



# **A Response to the TSA Discussion Paper:**

## ***“Building a new regulatory framework”***

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## About HLPAs

Housing Law Practitioners Association (HLPAs) is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing law.

Membership: this is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. HLPAs has existed for over 20 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves.

The Association is regularly consulted on proposed changes in housing law (by primary and subordinate legislation and also by other means such as relevant codes) by the relevant Department, currently the CLG (department of Communities and Local Government).

Most recently it made a communication to the Committee of Ministers of the Council of Europe on the execution of the judgement of the European Court of Human Rights in *McCann v UK* under Rule 9 of the Committee of Ministers Rules (March 2009), responded to the Legal Services Commission's consultation paper on changes to civil legal aid remuneration (May 2009) and to the "Review of Civil Litigation Costs : Preliminary Report- the "Jackson Report"(July 2009)

The Chair, Vivien Gambling, is an experienced housing specialist and currently works for Lambeth Law Centre. Although the Association is London based, the membership is countrywide. The Association is also informally linked with similar Housing Law Practitioners Groups in the North-West, South Yorkshire and the West Midlands.

Membership of HLPAs is on the basis of a commitment to HLPAs's objectives. These objectives are:

- To promote, foster and develop equal access to the legal system.
- To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
- To foster the role of the legal process in the protection of tenants and other residential occupiers.
- To foster the role of the legal process in the promotion of higher standards of

housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.

- To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

The HLPAs Law Reform Group has prepared this communication. This group meets regularly to discuss law reform issues as it affects housing law practitioners. The Convenor of the group reports back to the Executive Committee and to members at the main meetings which take place every two months. The main meetings are regularly attended by over 100 practitioners.

## **1. Introduction**

1.1 HLPAs approach this consultation from their particular expertise gained through acting for tenants in dispute with their social landlords and for applicants seeking access to social housing. Our members have a particular insight of the consequences when relationships break down and where social landlords do not have fair procedures to resolve these situations. This gives a different perspective from the National Conversation which has focused on the views of the majority of tenants who do not come into dispute with their landlords. However, if “tenant empowerment” is to be practical and effective, rather than merely theoretical and illusory, the TSA must ensure that its regulatory framework requires social landlords have robust procedures to deal with areas of potential conflict.

1.2 This consultation overlaps with three other consultations which will impact upon the TSA’s regulatory framework. Our response anticipates what may arise from these consultations:

(i) “The Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2009”. Consultation closes on 30 October 2009. We anticipate that the appropriate order will be made and that local housing authorities (LHAs) who remain providers of social housing will be registered and regulated by the TSA from April 2010.

(ii) “Directions to the TSA”. Consultation closes on 9 October 2009. We anticipate that the Secretary of State will issue directions to the TSA under s.197 of the Housing and Regeneration Act 2008 (“the Act”) on rent policy, quality of accommodation and tenant involvement. These are not issues which we address in this response.

(iii) “Fair and Flexible: Draft Statutory Guidance on social housing allocations for local authorities in England”. Consultation closes on 23 October 2009. We anticipate that further statutory guidance will be issued to LHAs under Part 6 of the Housing Act 1996 (HA 1996). This will reinforce the current government policy set out in “Allocation of Accommodation: Choice Based Lettings: Code of Guidance for Local Housing Authorities” (August 2008), namely that LHAs and other registered providers should move towards common allocation schemes and maintain common housing registers. This is an issue which we address in Section 7 below.

1.3 In our response, we use the phrase “social landlords” to embrace both LHAs and other registered providers. The standards which we discuss relate to social landlords who provide low cost rental accommodation (as defined by s.69 of the Act). We do not address specifically standards in respect of low cost home ownership. We use “RSL” to refer to social landlords who are currently registered social landlords, but who will become registered providers in April 2010.

1.4 HLPAs focus on the following areas:

- (i) The role of registered providers as public authorities
- (ii) Security of Tenure
- (iii) Tenancy Agreements
- (iv) Evictions
- (v) Allocations
- (vi) Diversity

## **2. The Statutory Framework for Regulatory Standards**

2.1 We understand that the policy objective of bringing LHAs within the regulatory regime provided by the TSA is to secure a level playing field between the tenants of LHAs and other registered providers. This also extends to access to social housing (see Section 1 of the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2009: Consultation).

2.2 We suggest that it is difficult to achieve these objectives given the current statutory framework. It is a matter of regret that these were not addressed in the 2008 Act:

- (i) LHAs are public authorities for the purposes of the HRA 1998 and the various equality duties. RSLs have been reluctant to accept that they are also public authorities for these purposes. Current case law would suggest that they are (see *R (Weaver) v London and Quadrant [2009] EWCA Civ 587*).
- (ii) LHA tenants occupy as secure tenants under Part 4 HA 1985; RSL tenants occupy as assured tenants under Part 1 Housing Act 1988 (HA 1988). The grounds upon which possession may be sought differ. There are different rights of succession upon

the death of the tenant. There are different provisions in respect of assignments. Secure tenants have their statutory right to buy under Part 5.

(ii) LHAs must maintain an allocation scheme maintained pursuant to Part 6 HA 1996 and allocate social housing within strict statutory provisions. RSLs currently allocate accommodation under the regulatory code and guidance which was issued by the Housing Corporation. The differences between these two regimes were discussed in an article “Allocating Social Housing: the registered social landlord context” (Robert Latham, Legal Action, October 2008 at p.42)

2.3 In considering any regulatory standards, HLPAs have had regard to the TSA’s fundamental objectives (s.86 of the Act) and the provision for setting standards which are specified in s.193. We make the following observations:

(i) The TSA’s stated objective of “empowering tenants” is one which we support. However, HLPAs are concerned that “tenant empowerment” should be practical and effective. Concern has been expressed that the TSA is merely paying lip service to this principle.

(ii) Objective 2 requires the TSA to ensure that tenants and potential tenants have the appropriate degree of “protection”. This is particularly relevant to standards in respect of security of tenure and evictions.

(iii) Objective 10 requires any regulation to be “proportionate, consistent, transparent and accountable”. HLPAs believe that the TSA should give unambiguous guidance as to the obligations placed on all registered providers as “public authorities”.

(iv) Section 193 makes specific provision for standards to be set as to “criteria for allocating accommodation” and “terms of tenancies”. These must be addressed in any regulatory framework.

2.4 On 6 April 2006, the Law Commission published its Rented Homes Bill. This sought to achieve a level playing field for tenants of LHAs and RSLs. Such tenants would normally occupy under a “secure contract”. However, it would be open to social landlords to issue standard contracts as probationary agreements or in other circumstances. The Law Commission was satisfied that a social landlord seeking to evict a tenant occupying under a

secure contract on grounds of rent arrears should be required to establish that the eviction is necessary/proportionate.

2.5 In May 2009, the government announced that it does not consider that the time is right to implement the Rented Homes Bill because of the burdens and uncertainty that this would create for both tenants and landlords at a difficult time in the housing market (see para 17 of the Consultation Paper “The Private Rented Sector: professional and quality – The Government response to the Rugg Review”). HLPAs reject this view. We believe that this Bill would simplify the law and reduce burdens on landlords. It would empower tenants by enabling them to better understand their rights. It would ensure the level playing field between tenants of LHAs and RSLs. We hope that the TSA will lobby the government to implement the Bill at the earliest opportunity.

2.6 Given the current unsatisfactory state of the primary legislation, HLPAs are concerned that the TSA is consulting on a new regulatory framework at a time when there is also a lacuna in government policy as to the role of social housing. A housing green paper was promised at the end of 2008. We understand that the plans for a housing green paper have now been shelved by the current housing minister, the ninth minister since May 1997.

2.7 Professor Martin Cave in his report “Every Tenant Matters: A review of social housing regulation” (June 2007) noted the current failure to adequately separate policy and regulation leading to the unacknowledged implementation of policy by regulation. This reflects what Dominic Grieve MP described in his recent Boydell Lecture as “the slow death of ministerial responsibility”. HLPAs would stress that it is not the role of the TSA to usurp the development of a policy for social housing which is properly the preserve of parliament and government.

### **3. The Role of Registered Providers as Public Authorities**

3.1 HLPAs recommend that the regulatory framework should reflect the fact that all social landlords are public authorities for the purposes of the HRA 1998 and the various equality duties. Whilst the concepts of public authority for the purposes of judicial review, the HRA and the Equality duties are not identical, they are similar.

3.2 The leading authority is the Court of Appeal decision in *R (Weaver) v London and Quadrant [2009] EWCA Civ 587*. The Court of Appeal held that a decision by L&Q to terminate a tenancy was in principle subject to the HRA. Whilst the determination of whether any RSL is a hybrid public authority is fact sensitive, most RSLs are likely to be caught by the

judgment. The Court identified the following factors: (i) the public subsidy which enabled L&Q to achieve its objectives; (ii) the statutory duty on L&Q to cooperate with local authorities in the allocation of its accommodation; (iii) L&Q's contribution to the government objective of providing subsidised housing; (iv) the extent to which L&Q was acting in the public interest and has charitable objectives; and (v) the nature of the regulatory framework within which it operated. The relevant regulatory framework was that provided by HA 1996. It is the more likely that registered providers will be public authorities.

3.3 This decision is consistent with the view of the Joint Committee on Human Rights in their report "The meaning of Public Authority under the Human Rights Act (HL Paper 22/HC 410 28 March 2007). This is also the view of the Equality and Human Rights Commission who intervened in *Weaver*.

#### **4. Security of Tenure**

4.1 HPLA believes that all social tenants should be given the maximum social security of tenure equivalent to that provided to secure tenants by Part 4 HA 1985. The HA 1988 was passed at a time when Parliament believed that tenants of RSLs should be provided with the same security of tenure as private tenants. All that has changed with the stock transfers which have occurred over the past 20 years.

4.2 We accept that a level playing field will not be secured between tenants of LHAs and RSLs until the Rented Homes Bill, or something equivalent, is implemented. However, in the interim, it is open to the TSA to seek to level up the rights of tenants of RSLs in respect of rights of succession (ss.87-89 HA 1985) and assignment, lodgers and sub-letting (ss.91-95).

4.3 The discussion paper suggests that tenants might be offered less than full security in areas of high demand (para 4.99). We cannot support this proposal. It will not be open to LHAs to do this. RSLs should normally grant assured tenancies. Assured shorthold tenancies are only acceptable as "starter tenancies" to mirror "introductory tenancies" under Part 5 HA 1996. To suggest that social tenants should be granted less than full security is usurping the role of those entrusted with such policy decisions.

#### **5. Tenancy Agreements**

5.1 The covenant to repair implied by section 11 of the Landlord and Tenant Act 1985 does not require a landlord to remedy an inherent defect, i.e. inadequate thermal insulation which causes condensation induce dampness (see *Quick v Taff Ely [1986] QB 809*). We suggest that

there should be a covenant for fitness, as provided by s.8 of the Landlord and Tenant Act in respect of tenancies at low rents. Clause 43 of the Rented Homes Bill proposes a standard that “the landlord must ensure that (a) there is no category 1 hazard on the premises and (b) if the premises form part only of the a building, there is no category 1 hazard on the structure or exterior of the building or the common parts”. We recommend this as a standard term.

5.2 HLPAs also recommend a standard clause imposing a duty of care to protect the most vulnerable tenants. This would reverse the effect of the recent Court of Appeal decision in *X v Hounslow LBC [2009] EWCA Civ 286*.

## **6. Evictions**

### Ground 8

6.1 HLPAs do not believe that RSLs should use Ground 8, namely the mandatory ground for possession based on 8 weeks rent arrears. This was intended for private landlords. There is no equivalent in Part 4 HA 1985. It should be a regulatory requirement that a social landlord seeking to evict a tenant with security of tenure should satisfy a court that the proposed eviction is reasonable/proportionate. In *North British Housing Association v Matthews [2005] 1 WLR 3133*, the Court of Appeal noted how there is no defence to Ground 8 claims even where the arrears arise through the default of the housing benefit authority.

### Starter Tenancies

6.2 RSLs who grant assured shorthold tenancies as “starter tenancies” or who seek to evict demoted tenants should be required to provide similar procedural safeguards to those provided to introductory tenants under Part 5 HA 1996. There should be a right of review before a RSL commences possession proceedings against such a tenant. The assured shorthold tenancy should mature to an assured tenancy after one year unless the RSL has commenced possession proceedings in the interim.

### Eviction of tenants who do not have security of tenure

6.3 Any social landlord who seeks to evict an occupant who does not have security of tenure should be required to follow robust procedures to comply with an occupant’s right to respect of their home contained in Article 8 of the European Convention.

6.4 We highlight this passage in the earlier Law Commission Consultation Paper “Renting Homes - 1: Status and Security” (No.162, March 2002) at para 5.70:

“We consider that the way that the case law has developed since October 2000 makes a significant difference to the availability of any procedure by which a public authority landlord can recover possession without a court being able to consider the reasonableness or proportionality of evicting the tenant. In short, any procedure which automatically leads to possession being granted without a court having to exercise its discretion must be accompanied by some other procedure adequate to determine the question of proportionality”.

6.5 This view has been affirmed by the recent decision of the ECtHR in *McCann v UK* [2008] HLR 50. This is likely to be reinforced when the ECtHR gives judgment in *Kay v UK* (App No.37341/06) later this year.

6.6 In “Review of Civil Litigation Costs: Preliminary Report” (May 2009), Lord Justice Jackson (at p272) proposes a protocol where any public body is proposing to issue possession proceedings against occupants with no security of tenure. Public bodies should write to the occupants explaining why they currently intend to seek possession and inviting the occupants to notify the landlord in writing of any personal circumstances which they wish the landlord to take into account. The public body should consider any such representations before deciding to pursue the claim for possession and give brief written reasons for doing so. If they decide to proceed, the relevant correspondence should be annexed to the Claim Form.

6.7 HLPAs believe that such a protocol would help ensure that social landlords act in a Convention compliant manner and enable a Court to determine at an early stage whether there is any Article 8 defence with a real prospect of success. However (as stated in our response to the “Review of Civil Litigation Costs” Preliminary Report Vol 1 May 2009 – The Jackson Report at paras 11 and 12) “we are concerned that it be made clear to the occupants that the information is being sought to enable the public authority to decide whether to issue proceedings or not. Otherwise there is likely to be an understandable reluctance to answer inquiries about personal circumstances. In addition allowance needs to be made for the inarticulate, illiterate, or non English speaking occupant if a genuine attempt to obtain relevant information is to be made.” and “The opportunity could be taken to make it clear that the Protocol applies to all social landlord possession cases where the reason for seeking possession is rent arrears even those where the tenant had no security of tenure (eg because the tenancy was granted pursuant to the local authority’s powers and duties under the homelessness legislation – Schedule 1 para 4 Housing Act 1985)”.

## **7. Allocations**

7.1 LHAs must maintain an allocation scheme maintained pursuant to Part 6 HA 1996 and allocate social housing within strict statutory provisions. This relates to whom accommodation may be allocated (s.160A); those applicants to whom a reasonable preference must be afforded (s.167(2)); and factors which a LHA may take into account in reducing priority (s.167(2A)). The scheme must be published (s.168). The scheme must afford a right of review against adverse decisions (s.167(4A)).

7.2 RSLs currently allocate accommodation under the regulatory code and guidance which was issued by the Housing Corporation. This guidance does not restrict the allocation of social housing to “eligible persons”. There are no reasonable preference groups. The guidance contemplates “suspensions” a concept which is quite alien to Part 6. Applicants are not provided with the same procedural safeguards.

7.3 HPLA recognises that it is difficult to realise the government’s policy of common allocation policies and common housing registers without amending the primary legislation. In the interim, registered providers should be required to adopt allocation schemes which mirror the statutory framework provided by Part 6 HA 1996.

7.4 All social landlords should normally offer joint tenancies to adult members of a household. This is recommended at para 3.7 of the “Allocation of Accommodation” Code of Guidance (November 2002). Similar guidance should be given to RSLs. However, all social landlords must also have procedures to deal with relationship breakdowns. Otherwise there is a policy lacuna where a joint tenant unilaterally determines a tenancy leaving the other tenants in occupation as trespassers.

7.5 HPLA question whether it is appropriate for any registered provider (except small specialist providers) to maintain waiting lists independent of those maintained by LHAs. Equality of access to social housing is best secured through LHAs maintaining the housing registers. We would also question how well nomination agreements are working in practice. Many of these were executed a considerable time ago. In the interim, there have been local authority reorganisations and stock transfers.

## **8. Diversity**

8.1 The Disability Rights Commission were satisfied that RSLs were public authorities for the disability equality duty (see “Housing and Disability Equality Duty: A Guide to the Disability

Equality Duty and Disability Discrimination Act 2005 for the social housing sector” (July 2006)). The concept of public authority for the purposes of the equality legislation is likely to be wider than that for the HRA (see para 106 of the speech of Lord Mance in *YL v Birmingham CC [2008] 1 AC 95*).

8.2 The TSA must also consider the extent to which it is complying with its own equality duties as a public authority. This extends to the manner in which it exercises its regulatory functions.

8.3 In order to ensure that all social landlords promote diversity, the TSA should set standards requiring:

(a) All registered providers to have Equality Schemes and Action Plans to ensure equality of access to social housing and equality of treatment as tenants.

(b) Social Landlords should to carry out equality impact assessments before implementing any significant changes in policy relating to the allocation of their accommodation or the management of their housing stock.

## **9. Conclusions**

HLPAs would be pleased to be invited to comment again on the TSA’s Regulatory Standards at the formal consultation stage.

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