

**A Response to the
Communities and Local
Government Consultation
Paper:**

***The Housing and
Regeneration Act 2008
(Registration of Local
Authorities) Order 2009***

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About HLPAs

The 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 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 (whether by primary and subordinate legislation or statutory guidance. HLPAs's Responses are available at www.hlpas.org.uk.

During 2009, HLPAs has responded to the Communities and Local Government Consultations: (i) "The Government Response to the Rugg Review (Aug 2009); (ii) "Fair and Flexible: draft statutory guidance on social housing allocations for local authorities in England" (Oct 2009); (iii) "Lender repossession of residential property: protection of tenants" (Oct 2009).

HLPAs has also responded to (i) the Legal Services Commissions consultation papers (a) "Phase 1: Civil Fee Schemes Review" (May 2009) and (b) Legal Aid: Refocusing on Priority Cases (October 2009); (ii) the "Review of Civil Litigation Costs: Preliminary Report- the "Jackson Report"(July 2009); (iii) The Tenant Services Authority Discussion Paper "Building a New Regulatory Framework" (Sept 2009); and (iv) The Government Equalities Office Consultation: "Equality Bill: Making it Work – Policy Proposals for specific duties (Sept 2009).

HLPAs 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).

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 HLP 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

Terms Used

Cave	-	Professor Martin Cave's Report "Every Tenant Matters: A review of social housing regulation" (June 2007)
CLG	-	Communities and Local Government
EHRC	-	Equality and Human Rights Commission
HA 1985	-	Housing Act 1985
HA 1988	-	Housing Act 1988
HA 1996	-	Housing Act 1996
H&RA 2008	-	Housing and Regeneration Act 2008
HRA 1998	-	Human Rights Act 1998
LHA	-	Local Housing Authority
RSL	-	Registered Social Landlord (to be abolished April 2010)
RP	-	Registered Provider (to replace RSLs in April 2010)
TSA	-	Tenants Services Authority

Introduction

1. HLPAs notes that the desired policy option is "a tailored regulatory framework for local authorities in alignment with the Local Performance Framework allowing consistent standards to be set across registered providers and local authorities that support the Local Performance Framework. The regulator will have the power to set standards for local authorities but any new performance indicators would be set by Government"¹

2. Central to the Cave recommendation for cross-domain regulation was the principle that tenants should receive an equally good service across all parts of the domain, regardless of whether their landlord was a RSL or LHA. As the Impact Assessment notes (at para 3), Cave put forward the following arguments in its favour:

- Issues, such as access to housing and mobility between providers, need to be dealt with on a domain wide basis.
- Performance needs to be compared across all providers so that good practice can be spread and standards raised across the whole domain.
- There are a number of common failures across providers and these could be dealt

¹ para 12 at p.56

with more effectively by a single regulator.

3. HPLA doubt whether these objectives can be achieved within the current statutory framework. We regret that Parliament did not consider the consequences of cross domain regulation more fully when enacting the Housing and Regeneration Act 2008. This is all the more important given the current situation where:

(i) only 180 out of 354 LHAs retain a stock of social housing (a decline from 210 when Cave was published in June 2007)²;

(ii) RSLs and LHAs are now each managing a similar number of homes, namely some 2m each;

(iii) Of the LHA stock, some 800,000 homes are now managed by Arms Length Management Organisation (ALMOs)³ and an unspecified number by Tenant Management Organisations (TMOs).

(iv) RSLs are now allocating as much social housing in England as LHAs. In 2006/7, LHAs granted 152,217 new tenancies; whilst RSLs granted 145,034⁴.

(v) Whilst 55.6% of RSL tenancies are allocated pursuant to nomination agreements with LHAs⁵, many of these agreements are badly drafted; were executed years ago; and were made between two parties both of which may have changed their legal identity. The remaining 44.4% of RSL stock is allocated pursuant to policies adopted by individual RSLs (including transfers).

(vi) Whilst RSL tenants occupy under the 'assured' security of tenure regime (under Part 1 HA 1988) many RSLs deny tenants security of tenure by granting assured shorthold tenancies or by relying on the mandatory Ground 8 (rent arrears), thereby denying a Court the opportunity to assess whether any eviction is proportionate.

(vii) 60,230 homeless households occupy temporary accommodation without any security of tenure⁶.

4. The Consultation Paper does not seem to recognise the diversity issues raised by these developments. For example, a disproportionate number of ethnic minority families are accommodated in temporary Part 7 HA 1996 accommodation. The recent Housing Statistical Release (10.9.09) estimates that over a half of all households in temporary accommodation are headed by ethnic minority applicants⁷. However, between 2007/8 and 2008/9, the national figure for RSL general needs lettings to statutory homeless households declined from 17.2 to 16.5%⁸.

5. If a level playing field is to be achieved between tenants of RSLs and LHAs and if there is to

² para 10 at p.55 of the Consultation Paper

³ para 2.9 at p.32 of Cave

⁴ statistics from Housing Corporation Sector Study 62 (2008)

⁵ statistics for 2007/8 taken from HAT Update September 2009 (TSA)

⁶ See Housing Statistical Release (10.9.09) (CLG).

⁷ at p.11

⁸ see HAT Update, Sept 2009 (TSA)

be greater equality and transparency for applicants seeking access to social housing, the following issues need to be addressed:

(i) There should be a common statutory framework for the allocation of social housing. Part 6 HA 1996 provides strict rules within which LHAs allocate accommodation. RSLs currently allocate pursuant to guidance issued by the Housing Corporation (s.36 HA 1996). From April 2010, RPs will allocate accommodation within the statutory framework provided by the H&RA 2008.

(ii) The current practice whereby the CLG issues guidance to LHAs on the allocation of social housing pursuant to s.169 HA 1996, whilst the TSA will issue standards and codes of practices pursuant to ss.193 and 195 H&RA 2008 is not satisfactory. Joint guidance should be issued.

(iii) Tenants of social landlords should occupy their homes under a common statutory framework. LHA tenants are secure tenants within Part 4 HA 1985; whilst RSL tenants occupy under assured or assured shorthold tenancies within Part 1 HA 1988. These statutes make different provision for (i) security of tenure (many RSLs granting assured shorthold tenancies or using Ground 8); (ii) rights of succession; (iii) rights to assign and (iv) the right to buy.

(iv) 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”. Cave supported this proposal⁹. In May 2009, the CLG 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 market¹⁰. 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 necessary level playing field between tenants of LHAs and RSLs.

(v) Primary legislation should resolve the uncertainty and expressly provide that RSLs/RPs are public authorities for the purposes of the HRA 1998 and the equality duties.

Question 1

Q1: Do you consider that the Cross Domain Order would provide a framework to allow:

- *The Tenant Services Authority to regulate local authority landlords in an effective and proportionate way?*
- *The Tenant Services Authority to regulate in a manner which ensures that it can achieve its fundamental objectives?*

6. Despite the concerns expressed above, HLPAs support the move towards a common

⁹ see para 5.105

¹⁰ (see para 17 of the Consultation Paper “The Private Rented Sector: professional and quality – The Government response to the Rugg Review”)

regulatory framework. However, there must be no levelling down of the rights of LHA tenants. We welcome the Housing Minister's statement in his forward that "our goal is to raise the standard of services for tenants no matter who their landlord is". The CLG must ensure that this goal is achieved in practice.

7. In "empowering tenants", the TSA must ensure that LHAs tenants retain their current package of rights:

(i) Secure tenancies within Part 4 HA 1985;

(ii) Any eviction, regardless of security of tenure, must be proportionate within Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, LHAs being public authorities for the purposes of the HRA 1998;

(iii) LHAs are public authorities with regard to the various equality duties.

8. If a level playing field is to be achieved and LHA tenants are to enjoy their current rights, the CLG and TSA must ensure that the rights of RSL tenants are levelled up to those enjoyed by LHA tenants. We note that the EHRC intervened in the recent appeal in *R (Weaver) v London & Quadrant HT [2009] EWCA Civ 587; [2009] HRLR 29*), in support of their contention that RSLs/RPs are public authorities for the purposes of the HRA. This is also the view of the Joint Committee on Human Rights¹¹. It is a matter of regret that neither the CLG nor TSA intervened to support this argument which was upheld by the Court of Appeal. HPLA is concerned at the government's most recent policy statement (29th October 2009) that it "is considering" the judgment in *Weaver*, but is "committed to consulting on the issue"¹². This is an issue upon which the CLG should take a lead if it is committed to empowering tenants.

9. Until the primary legislation is harmonised, the CLG must use its powers to issue directions to the TSA under s.197 H&RA 2008 to achieve the objective of securing a level playing field. It is a matter of regret that this is not an issue that is addressed in the Consultation Paper.

Question 2

Q2: Do you agree that all local authorities who currently retain ownership of social housing stock (regardless of management arrangements) should be subject to registration with the Tenant Services Authority? This would mean that organisations such as ALMOs who manage rather than own social housing stock would not be registered with the regulator directly.

10. HPLA agrees with this proposal. The current statutory framework whereby ALMOs and TMOs manage housing on behalf of LHAs is not entirely satisfactory, but this is best addressed by primary legislation.

¹¹ see "The Meaning of Public Authority under the Human Rights Act", Ninth Report of Session 2006-7 at para 31.

¹² see "The Human Rights Act 1998: The Definition of 'Public Authority' – Government Response to the Joint Committee on Human Rights' Ninth Report (Cm 7726) at para 100.

Question 3

Q3: Do you agree that all social housing stock owned outright or acquired on a long-lease by a local authority should be subject to regulation by the TSA?

11. HLPAs agree with the principle that all social housing should be regulated by the TSA. We also agree that this should extend to all accommodation owned or leased by LHAs.

12. HLPAs believe that all temporary accommodation managed by LHAs should also be included. HLPAs understand that most of the 60,250 homes used as temporary accommodation for homeless families will be excluded. We can see no justification for this.

13. HLPAs also understand that the TSA does not currently regulate all accommodation managed by RSLs. The current regulatory framework excludes lettings at intermediate rents (i.e. key worker schemes) and temporary accommodation. "Intermediate rents" are below market rents and should fall within the definition of "low cost rental" (s.69 H&RA 2008). These should also be included within the regulatory framework, if the level playing field envisaged by Cave is to be achieved.

Question 4

Q4: We propose that information burdens arising from new regulatory framework should be minimised through making best use of information already in the system (information already produced by local authorities for public reporting and internal management purposes). Do you agree that this approach will enable the TSA to gain a good understanding of performance without adding burdens to local authorities?

14. HLPAs agree with this recommendation. HLPAs are concerned that LHAs should not have to bear any undue costs through the new regulatory framework and that there should be no duplication with the regulation by the Audit Commission or the supervision by the CLG. Any such unnecessary costs will be passed on to tenants through the housing revenue account.

Question 5

Q5: We propose that the TSA would have the same power to set standards for local authorities on matters of housing management as for housing associations. Any nationally applied performance indicators would need to be set by Government and included in the National Indicator Set when next refreshed. Do you agree that this approach would provide the TSA with the necessary powers to set standards across all providers of social housing?

15. HLPAs agree with this in principle, provided that there is no levelling down of the rights currently enjoyed by tenants of LHAs. HLPAs are concerned that this principle may be watered down by the provision that "in setting standards the regulator shall have regard to the desirability of registered providers being free to choose how to provide services and conduct business" (s.193(3) H&RA 2008).

16. HLPAs were concerned to see in the TSA Discussion Paper "Building a New Regulatory Framework" (June 2009), a suggestion that RSLs might grant tenants less than full security of tenure. Cave noted the current failure to adequately separate policy and regulation leading

to the unacknowledged implementation of policy by regulation¹³. This reflects what Dominic Grieve MP described in his recent Boydell Lecture as “the slow death of ministerial responsibility”. 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.

Question 6

Q6: Do you agree that the proposed regulatory and intervention powers will be sufficient to enable the TSA to promote high standards for tenants?

17. HLPAs believe that the proposed regulatory and intervention powers should be sufficient.

18. We reject the proposal (at para 37) that the TSA’s powers to impose fines on providers and order a landlord to pay compensation to tenants should not apply to LHAs. There is no case to deny this benefit to LHA tenants.

Question 7

Q7: Do you agree with our proposals to pass the power to grant consent from the Secretary of State to the TSA in situations where local authorities wish to enter into a management agreement with another body to take over management of all or part of its housing stock?

19. HLPAs disagree with this proposal. In our view, this is a matter of policy for the Secretary of State and not a matter of regulation (see para 16 above).

Question 8

Q8: Do you think that the impact assessment broadly captures the types and levels of costs associated with the policy options?

20. The Impact Assessment assumes efficiency savings of between 0.2 and 0.4% per annum. There is nothing in the paper to establish whether these estimates are realistic. No case is made as to why savings should be unlocked by the new regulatory regime which were not possible under the current regulatory framework by the Audit Commission/CLG.

21. The Consultation Paper recognises that additional costs will be incurred by both the TSA and LHAs. Whilst the additional costs to the TSA of £327k-£654k (para 26 at p.59) may be realistic, we suggest that estimate of extra administration costs to LHAs of £5k pa (para 31 at p.60) is wholly unrealistic. We note that no attempt is made to estimate the registration fees and annual levy for inspections which will become payable (see paras 28 and 29 at p.59).

23. HLPAs are concerned that the costs of the proposals are underestimated; while the possible savings are overstated. There is no attempt to grapple with the difficulties faced by the TSA in securing a level playing field between LHAs and RSLs given the different statutory frameworks within which they operate. The rational approach would have been to introduce a common statutory framework, prior to changing the regulatory framework.

¹³ see p.13

Question 9

Q9: Do you think that the impact assessment broadly captures the types and levels of benefits associated with the policy options?

24. HLPAs do not believe that the Impact Assessment is sufficiently rigorous.

Question 10

Q10: Do you agree that the impact assessment reflects the main impacts that particular sectors and groups are likely to experience as a result of the policy options?

25. Cave recommended that the TSA should ensure that vulnerable groups are particularly protected and that minority groups are not subject to discrimination¹⁴. We note that ensuring equality in the allocation and management of social housing is not specified as a fundamental objective for the TSA (see s.86 H&RA 2008). This is a further area where the CLG should consider a direction under s.197.

26. LHAs are public authorities for the purposes of the HRA 1998 and the various equality duties under the Race Relations Act 1976, Sex Discrimination Act 1975 and the Disability Discrimination Act 1995. The TSA is also a public authority for the purposes of these duties.

27. The position of RSLs is less clear. In *Weaver*, the Court of Appeal have established that London and Quadrant are a public authority for the purposes of judicial review and the HRA 1998. This ruling is likely to extend to most of the larger RSLs. The case was determined on the basis of the existing statutory powers under Part 1 HA 1996. It is more probable that RPs regulated under the H&RA 2008 will be public authorities.

28. Whilst the Race Relations Act 1976 has a schedule which lists the relevant bodies caught by the public authority equality duties (a list which includes the TSA), the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995 extend to organisations which carry out public functions. In *YL v Birmingham City Council [2007] UKHL 27; [2008] 1 AC 95*, it was noted that the public function test under the equality legislation may differ from that under the HRA 1998 (see Lord Mance at para 106). It was the view of the Disability Rights Commission that RSLs were functional public authorities for these equality duties. The Housing Corporation sought to pass its equality duties down to RSLs through its Regulatory Code and Guidance.

29. There are a raft of equality issues relating to both the allocation and management of social housing. We refer to our example at para 4 above. Indeed, the Impact Assessment recognises the disproportionate number of disabled people living in social housing¹⁵. Disabled applicants wait longer for an allocation of suitable accommodation. Further examples are given in the recent EHRC Guidance Note "Using your revised disability equality scheme to improve the lives of disabled people"¹⁶.

¹⁴ at p.20

¹⁵ The Survey of English Housing for 2006/7 showed that 49% of LHA tenants considered that at least one person in their household had a disability or serious illness.

¹⁶ available at www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/news-and-updates-on-the-duties/latest-additions-and-updates/

30. The Consultation paper does not address how LHAs and RPs will be required to comply with their equality duties under the new regulatory framework. This is a serious omission. When the TSA seeks to ensure common standard between LHAS and RSLs, there must be a levelling up. Otherwise, equality in the allocation and management of social housing will be severely compromised.

31. We have not sought to comment on the detail of the order itself. Indeed, when we sought to access the consolidated version of the H&RA 2008 through the link at www.communities.gov.uk/housing/crossdomainorder, we have been unable to do so.

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