

# Social housing: the new regulatory framework



On 1 April 2010, the Tenant Services Authority (TSA) assumed its new regulatory powers in respect of social housing in England under the Housing and Regeneration Act (H&RA) 2008. In this article, **Robert Latham** considers the impact of these changes.

## Introduction

Professor Martin Cave's *Every tenant matters: a review of social housing regulation* was published in June 2007.<sup>1</sup> The remit for his independent review was to establish a clear set of objectives for the regulation of social housing in England. The Housing Corporation (HC) had been established some 40 years earlier by the Housing Act (HA) 1964. The concept of the 'registered social landlord' (RSL) was introduced by the HA 1996.

Martin Cave identified three principles for the future regulation of social housing:

- to ensure continued provision of high quality social housing;
- to empower and protect tenants; and
- to expand the availability of choice of provider at all levels in the provision of social housing.

He concluded that the objective of expanding the supply of social housing is best promoted by the diversity of organisations engaged in ownership and management. His proposed regulatory regime allowed such alternative providers to compete on level terms. The choice afforded to tenants should extend to choice of tenure. He noted that the current failure adequately to separate policy and regulation, leading to the unacknowledged implementation of policy by regulation.

## The Housing and Regeneration Act

In July 2008, the H&RA was enacted to give effect to the Cave recommendations. Part 1 established the Homes and Communities Agency (HCA). Since December 2008, its role has been to deliver more social and affordable housing and to promote regeneration.

Part 2 relates to the regulation of social housing. On 1 December 2008, the TSA replaced the HC. For its first 16 months, the TSA regulated RSLs in England using the existing statutory framework provided by HA 1996 Part 1. The HC had set standards through *The regulatory code and guidance*, 58 circulars and 12 good practice notes. The TSA has now withdrawn all of these, except

for four HC circulars relating to rents. Since 1 April 2010, the RSL system has been restricted to Wales.

The TSA now regulates some 1,800 providers of social housing in England under its new powers. This includes not only those bodies that were RSLs but also those local housing authorities (LHAs) which continue to provide social housing. Only 180 out of 326 English LHAs retain a stock of social housing.

On 1 April, the following homes fell within the remit of the TSA:<sup>2</sup>

Provider	Homes managed (approximate)
Former RSLs	1,900,000
LHAs (retained stock)	1,300,000
Arms length management organisations	800,000

H&RA s193 permits the TSA to set standards for registered providers (RPs) about the nature, extent and quality of accommodation, facilities or services provided by them in connection with social housing. In setting a standard, the TSA shall have regard to the desirability of RPs being free to choose how to provide services and conduct business (s194(3)). The TSA may also issue a code of practice amplifying any standard it has set (s195).

The secretary of state may direct the TSA to set a standard under s193 (s197). On 10 November 2009, he issued such a direction on quality of accommodation, rent, and tenant empowerment.<sup>3</sup> This requires the TSA to retain four HC circulars relating to the rent-fixing regime (see below).

On 16 March 2010, the TSA issued *The regulatory framework for social housing in England from April 2010* (the *Regulatory framework*) together with four annexes to the framework document.<sup>4</sup> In the foreword to the *Regulatory framework*, the TSA promises to free RPs from 'red tape', enabling them to

'innovate in the best interests of their tenants'. It has set six regulatory standards. It does not intend to issue any codes of practice.

## The new language

■ 'Cross-domain regulation': the common regulatory framework which now applies to social housing provided both by former RSLs and homes managed by LHAs. This concept is derived from *The Cole report: delivering cross-domain regulation for social housing* (August 2008).<sup>5</sup>

■ 'Social housing': defined to include both low-cost rental and low-cost home ownership accommodation (H&RA ss68–70).

■ 'Registered providers' (RPs): bodies registered by the TSA (H&RA s80(2)).

■ 'Private registered providers' (PRPs): registered bodies which are not LHAs (ie, former RSLs) (H&RA s80(3), added by the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010 SI No 844 (see below)). There is no distinct phrase to encompass the 180 LHAs which are now registered.

■ 'Co-regulation': the TSA's new approach to regulation whereby its standards are focused on outcomes requiring robust self-regulation from the boards and councillors that govern the delivery of social housing, incorporating effective tenant involvement (*Regulatory framework* page 9).

■ 'Tenant': defined as 'a resident in social housing', a term that 'does not include leaseholders'. It is unclear whether this includes children (*Regulatory framework*, page 8).

■ 'Products': the new consumer-orientated language describing the types of housing provided by RPs. Some 'products' fall outside the statutory definition of social housing. Thus the tenancy standard relating to allocations, rents and tenure will not apply to 'intermediate rent products'. Neither will this standard apply to 'low-cost home ownership' products (*Regulatory framework*, Table 1 at page 35).

■ 'Local offers': to be agreed after consultation between RPs and their tenants reflecting local priorities around home, neighbourhood, community and involvement and other standards. Where agreement cannot be reached, the TSA encourages RPs and their tenants to seek independent mediation (*Regulatory framework*, page 13 and Figure 2 at page 16). However, as a small number of PRPs grow ever larger and cover wider geographical areas, this concept of local standards has a somewhat hollow ring to it.

## Preparing for change

A regulatory regime to empower tenants should be both certain and accessible. There

has been 21 months to prepare for this.

H&RA s81 provides that there shall be a body corporate to be known as the Office for Tenants and Social Landlords. There is not, has not been, and will not be such a body. The Regulator for Social Housing is, rather the TSA.

H&RA s80, as enacted in July 2008, introduced the concept of the RP that was to extend to those bodies that had been RSLs on 31 March 2010 and any additional bodies that chose to register. Profit-making bodies are now eligible to register (see H&RA s115). There is little evidence of new bodies wanting to do so.<sup>6</sup>

On 17 March 2010, parliament approved the Registration of Local Authorities Order. This brings LHAs within the TSA's regulatory regime. Article 1 and Sch 1 para 5 amend s80 providing for the current definition of RP and PRP.

Questions had been asked about how LHAs will be able to discharge their statutory duties under HA 1996 Parts 6 and 7 since parliament omitted, when enacting the H&RA, to amend HA 1996 ss170 and 213 (co-operation between RSLs and LHAs). On 17 March 2010, parliament made the Housing and Regeneration Act 2008 (Consequential Provisions) Order (the Consequential Provisions Order) 2010 SI No 866.<sup>7</sup> Articles 102 and 103 make the necessary amendments imposing the duty to co-operate on PRPs. One hundred and nineteen further amendments were made to a raft of primary legislation which could, and should, have been included in the H&RA.

On 16 March 2010, the TSA promised that it will ensure that over eight million tenants of LHAs, housing associations and co-operatives will 'get similar levels of protection and services regardless of who their landlord happens to be' in a press release which accompanied the publication of the *Regulatory framework*.<sup>8</sup>

### A missed opportunity

Parliament has signally failed to enact the primary legislation necessary to achieve this level playing field for applicants seeking access to, and for tenants occupying, social housing. First, it should have provided a common statutory framework within which LHAs and PRPs allocate accommodation. This should provide for common housing registers and allocation schemes within any housing district. Instead, the 326 LHAs in England must adopt an allocation scheme in line with HA 1996 Part 6, having regard to the statutory guidance issued by Communities and Local Government (CLG). All RPs, including 180 of the 326 English LHAs, must also have regard to the allocation provisions

which form part of the 'tenancy standard' (see below).

Second, tenants of social landlords should occupy their homes under a common statutory framework. A blueprint for this is provided in the Rented Homes Bill which the Law Commission published in May 2006. While the tenants of the 180 RPs which are LHAs occupy under secure tenancies within HA 1985 Part 4, tenants of PRPs occupy under assured tenancies within HA 1988 Part 1, the regime tailored for private sector tenants. These statutory codes make different provision for:

- security of tenure (it being open to PRPs to grant assured shorthold tenancies and use HA 1988 Sch 2 Ground 8);
- rights of succession;
- rights to assign; and
- the right to buy.

An unsuccessful attempt was made to introduce an amendment to the H&RA which would have prevented PRPs from using Ground 8. In March, the TSA published *Rent arrears management practices in the housing association sector*.<sup>9</sup> This report demonstrates the use of Ground 8 across the sector with a disproportionate use in London where half of the RSLs make some use of it.

The TSA takes the view that security of tenure is a matter for the government. The drafting of the tenancy standard is aimed at ensuring that this is consistent with government policy and that no changes are introduced as a result of the regulatory standard on the issue (see footnote 22 in the *Regulatory framework*). Thus, while the HC thought it appropriate to provide guidance about how RSLs might use assured shorthold tenancies as 'starter tenancies' to mirror introductory tenancies granted by LHAs, the TSA considers this to be outside its remit.

Third, primary legislation should provide expressly that PRPs are public authorities for the purposes of judicial review, the Human Rights Act 1998 and the equality duties. The Court of Appeal decision in *R (Weaver) v London & Quadrant Housing Trust and Equality and Human Rights Commission (intervening)* [2009] EWCA Civ 587, 18 June 2009; [2010] 1 WLR 363 is currently binding authority. However, no one believes that it is the final word on this complex issue. The *Regulatory framework* is framed within the current law, but does not address the implications of this decision.

Fourth, certain standards do not apply to LHAs, namely, those relating to rents, governance and financial viability. These remain within the remit of CLG for the time being.

The background to the regulatory guidance on rent is the Department of the Environment,

Transport and the Regions' (DETR) housing policy statement, *Quality and choice: a decent home for all. The way forward for housing* (December 2000). This set out the government's objective that rent setting in the social housing sector be brought on to a common system based on relative property values and local earnings levels. This was to apply to both LHAs and RSLs. In March 2001, the DETR issued *Guide to social rent reforms*.

The HC first issued guidance on rent in HC Circular 27/01, which was amplified in three subsequent circulars. These required RSLs to begin restructuring their rents and to comply with the requirements set out in HC guidance: *Rent influencing regime. Implementing the rent restructuring framework* (October 2001). The restructuring programme contemplated a ten-year implementation period starting from 1 April 2002. By 31 March 2012, rents on individual properties should normally be within a band between five per cent higher and five per cent lower than the target rent. RSLs should use the Retail Prices Index (RPI) inflation figure for the September before the year of assessment. Circulars were issued each year to confirm the guideline limit. The TSA issued the most recent guidance in November 2009.<sup>10</sup> This caused some disquiet to RSLs as the RPI for September 2009 was -1.4 per cent leading to a change in the rent cap level of -0.4 per cent.

It is to be noted that this regime only applies to low-cost rental accommodation of PRPs. It does not extend to accommodation at intermediate rents or which is specifically exempted. It thus excludes vast tracts of accommodation provided under key worker schemes or as temporary accommodation for homeless families. CLG is jealously guarding its control over rents fixed by LHAs because of the impact on the housing benefit budget.

### The new standards

In the *Regulatory framework*, the TSA has set six standards for RPs, three of which incorporate the CLG's Direction (see above). The six standards are as follows:

- Tenant involvement and empowerment, including customer service, choice and complaints, and understanding and responding to diverse needs. A required outcome is that RPs should have an approach to complaints that is clear, simple and accessible and that ensures that complaints are resolved promptly, politely and fairly. RPs are also required to 'demonstrate that they understand the different needs of their tenants, including in relation to the seven equality strands and tenants with additional support needs' (page 20).
- Home, including repairs and maintenance and quality of accommodation. A required

outcome is that RPs should ensure that their homes meet the government's Decent Homes Standard by 31 December 2010 and continue to maintain their homes to at least this standard after that date.

■ Tenancy, including allocations, rents and tenure.

■ Neighbourhood and community, including neighbourhood management, local area co-operation and anti-social behaviour.

■ Value for money, which gives tenants new rights to scrutinise their landlord's performance as part of promoting self-improvement and accountability.

■ Governance and financial viability, where the onus is placed on those which govern providers to ensure that there is effective governance and performance.

For each standard, the TSA specifies 'required outcomes' and 'specific expectations'. By 1 October 2010, and annually thereafter, RPs are required to publish a report for their tenants, to be shared with the TSA, on how they are meeting these standards. It must specify how they measure their compliance against the standards. It should note any gaps and associated improvements. It should set out how the RP has provided opportunities for tenants to scrutinise performance and how it has made use of external validation, peer review and benchmarking.

The TSA gives examples of how these standards may work in respect of, for example, tenant involvement and empowerment.<sup>11</sup> The TSA performance indicators suggested that repairs and some tenant satisfaction ratings were poor at Birmingham-based Family Housing Association (FHA). A notice inspection arranged by the TSA confirmed this. FHA acted to tackle the issues raised by inspection and it put its tenants at the centre of that process. Its tenant panel was involved in developing and monitoring an action plan which acted as a focus for more meaningful engagement with tenants. Seventy-six per cent of FHA tenants now say their views are taken into account, against 50 per cent in 2008–09. The satisfaction rates with the repairs service have gone up by ten per cent in a year.

Housing lawyers will focus on the 'tenancy standard' in respect of tenure. The required outcomes are:

*[RPs] shall offer and issue the most secure form of tenure compatible with the purpose of the housing and the sustainability of the community. They shall meet all applicable statutory and legal requirements in relation to the form and use of tenancy agreements.*

*[RPs] shall set out in an annual report for tenants how they are meeting these obligations and how they intend to meet them in the future. The provider shall then meet the commitments it has made to its tenants (Regulatory framework, page 25).*

The specific expectation on tenure is:

*[RPs] shall publish clear and accessible policies which outline their approach to tenancy management. They shall develop and provide services that will support tenants to maintain their tenancy and prevent unnecessary evictions. The approach should set out how [RPs] will make sure that the home continues to be occupied by the tenant they let the home to (Regulatory framework, page 28).*

The *Regulatory framework* provides little for the housing lawyer to latch on to in arguing that any eviction by a PRP is disproportionate. The TSA approach is to focus on outcomes which concern tenants, rather than detailed processes. The outcome is the 'local offer' agreed between the RP and its tenants. The danger is that tenants who engage with the process are those who expect their neighbours to comply with all their contractual obligations and have little sympathy for the more vulnerable and disadvantaged tenants who find it difficult to do so. The tenant involvement and empowerment standard requires RPs to ensure that the voices of all tenants are heard.

### The future

On 10 March 2010, when the Delegated Legislation Committee debated the Consequential Provisions Order, the Conservative spokesman, Stewart Jackson, confirmed that a future Conservative government would abolish the TSA, believing it to be an expensive and unnecessary quango.<sup>12</sup> On 27 January 2010, the TSA announced plans to slash £3.5m from its annual budget of £38.5m.<sup>13</sup>

There is much to commend the new regulatory approach. It heralds an end to paternalism. It aims to empower tenants and increase their rights in their homes. However, many RPs seem unprepared for the new regime. Research carried out by the Chartered Institute of Housing in April found that 45 per cent of respondents thought that it would have minimal impact and were unsure what the changes would mean.<sup>14</sup>

The regret is that parliament has failed to provide a legislative framework whereby all tenants of social landlords have similar rights with regard to security of tenure and sub-market rents. The H&RA restricts 'social

housing' to low-cost rental, thereby excluding large swathes of accommodation provided by both LHAs and PRPs.

Thirteen years ago, Lord Woolf called for housing law to be consolidated and simplified in *Access to justice* (July 1996). This call has now been echoed by Lord Justice Jackson in his *Review of civil litigation costs: final report* (January 2010).<sup>15</sup> This is the challenge for the future.

- 1 Available at: [www.communities.gov.uk/documents/housing/pdf/320365.pdf](http://www.communities.gov.uk/documents/housing/pdf/320365.pdf).
- 2 The statistics are taken from *Every tenant matters*, see note 1.
- 3 Available at: [www.communities.gov.uk/documents/housing/pdf/1385784.pdf](http://www.communities.gov.uk/documents/housing/pdf/1385784.pdf).
- 4 Available at: [www.tenantservicesauthority.org/upload/pdf/Regulatory\\_framework\\_from\\_2010.pdf](http://www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_from_2010.pdf) and [www.tenantservicesauthority.org/upload/pdf/Regulatory\\_framework\\_for\\_social\\_housing\\_-\\_annexes.pdf](http://www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_for_social_housing_-_annexes.pdf) respectively.
- 5 Available at: [www.communities.gov.uk/documents/housing/pdf/thecolereport](http://www.communities.gov.uk/documents/housing/pdf/thecolereport).
- 6 See 'Party poopers', Isabel Hardman, 1 April 2010, available at: [www.insidehousing.co.uk/story.aspx?storycode=6509253](http://www.insidehousing.co.uk/story.aspx?storycode=6509253).
- 7 Available at: [www.opsi.gov.uk/si/si2010/pdf/uksi\\_20100866\\_en.pdf](http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100866_en.pdf).
- 8 See *Six standards for landlords set to benefit eight million tenants*, 16 March 2010, available at: [www.tenantservicesauthority.org/server/show/ConWebDoc.20179/changeNav/14567](http://www.tenantservicesauthority.org/server/show/ConWebDoc.20179/changeNav/14567).
- 9 Available at: [www.tenantservicesauthority.org/upload/pdf/Rent\\_arrears\\_management\\_practices.pdf](http://www.tenantservicesauthority.org/upload/pdf/Rent_arrears_management_practices.pdf).
- 10 See *Rents, rent differentials and service charges for housing associations 2010–11*, available at: [www.tenantservicesauthority.org/upload/pdf/Rents\\_differentials\\_and\\_s\\_charges.pdf](http://www.tenantservicesauthority.org/upload/pdf/Rents_differentials_and_s_charges.pdf).
- 11 See note 8 above.
- 12 See: [www.publications.parliament.uk/pa/cm200910/cmgeneral/deleg8/100310/100310s01.htm](http://www.publications.parliament.uk/pa/cm200910/cmgeneral/deleg8/100310/100310s01.htm).
- 13 See *Social housing regulator outlines plans for cutting £3.5 million in running costs*, available at: [www.tenantservicesauthority.org/server/show/ConWebDoc.20025/changeNav/14567](http://www.tenantservicesauthority.org/server/show/ConWebDoc.20025/changeNav/14567).
- 14 *Inside Housing*, 15 February 2010 available at: [www.cih.org/news/view.pphp?id=1178](http://www.cih.org/news/view.pphp?id=1178).
- 15 Available at: [www.judiciary.gov.uk/about\\_judiciary/cost-review/jan2010/final-report-140110.pdf](http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf).



**Robert Latham is a barrister at Doughty Street Chambers, London.**