to sublet. The landlord cannot add conditions to the lease agreement in order to limit or deny the ability to sublet.³⁶

7.02.7 In **Alberta, Canada,** tenants can sublease or assign the premises to someone else without the landlord’s consent if the landlord fails to reply to their request to do so within 14 days. After the 14-day period, the tenant is entitled to assume that the landlord agrees. If the landlord does reply to the request and disagrees, they must provide reasonable grounds for refusing as failure to do so can also result in the tenant continuing without their consent.³⁷

7.03 Repair Obligations

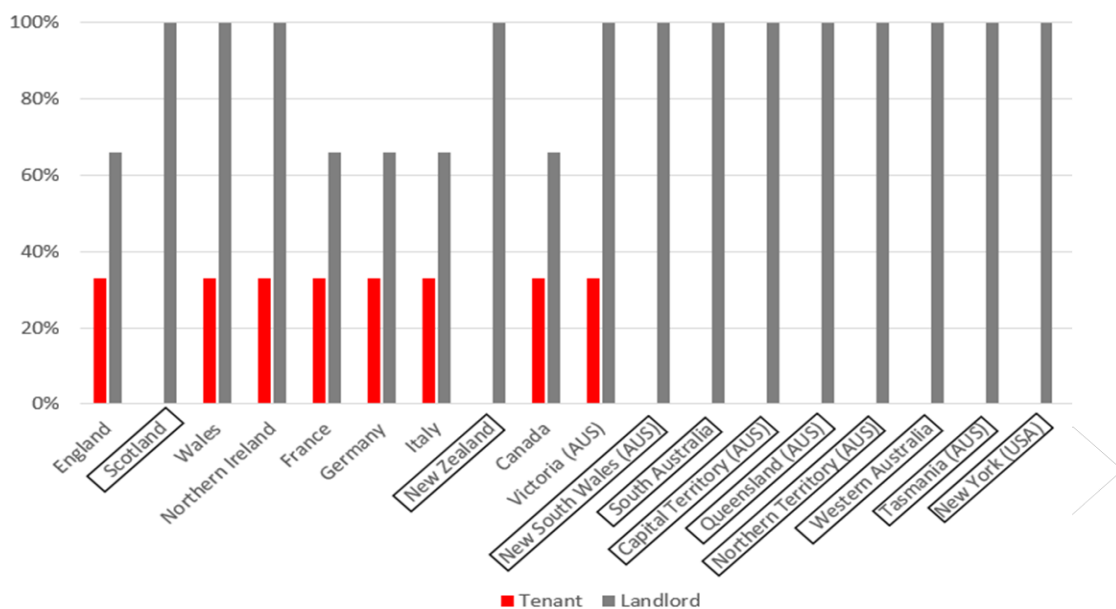


Table 7 shows the % of repair obligations (minor, major and urgent) that are the tenant’s responsibility.

7.03.1 More than half of the jurisdictions shown do not impose any repair obligations on the tenant, other than repairing damage caused by themselves or their guests. This ultimately takes away any financial strain on tenants and gives reasonable responsibilities to the landlord. The type of repairs that tenants are responsible for in the other jurisdictions, shown in red, are minor repairs or maintenance.

7.03.2 In England, the courts tightly defined what is “disrepair” in the Landlord and Tenant Act 1985. The following repairs are mandatory for landlords to carry out (they cannot be cancelled out by anything in a tenancy agreement and the landlord cannot pass on the cost of the work that is their responsibility):

- The structure and exterior of the dwelling (the walls, roof, foundations, drains, guttering, external pipes, windows and external doors);
- Basins, sinks, baths, toilets and their pipework;

- Installations for water and gas, electrical wiring, water tanks, boilers, radiators, gas fires, fitted electric fires or fitted heaters.

7.03.4 Many jurisdictions allow tenants to be reimbursed for any repairs that they carry out themselves. For example, in **Germany**, tenants are reimbursed for repairs which correspond with the landlord's interest, without the landlords' permission. Tenants can also claim reimbursement for remedied defects against the landlords' request for rent.³⁸

7.03.5 There are certain limitations for the amount that a tenant can be reimbursed for repairs in the following **Australian States**:

- Victoria – tenants are reimbursed for costs up to \$1800 / **£1345** / **€1535**³⁹
- New South Wales – tenants are reimbursed for costs up to \$1000 / **£746** / **€852**⁴⁰
- Northern Territory – tenants are reimbursed for repairs that cost the same amount as, or less than, two weeks rent.
- Capital Territory – tenants are reimbursed for repair costs equivalent to 5% of their annual rent.⁴¹

7.03.6 In **Queensland**, Australia, the tenant is entitled to receive reimbursement for repairs that they have arranged, for the amount stated on the receipt. The landlord has just 7 days to complete the reimbursement to avoid breach of the agreement.⁴²

7.03.7 In **Australia's Capital Territory**, not only are landlords responsible for all repairs, tenants are also not liable to return the premises in perfect condition, they are able to leave it in "everyday state" which is usually termed "fair wear and tear" in England. Landlords also allow for fair wear and tear in **New Zealand** and are responsible for all repairs.⁴³

7.03.8 75% of the states covered in the **USA** allow tenants to deduct the cost of any repairs they conduct themselves from the rent due as reimbursement.

7.03.9 The *Italian Civil Code* mandates that tenants can demand to discharge the contract or reduce the rent in cases of vices (defects that affect the structure and quality of the premises) but cannot carry out repairs themselves without permission.⁴⁴

7.03.10 *Move-In / Out Inspections* can minimize the risk of landlord and tenant disputes regarding accusations that either party failed to repair damage during the tenancy or that existing damage was not disclosed at the beginning of the tenancy. Although advised in England, they are not mandatory. The inspections help to ensure the property is returned in the same condition as it was at the beginning of the tenancy agreement.

7.03.11 Jurisdictions where inspections are mandatory

Move-In	Move-Out
Scotland	
France	France
New Zealand <i>Recommended</i>	New Zealand <i>Recommended</i>
Alberta (Canada)	Alberta (Canada)
Victoria (AUS) <i>After 3 Months</i>	
South Australia	South Australia
Northern Territory (AUS)	Northern Territory (AUS)
Tasmania (AUS)	
	Western Australia
	Capital Territory (AUS)
	Washington (USA) <i>Deposit Deductions</i>

Table 8 shows the jurisdictions that require *mandatory* inspection records when tenants move in and out.

7.04 No Pet Clauses

Jurisdiction	“No Pet” Clause
England	<i>Included in the Tenancy Agreement</i>
France	<i>Unlawful to prohibit keeping of pets</i>
Germany	<i>Prohibition of pets is ineffective</i>
New Zealand	<i>Prohibition of pets is un-enforceable</i>
Australian Capital Territory	<i>Prohibition of pets is ineffective</i>

Table 9 shows the jurisdictions that have stronger restrictions for the use of a “no pet” clause.

7.04.1 In England, tenants must seek legal advice themselves if the landlord has prohibited the keeping of pets and they require a service animal (such as a guide or hearing dog). There is, therefore, need for a regulation ensuring the need for a service animal is not discriminated against. It should be mandatory to include to exclude service animals from prohibitions on pets in contracts.

7.04.2 In 2015, a tenant in England started a petition on Change.org to get rid of the use of a “no pets” clause in tenancy agreements for all domesticated pets, which received over 50,000 supporters.^{45 50} The petition stated that only a small percentage of landlords are willing to accept tenants with pets. This ultimately decreases housing opportunities for low-income families who are unable to obtain a mortgage and happen to be part of the 12 million households in the UK that own a pet.⁴⁶

Conclusions

In conclusion, tenants are less protected in England than other jurisdictions. Their rights and their ability to enforce those rights should be improved.

Firstly, the security and length of tenure should be increased. The mean length of tenure for the jurisdictions studied is 25 months. This is more than twice the average length in England, which is 6-12 months. Providing a longer lease improves home stability for upholding a career and supporting children at school. A 2011 report on housing insecurity in the US showed that crowding in the home and multiple moves due to a lack of security and increased eviction has serious effects on children. These issues are directly associated with mental health issues, social relationships, respiratory and other health issues as well as behavioural problems. The report also concluded that almost half of the study sample admitted to having been seriously affected by housing insecurity.⁴⁷

There is a big difference between a “dwelling” and a “home”. The dwelling (house or flat) is the physical structure that provides shelter and the necessary space, facilities and amenities for the occupant(s) or intended occupant(s). It should provide protection from the local climate and give an optimum indoor environment for the occupants, it should allow for the normal day-to-day activities throughout the year without problems, and its condition should be such that it does not interfere with the establishment of a home. It should have sufficient space to allow for the inter-relationship between the members of the household and allow individuals the opportunity for privacy.

The home is the social, cultural and economic structure created by the individual or household. It is the structure that gives a human refuge from the outside world, enables the development of a sense of identity and, for a household, a sense of attachment to the local community. The home creates an environment where one can be, and can develop, oneself.

To improve security of tenure, England could adopt a silent renewal approach, as seen in **Scotland**, or a similar approach seen in Italy in which tenants gain two extra years of tenancy for every three years they have been in occupation under their agreement. This will immensely improve tenant’s sense of security within their home.

A landlord’s ability to resume possession of a property is another element that directly affects a tenant’s sense of security. Ideal approaches are taken by **France** and half of the states in **Australia** in that landlords are prohibited from resuming possession, without good reason, until the end of the fixed term. This will increase home stability by minimizing the risk of forced eviction with short notice and it subsequently increases the average length of tenure.

Furthermore, 75% of the other jurisdictions researched in this report allow tenants to automatically renew their tenancy agreement once it has expired; unless *either* party serves a required notice to terminate. It should not be down

to the landlord's consent alone as this imposes a high risk of forced eviction and homelessness as a result of a process which was out of the tenant's control. At the very least, tenants should be offered renewal leases by receiving notice of renewal and upon failure to accept, the landlord will then gain the right to refuse; as seen in **New York (USA)**.

Another area to improve is rent increase restrictions, starting with a longer period of exemption than one year for periodic tenancies. In **New South Wales (Australia)** landlords cannot increase the rent in the first 2 years of the agreement, which provides much more security to tenants. There should also be certain exemptions, as seen in **New York (USA)**, for those who are less likely to be able to meet rent increase demands such as senior citizens; those with a disability and low-income families. These implementations also allow for the length of tenure to increase and also give families more security within their tenancies. If tenants were given a longer period of exemption from rent increases and those who are less likely to be able to adapt to rent increase demands were exempt from them, it would allow for the average length of tenure to increase and will provide families with more security within their tenancies. Categorical exemptions will allow for low-income families, seniors and those with a disability to continue occupation within their agreement without the risk of unexpected financial strain or forced eviction as a result of inability to meet rent increase demands.

The inability to withhold rent, which can result in eviction, prevents tenants from remedying uninhabitable dwellings whilst awaiting resolution of disputes. In **France, Germany and California (USA)** tenants are able to withhold rent for their carrying out of repairs and due to the property being insalubrious England should, therefore, adopt a similar approach to provide tenants with more control and remedies for repairs and awaiting dispute resolution.

The use of the Housing Ombudsman Service (HOS) and Tenancy Deposit Schemes (TDS) have membership requirements and do not cover every area of dispute between landlords and tenants. **Scotland, Wales, France, Germany, New Zealand, Australia, and Washington (USA)** all offer conciliation services to tenants and landlords without the requirement of a membership. England could adopt a pre-trial mandatory conciliation procedure, as seen in more than 10 federal states in **Germany**, for cases in which the amount in dispute is less than a certain amount (750 EUR in Germany).

The dispute resolution process should be less time consuming. The current aim for HOS is to resolve disputes within 12 months. The **Australian Capital Territory Civil and Administrative Tribunal** aims to resolve disputes in just 14 days and more than 35% of jurisdictions use tribunals for landlord and tenant dispute resolution as the decision is usually given on the same day as the hearing. England could implement a free conciliation service that aims to provide quick and free decisions for both parties.

Whilst landlords and tenants are in dispute, tenants should have the facility to pay their rent into a blocked, separate bank account of a tribunal or conciliation organisation. This is seen in **Victoria, Capital Territory (AUS) and France** where tenants pay rent into a blocked account, providing them with better protection and suspending their responsibility to pay rent when living in a property that is insalubrious.

England should adopt a similar approach to the jurisdictions mentioned by providing a dispute resolution service that is free, not time-consuming and is available to every landlord and tenant with no membership requirement. The service should address issues outside of security deposits, such as the rights and obligations of either party and the independent adjudicator should consider evidence given regarding behavioural issues and the condition of the dwelling. The service should also provide tenants with a remedy to alleviate their responsibility of paying rent, whilst disputing the condition of a property that has been evidently shown to be unfit for human habitation.

The following conclusions will minimize the possibility of disputes.

It is imperative to tenants in England, who require a service animal, for the animal to be exempt from “no pet” clauses within tenancy agreements. There must be a disclosure to eliminate discrimination amongst landlords who refuse to allow such domesticated animals within their properties.

Certain tenants, especially those who travel frequently, would benefit immensely from the freedom to sublet whilst they are away. The criminal offence of subletting should be diminished in these cases as it is beneficial to all parties involved.

If the landlord is responsible for all repairs, as happens in most jurisdictions, this benefits the landlord as (s)he is in control of the repairs that are carried out and at the same time ensures the property is maintained in a good state of repair. The **Italian Civil Code** mandates that tenants cannot invoke remedies themselves and in **Australia’s Capital Territory**, tenants are not liable for repairs nor do they have to leave the property in perfect condition; it can be left in “everyday state”. The only situation where tenants should be able to arrange for repairs or other works is in an emergency situation (e.g. blocked drain, heating system in winter etc.), and then recover the cost from the landlord, if necessary by withholding rent to cover the cost.

It is recommended that England adopts a similar approach by eliminating the responsibilities imposed on tenants to conduct any category of repairs themselves. There are many reasons as to why tenants should not be responsible for repairs that were not caused by themselves or their guests, children and pets. Examples of these are as follows:

1. Landlords will have the ability to control what repairs are carried out, by whom and what the cost will be without the risk of tenants conducting faulty repairs that could further damage their property.

2. Landlords have more experience and are in a better financial position to carry out repairs in comparison to the average tenant.
3. If the landlord is responsible for minor repairs, they can ensure that they are completed, and this will ensure that their property is maintained to their own condition standards.
4. Tenants naturally feel less responsible for repair needs that were not caused by their own acts or omissions, resulting in a minimized chance that the necessary repairs will be carried out within the duration of the tenancy.
5. Future tenants are subsequently less likely to accept the condition of a property if it is apparent that previous tenants have failed to conduct minor maintenance, which is currently deemed to be their responsibility.

Landlords should conduct all repairs to benefit themselves and both previous and future tenants by eliminating risk of repairs being ignored and ultimately becoming the responsibility of the landlord at the end of the agreement.

Finally, the implementation of mandatory moving in and out inspections, with evidence of completion, is essential to ensure that neither party can begin dispute over failed repairs and damage caused before or during the tenancy.

These conclusions support the introductory recommendations in the executive summary of this report and provide ideas from other jurisdictions in how to achieve stronger tenant rights and enforceability.

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