



Serious Detriment, Time to reconsider?

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considered. strong.



The Homes and Communities Agency ('HCA') has published its Consumer Regulation Review for 2013/2014. The paper outlines the HCA's approach to consumer standard regulation and highlights important lessons for registered providers. It also raises, it is suggested, serious questions about the current threshold for HCA intervention.

The HCA has only limited jurisdiction to regulate compliance with the Regulatory Framework's four consumer standards – Tenant Involvement and Empowerment ('TIE'); Home; Tenancy; and Neighbourhood and Community. The Review acknowledges as much; and that the HCA's role is reactive.

The HCA may intervene only if a registered provider has failed to meet one or more of the standards and it has reasonable grounds to suspect either: that the failure has caused 'serious detriment' to the provider's tenants or potential tenants; or that, if it does not intervene, there is a significant risk that the failure would do so.

The HCA's ability to intervene depends, therefore, on the definition of 'serious detriment'. There is no statutory definition. In its Review, the HCA interprets it as the 'risk of, or actual, serious harm'. It acknowledges that the threshold for consumer regulation by the HCA is significantly higher than that for economic regulation, but observes that it is intentionally high. The purpose of changes made by the Localism Act 2011 was to make Boards and councillors responsible for regulating consumer standards in the first instance; and the HCA is required by statute to minimise its interference in consumer matters.

The importance of provider responsibility is, arguably, the nub of the Review's principal lesson. Boards and councillors must ensure that providers have the systems and processes in place to meet consumer standards, especially where they concern tenants' health and safety; and should be open with the HCA about breaches. In default, the consequences may be serious and public; and may open the provider's performance in economic matters to HCA scrutiny.

In the three cases in which the HCA has, to date, issued Regulatory Notices for breach of consumer standards – each a breach of the Home Standard because of the providers' failure to comply with the Gas Safety (Installation and Use) Regulations 1998 – the HCA also downgraded the providers' rating for Governance. Registered providers can ill-afford not to heed, therefore, what is undoubtedly a salutary lesson. Boards and councillors nationwide would be well-advised to review their systems and protocols now, to ensure that they are and remain fit for purpose. Given the height of the regulatory threshold, however, and the correspondingly low number of cases in which the HCA has made findings of 'serious detriment' in its first two years as regulator, some will question whether the threshold for intervention is



appropriately set. Of the 930 consumer standard complaints received in the last two financial years, only three resulted in findings of ‘serious detriment’; and it is difficult to foresee, for example, how a breach of the TIE standard - which aims to ensure tenant involvement in providers’ decision- making and the effective resolution of tenants’ complaints – would ever lead to ‘serious detriment’ as it is presently interpreted.

It is premature, misguided even, to accuse the HCA – as some have – of being unduly reticent to engage in consumer regulation. The recent Regulatory Notices and Review are, perhaps, a sign that the HCA is readying providers for a somewhat stricter education. Nevertheless, at a time when it is considering amending the Regulatory Framework to ensure more effective economic regulation, would it not be opportune for the HCA to reconsider its definition of ‘serious detriment’ to enable more active and consistent regulation across the consumer standards? Respectfully, the writer suggests, it would. Resetting the threshold for consumer regulation need not offend the rationale or principle of localism and minimalism. Arguably, a requirement that breaches must have ‘caused or be likely to cause serious harm or disadvantage’ would still enable the HCA to remit the vast majority of complaints to providers’ internal complaints panels, as it has done in the last two financial years, while enabling it to intervene more actively in the regulation of all four standards when appropriate. Whatever the answer, it is suggested, there is clearly a case for further consideration of the current regulatory threshold.

This article was first seen in “Local Government Lawyer” - http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=20212%3Athe-homes-and-communities-agency-and-intervention&catid=49%3Acomment-a-analysis-articles&Itemid=1 – with a shortened version also in “Inside Housing”