

# Cornerstone Barristers Special Edition Housing Newsletter

May 2016



## Housing and Planning Act 2016

## The Housing and Planning Act 2016

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*This Special Edition Housing Newsletter has been produced by the Housing Team at Cornerstone Barristers to highlight the main issues arising from this important piece of legislation. Other articles will look at particular provisions either in force already or with a future commencement date, but first **Andy Lane** and **Matt Lewin** take a step back and take an overarching view of the housing and planning themes in the Act*

### The “housing” side of the Housing and Planning Act 2016 for housing lawyers

Andy Lane

There was a strange period of 11 days between the Royal assent being given to the Housing and Planning Act 2016 (“the Act”) on 12 May 2016, and it being officially published for us all to see in final form. The preamble to the Act gives little away:

*“An Act to make provision about housing, estate agents, rentcharges, planning and compulsory purchase.”*

and even a thorough read of its final form demonstrates significant gaps to be filled by as yet unpublished

regulations.

Whilst there is an element of “mish mash” to the housing provisions in the Act - covering areas as diverse as private rented sector banning orders and rent repayment orders, a rogue landlords and property agents database, recovery of abandoned premises, extended (“voluntary”) right to buy and sale of higher value local authority properties, ‘pay to stay’, reducing social housing regulation, succession rights for secure tenants and phasing out “tenancies for life” – common themes can be identified:

1. The acknowledgment of the increased importance of the private rented sector and desire to improve standards therein.
2. The continued aspirational goal of home ownership, and in the government’s own words turning “generation rent into generation buy”.
3. The reassessment of the purpose and function of local authority housing.
4. The desire to stress the private nature of housing associations (for obvious financial reasons given the ONS classification of them as public bodies in October last year leading to a £60bn increase in public sector net debt).

Whilst there was fierce debate during the passage of this legislation through the Houses of Parliament – not least on questions of the sale of higher value local authority housing stock to fund the “voluntary” extension of the right to buy to housing associations – the government succeeded in getting most of its agenda for the Act through after an extended ‘ping pong’ session between the House of Commons and House of Lords at the conclusion of the Bill’s passage.

An obvious “casualty” was the original plan for a statutory right to buy for housing association tenants, being replaced by the voluntary scheme negotiated between the government and the National Housing

Federation. Further, ‘pay to stay’ remains discretionary for housing associations following a consultation process that ended on 20 November 2015.

In summary, there are macro and micro issues, as always, which will exercise housing lawyers as the provisions come into effect, and regulations start to be made.

One final warning, and that is:

- sections 69 to 79 (vacant higher value local authority housing) are already in force,
- provisions concerning the assessment of accommodation needs in England (section 124) and the power of tenant associations to request information about tenants (section 130) are in force from 12 July 2016, and
- .The Housing and Planning Act 2016 (Commencement No.1) Regulations 2016 (SI No.609/2016) have brought into force with effect from 26 May 2016 provisions for the funding of right to buy discounts provided by housing associations.

### **The “planning” side of the Housing and Planning Act 2016 for housing lawyers**

Matt Lewin

It has long been a common theme in statements emanating from the Department for Communities and Local Government that the planning system is a problem that needs to be solved. One of the first acts of the coalition government of 2010-2015 was radical reform of the planning system; one of the central objects of that programme of reform was “*to boost significantly the supply of housing*” (paragraph 47 of the National Planning Policy Framework).

That same object lies at the heart of the latest version of planning reform – the Housing and Planning Act 2016 – but, as the product of a single party government, it now takes a more recognisably Conservative form: it is

intended to boost significantly the supply of housing *for home ownership*.

The privileging of home ownership over other forms of tenure is expressed, on the “housing” side of the Act, by the further erosion of the social rented sector, in particular the extension of right to buy to housing association tenants and the phasing out of secure tenancies for life.

On the “planning” side of the Act, the reform which is of most interest to housing lawyers is the requirement for “starter homes” to be provided on new housing developments. It is important to bear in mind that this reform applies to England only.

### **Starter homes**

A starter home is defined as a new-build property which will be sold to a first-time buyer under the age of 40 and at a discount of at least 20% off the open market price, but which is below a price cap of £250,000 outside Greater London and £450,000 within Greater London.

The government’s position when the Housing and Planning Bill was introduced was that the discount would not be repayable if the owner sold her starter home five years after she purchased it. Therefore, at the end of a five year “restricted period”, the starter home would be indistinguishable from any other property on the open market and could be bought and sold at the market rate. The detail, however, was not dealt with in the Bill itself, but was left to be fleshed out in secondary legislation. The House of Lords proposed an amendment to the statutory definition of a starter home, which would have extended the restricted period to 20 years and would have limited the resale price of the starter home during the restricted period to a % of the market value, from 20% in the first year, tapering by 1% each year, to 0% at the end of the restricted period. Introducing the amendment, Lord Best explained that it would “*moderate the generosity of the starter homes package*”. In response, the government proposed its own amendment which accepted the tapering principle. In its consultation on Starter Homes Regulations, the

government has stated that it will limit the restricted period to a maximum of 8 years.

The most contentious aspect of the starter homes provisions was that the government would be given power to determine the number and location of starter homes at a national level, rather than allowing these matters to be decided by local authorities according to local assessments of housing need. The result would be that starter homes must be provided in all new housing developments (of a certain size to be determined). However, the provision of starter homes will be at the expense of other forms of affordable tenure: rather than providing an affordable housing contribution comprising a mix of social rent, affordable rent and shared ownership properties, a developer will be legally obliged to provide starter homes as a proportion of the properties built on all new developments (the government’s current proposal is 20%) which exceed a prescribed size threshold. In these circumstances, the requirement for an affordable housing contribution would in many cases fall away because insisting on affordable housing on top of starter homes would make the development unviable (local authorities cannot demand affordable housing requirements which would prevent a developer from making a “competitive return” on its investment).

The government accepted that the starter homes provisions would have the effect of pushing out affordable housing for rent, but that this was “*exactly what we put on the tin in the general election manifesto*” (HC Deb 3 May 2016 c65).

A furious debate between the House of Commons and House of Lords ensued over a succession of amendments, proposed by Lord Kerlake, which he argued would “*... place the responsibility for determining the proportion of starter homes in any particular development where it should properly lie: with the local planning authority.*”

A majority of the House of Lords supported Lord Kerlake’s amendment, agreeing with his concern that

*“very few of us ... want to see more homes for better-off potential buyers at the expense of significantly fewer homes for those on lower incomes who struggle to find rented housing that they can afford.”*

Lord Kerslake’s amendments were repeatedly rejected by the House of Commons, where the government played its trump card: its manifesto – including the starter homes proposals – had won a majority at the general election. Eventually, Lord Kerslake reluctantly withdrew his amendment.

Starter homes occupy pole position in the Act and, along with additions and amendments to the Self-build and Custom Housebuilding Act 2015, can be found at sections 1 to 12. The essence of the starter homes reform is that all new housing developments of a certain size (to be determined) must include a proportion (to be determined) of starter homes, and will only be required, additionally, to provide affordable housing where that requirement would not undermine the viability of the development. For housing lawyers, this means that the number of new properties being built in the social rented sector is set to diminish, potentially radically.



**Matt Lewin**



**Andy Lane**

## Part 2: Rogue landlords

The Government’s view is that:

*‘A bigger and better Private Rented Sector is good for the housing market; it improves standards and choice for tenants, as well as providing opportunities for investment.’*

This Part of the Act is aimed at ensuring that the way housing is managed is improved. And it means that the Government has now *‘taken action to tackle bad landlords, so they either improve or leave the sector.’* (my emphasis)

As the Sponsoring Minister, Minister for Local Government Mr Marcus Jones MP, explained:

*‘We want to ensure that such rogues can be placed on a national database, so that local housing authorities in whose area they operate can identify them and their behaviours and standards can be properly monitored. We also want to ensure that the worst rogue offenders can be removed from the rental market altogether, through banning orders. Rogues who let out unsafe or unhealthy properties or engage in illegal practices such as violent entry, harassment or unlawful eviction of tenants will no longer be able to financially benefit from such activities.’*

There were already a number a ways to tackle such behaviour under the Protection From Eviction Act 1977, the Housing Act 1988 and other statutes. Assisting victim tenants to enforce these remedies might have been a way to ‘take action’ against rogue landlords.

### Summary

This Part:

- Allows local authorities to apply for a ‘Banning Order’ to prevent a particular landlord/letting agent from continuing to operate where they have committed certain housing offences. (sections 14-



27)(But, unhelpfully, leaves deciding what the offences are to the Secretary of State).

- Creates a 'blacklist' in a national database of rogue landlords/letting agents which is to be maintained by local authorities (sections 28-39)
- Extends the scope of rent repayment orders, covering up to 12 months' rent, sought by tenants or local authorities where a landlord has committed certain offences (sections 40-52)

This Part of the Act enables the Government to state that it has 'taken action' but it doesn't, as yet, enable local authorities to actually take action. The Act provides more weapons for a local authority's arsenal but without an instruction manual!

The Act as a whole grants the Secretary of State 34 additional powers meaning that vast swathes of policy has been left to secondary legislation. This approach came in for strong criticism through Parliament and continues the trend towards skeleton bills.

Lord Palmer when noting the lack of published regulations relating to the Act said *'I suspect that that is because they have not even been written yet.'* Baroness Williams of Trafford, who was the sponsoring Minister in the House of Lords stages, explained: *'We are planning to publish the secondary regulations in draft and will consult on these in the autumn before they are laid before the House.'* The Delegated Powers Committee considered *'it inappropriate that the determination of the offences that are to constitute 'banning order offences' should be left entirely to the discretion of the Secretary of State and with only a modest level of Parliamentary scrutiny.'*

So we have some weapons but the instruction manuals will not be printed until spring 2017 at the earliest.

### Who is a rogue landlord?

This is not defined in the Act. Some in Parliament felt this was unhelpful. Lord Greaves (LD) said that a rogue could mean a *'scoundrel, villain, reprobate, rascal, good-for-nothing, wretch, rotter, bounder, blighter or vagabond.'* He didn't go on and explain what an *'old rogue'* could mean. But he had *'the distinct impression that the phrase 'rogue landlord' [had] been added to this legislation... by some spin-merchant somewhere in the Government who thought it would be a good idea to get some good publicity to get [the Bill] through. I do not think this is the way that legislation should be written.'*

By contrast, Lord Deben (Con) had absolutely no problem with the phrase. He explained *'It seems a frightfully good word, it says exactly what we mean and it would be very nice if more of our legislation used language which we understood. "Rogue landlord" is a very good phrase to use because it is very important to underline how disgraceful some people are in their treatment of other people in this crucial part of their lives. My only objection is that the word is not used more frequently within the Bill... This is one of the best things in the Bill.'*

The Government considers that there may be about 10,500 rogue landlords operating and expects about 600 applications for banning orders.

### Banning orders

Section 14 introduces the concept of a banning order, which is an order made by the First-tier Tribunal, which has the effect of banning a person from:

- letting housing in England;
- engaging in letting agency work that relates to housing in England;
- engaging in property management work that relates to housing in England; or
- doing two or more of those things;

- being involved in a company or corporate body that carries out activities from which the person is banned.

A banning order can only be applied against someone who has been convicted of a 'banning order offence'.

Section 14 also introduces the concept of a "banning order offence" and provides the Secretary of State with the power to make regulations describing the offences which are to be banning order offences. In particular, regulations made by the Secretary of State may describe an offence by reference to the nature of the offence, characteristics of the offender, the place where the offence is committed, the circumstances in which it is committed, the sentencing court or the sentence imposed.

Although the list of relevant offences has not yet been finalised the Government did indicate at the Report Stage that it envisaged the list to include repeated offences involving breaches of health and safety requirements under the Housing Act 2004, such as a failure to comply with an improvement or overcrowding notice. It is also envisaged that a banning order offence will include unlawful eviction of tenants or violence or harassment towards them by the landlord or letting agent. A banning order may also be sought where a person has been convicted in the Crown court of a serious offence involving fraud, drugs or sexual assault that is committed in or in relation to a property that is owned or managed by the offender or which involves or was perpetrated against persons occupying such a property.

A local authority can apply for a banning order from the First Tier Tribunal. It must serve a notice of intended proceedings specifying the length of banning order to be requested. A notice can only be given 6 months after a banning order offence has been committed.

It is not clear why a local authority needs to wait 6 months. If a rogue landlord has committed a banning order offence why can't a local authority seek to stop them acting as a landlord straight away?

Where a banning order is imposed it must last for a least 12 months. (Amended from the original 6 month proposal). A Tribunal must consider:

- the seriousness of the offence;
- any previous convictions that the person has for a banning order offence;
- whether the person is or ever was included in the database of rogue landlords and property agents
- the likely effect of the banning order on the person against whom the banning order is proposed to be made and anyone else who may be affected by such an order.

#### **Breach of banning order**

It is a criminal offence to breach a banning order i.e. to undertake or be involved in activities that the person is banned from. A person who is convicted of breaching a banning order is liable to a term of imprisonment up to 51 weeks or a fine or both. If the breach of the banning order continues the person is liable for a daily fine of £50.

Importantly, however, a local authority has an alternative to prosecution; instead it can impose a financial penalty. The local authority may determine the amount of the penalty but this may not exceed £30,000 (increased from the £5000 original proposal).

Before imposing a financial penalty on a person, the local authority must give that person notice of their intention to do so. This notice must be given within a period of 6 months, beginning with the first day on which the authority has evidence of the person's breach of the banning order. The notice must set out the amount of the penalty, the reasons for imposing the penalty and information about the right to make representations. However, for each further 6 month period that the breach continues a local authority can impose a further financial penalty of up to £30,000.

What happens to the penalty? In these cash strapped times local authorities will be pleased to learn that they will be entitled to keep the penalty. The Government recognises that it is much more likely that the financial penalty option will be followed.

Parliament was very concerned. The Delegated Powers Committee was surprised that a local authority could impose a financial penalty as an alternative to a criminal prosecution. This 'empowers an authority to act as if it were prosecutor, judge, jury and executioner'. (Perhaps that is no bad thing!)

If a person fails to pay all or part of the financial penalty, the local authority may recover the penalty by County Court enforcement.

A banned person is not a 'fit and proper person' for the purposes of the Housing Act 2004 and may not hold an HMO licence. A local authority may also make a management order on the basis that a property is being let in breach of a banning order. The local authority can receive the rent and can keep any surplus after management costs.

#### **Database of rogue landlords and property agents**

The Secretary of State will establish and operate a database of rogue landlords and property agents. However (there is a theme here), local authorities are responsible for maintaining the content of the database, and are able to edit and update it.

There is a new duty (section 29) requiring a local authority to put anyone who is subject to a banning order on the database. There is also a power to include a person convicted of banning order offence on the database. A local authority might, for example, decide to make an entry in the database rather than apply for a banning order in a case where a person's offences are slightly less serious and the local authority considers that monitoring of that person through the database is more appropriate than seeking a banning order at that stage. An entry may also be made if a person has incurred two civil penalties in respect of banning order

offences within the last 12 months.

If a local authority decides to exercise the power to place an entry on the database it must give the person a decision notice before the entry is made. The decision notice must explain that the authority has decided to make the entry in the database after the end of a 21 day notice period and must specify the period for which the person's database entry will be maintained, which must be at least 2 years from the date on which the entry is made. The notice must also summarise the person's appeal rights. The authority is required to wait until the notice period has ended before making the entry in the database. A decision notice to make an entry must be given within 6 months of the date of conviction for the offence to which it relates.

As yet it is not known what information is to be included in the database. The Secretary of State may specify by regulations (again, there is a theme here). But section 33(2) of the Act does give a steer. The information will probably include personal address and contact details; banning order history; banning offence convictions and all properties owned, let and/or managed by the person.

#### **Rent repayment orders**

The Act empowers the First-tier Tribunal to make rent repayment orders to further deter rogue landlords who have committed certain offences; breaches of improvement orders and prohibition notices and of licensing requirements under the Housing Act 2004, violent entry under the Criminal Law Act 1977, unlawful eviction under the Protection from Eviction Act 1977 and breach of a banning order.

An order requires a landlord to repay rent paid by a tenant, or to repay to a local housing authority housing benefit or universal credit which had been paid in respect of rent.

A tenant or a local authority may apply for a rent repayment order against a landlord who has committed a listed offence. A tenant may apply in respect of an offence relating to premises let to the tenant, and

committed within 12 months before the application is made.

Where a local housing authority makes an application a notice of intended proceedings must be given. That notice must state that the authority is planning to apply for a rent repayment order and why, and the amount the authority seeks to recover. The notice must be given within twelve months of the offence. It must invite the landlord to make representations within not less than 28 days. The authority must consider any representations made and in any event must wait until the notice period has ended before applying for the order.

The First-tier Tribunal can make a rent repayment order if it is satisfied that a landlord has committed a listed offence. The size of the rent repayment order is calculated in a different way depending on whether it is the tenant or the local authority that has made the application.

Where the tenant applies the order must relate to rent paid in the 12 months preceding an offence. Then the Tribunal should deduct any benefit contributions to the rent. Then the Tribunal must consider the conduct of the landlord and tenant, the financial circumstances of the landlord and whether the landlord has any previous convictions for a listed offence. Perhaps this process means rent repayment orders to tenants will be small if benefit for rent has been received.

Where a local authority applies the order must relate to housing benefit or universal credit paid in respect of rent and received by the landlord in the 12 months preceding an offence. In determining the amount the Tribunal must take into account the conduct and the financial circumstances of the landlord and whether the landlord has any convictions for a listed offence.

A rent repayment order is recoverable as a debt. Money payable to a local authority is not to be treated as recovered housing benefit or universal credit, but the Secretary of State may make regulations providing how local authorities are to deal with money recovered.

Where a local authority becomes aware that a listed offence has been committed it must consider applying for a rent repayment order. A local authority can give advice to a tenant and conduct proceedings for them.

### **Enforcement of this part**

All the applications are to the First Tier Tribunal. Likewise challenges or appeals are to the Tribunal. The Tribunal is generally a 'no cost regime'.

### **Missed opportunities?**

The Shadow Housing Minister, Mr John Healy, said that the Act was *'a huge missed opportunity to reinforce the statutory enforcement powers that local authorities need to deal with problems in private rented housing, especially as it's the most rapidly growing sector.'* He suggested that the best way for local authorities to tackle bad landlords was through selective private landlord district wide licensing. Permission for licensing schemes has become harder. This is not the route the Government wants to follow.

The Deregulation Act 2015 addressed vindictive landlords and sought to prevent retaliatory evictions. It only applies to assured shorthold tenancies created after 1 October 2015. Why not extend this to all ASTs and catch old rogue landlords?

Once local authorities have been given the instruction manuals for these new weapons it will be interesting to see how many banning orders are made. This Part of the Act is really concerned with truly terrible landlords. It probably doesn't promote industry wide best practice. It doesn't address the shortcomings of 'bad' landlords. District wide licensing probably could.



**Michael Paget**



## Abandoned premises: Part 3

*The Housing and Planning Act 2016 contains little discussed but important provisions concerning the recovery of abandoned premises. Andy Lane discusses what this means in practice*

### Introduction

The Government's stated aim in respect of the abandoned premises provisions, to be found at Part 3 of the Housing and Planning Act 2016 ("the Act"), was to enable landlords to more easily repossess properties that had been abandoned without the need for a court order, and to speed up the repossession process.

This was despite the fact that implied surrender provisions would apply in many instances under existing law, and bodies such as Shelter and Crisis noting that genuine abandonment cases account for just 0.04% (1750) of private renting households.

Teresa Pearce, Shadow Minister for Communities and Local Government, sought unsuccessfully for an amendment whereby the local housing authority would be required to confirm that they also suspect the property to be abandoned.

### Section 57 notice

The abandoned premises provisions rely on the proper service of a notice – indeed, one of a number – with section 57 of the Act providing:

*"A private landlord may give a tenant a notice bringing an assured shorthold tenancy to an end on the day on which the notice is given if—*

- (a) the tenancy relates to premises in England,*
- (b) the unpaid rent condition is met (see section 58),*
- (c) the landlord has given the warning notices required by section 59, and*
- (d) no tenant, named occupier or deposit payer has responded in writing to any of those notices before the date specified in the warning notices."*

### Overview

In short, where an assured shorthold tenant has moved out of demised premises and owes rent arrears to their landlord, where the landlord has served 3 warning notices that the landlord intends to bring the tenancy to an end because of abandonment, and where no response has been made to the said notices then the tenancy will end on the day of the section 57 notice.

It is important to note:

1. **Private Landlord & ASTs:** This just applies to private landlords and assured shorthold tenancies, although "private landlord" is defined by section 62 as simply meaning those landlords not satisfying section 80(1) of the Housing Act 1985. **The definition therefore includes most housing associations' tenancies:** section 57.
2. **Rent arrears:** For the abandoned premises provisions to apply, the rent must have been unpaid for at least 8 consecutive weeks (if payable weekly or fortnightly), 2 consecutive months (if payable monthly), 1 quarter (if payable quarterly) or 3 months' rent outstanding for at least 3 months (if payable yearly): section 58(1).
3. Any rent paid before the section 57 notice will nullify the previous qualifying status of the arrears: section 58(2).
4. **Warning notices:** Before section 57 can apply a landlord must give 3 warning notices:
  - 4.1 The section 58 rent condition does not need to be satisfied at the time of the 1<sup>st</sup> notice, though it must be satisfied by the time of the 2<sup>nd</sup> notice: section 59(6)(7).
  - 4.2 The 2<sup>nd</sup> warning notice must be given between 2 and 4 weeks after the 1<sup>st</sup> notice, with the 3<sup>rd</sup> notice being given within 5 days after the date in the notice for the tenant to respond by: section 59(8)(9).

4.3 The 3<sup>rd</sup> notice can be prescribed subject to regulations (not yet made): section 59(10).

4.4 The first 2 notices must be served on the tenant, named occupiers<sup>1</sup> and any deposit payers<sup>2</sup>: sections 59(2).

4.5 **Service** of the section 57 notice and the first two warning notices is provided for by section 61:

*“(2) The notice may given by delivering it to the tenant, named occupier or deposit payer in person.*

*(3) If the notice is not delivered to the tenant, named occupier or deposit payer in person it must be given by—*

*(a) leaving it at, or sending it to, the premises to which the tenancy relates,*

*(b) leaving it at, or sending it to, every other postal address in the United Kingdom that the tenant, named occupier or deposit payer has given the landlord as a contact address for giving notices,*

*(c) sending it to every email address that the tenant, named occupier or deposit payer has given the landlord as a contact address for giving notices, and*

*(d) in the case of a tenant, leaving it at or sending it to every postal address in the United Kingdom of every guarantor, marked for the attention of the tenant.*

5. **Reinstatement:** A tenant can – within 6 months from the time the section 57 notice is given - apply to the county court to reinstate the tenancy if they have a good reason for failing to respond to the

<sup>1</sup> i.e. a person named in the tenancy as a person who may live in the demised premises – section 59(11)

<sup>2</sup> i.e. the person a landlord knows paid the deposit on behalf of the tenant – section 59(11)

warning notices (the court being able to make “any order it thinks fit for the purpose of reinstating the tenancy”: section 60.

### **Conclusion**

The security of tenure provisions of section 5 of the Housing Act 1988 have accordingly been amended by section 63 of the Act to allow for a tenancy coming to an end in accordance with section 57.

The abandoned premises provisions have not at the time of writing been brought into force.

### **Andy Lane**

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## **Extended right to buy: Part 4**

### **A statutory damp squib?**

#### **The 2016 Act's extended RTB provisions in overview**

In an Act of more than 200 sections, those providing - directly and indirectly - for the voluntary extension of the right to buy to the assured tenants of private registered providers number just 16. The reason, of course, is the voluntary nature of the extension: the real meat of the right is provided not in the statute itself but in the National Housing Federation's 2015 agreement with Government. The key principles of that agreement (available [here](#)) have been the subject of extensive discussion and controversy in the trade and legal press. They are not the subject of this briefing. The few and consequential provisions made by the 2016 Act are.

#### **Compensatory grants and local authority payments**

As anticipated by the 2015 agreement, the 2016 Act provides for the payment of grants to private registered providers to compensate them for selling their housing

at a discount<sup>3</sup>. The provisions give effect to a key principle of the 2015 agreement that private registered providers receive the full market value of the housing they sell, with the discount funded by Government.

The Secretary of State and, in respect of dwellings in London, the Greater London Authority ('GLA') are, however, given power to make grants on any terms and conditions they think fit. Clearly, the scope of this statutory discretion is wide. Far less clear is the use to which the Government and GLA will put it.

This uncertainty has led some to speculate that, in the absence of an overt mechanism for enforcing compliance with the 2015 agreement (see below), the Government and GLA might use the discretion as a 'backdoor' means of enforcement. Given the importance of discount compensation to the 2015 agreement and to the efficacy of a voluntary right to buy extension, this seems unlikely. Far more likely, it is suggested, is the exercise of the discretion to ensure that private registered providers use their grants to finance new-build accommodation. Like so many aspects of the extended right to buy, however, the use to which this statutory discretion is ultimately put is only likely to become clear with time.

The Act provides a mechanism (discussed in detail elsewhere in this briefing) by which these grants will be funded. In overview, by Chapter 2 of Part 4, local housing authorities will be required to make payments to the Secretary of State at the start of each financial year, calculated by reference to the value of their 'higher value' social housing, which is likely to become

vacant in the coming year. It is anticipated that local housing authorities will sell that housing to finance the payments required by the 2016 Act. Indeed, they are obliged to consider doing so. The payments will in turn be used to fund the grants payable to registered providers.

The detail of the scheme - not least the definition of 'higher value' housing, the statutory determinations requiring local housing authorities to pay the Secretary of State and the method for calculating the amount they are required to pay - will be provided in regulations made under the 2016 Act, many of which are expected later this year.

#### **Compliance with the voluntary, extended right to buy**

One controversial issue to which the voluntary extension of the right to buy has given rise is the means by the 2015 agreement will be enforced. The 2016 Act contains no overt means of enforcing the agreement, but provides instead that the Regulator of Social Housing, currently the Homes and Communities Agency ('HCA'), must monitor compliance at the Secretary of State's request<sup>4</sup>.

It is anticipated, therefore, that the Secretary of State will ask the HCA to monitor private registered providers' compliance with the 2015 agreement and, to that end, publish yardstick 'home ownership criteria', by which their compliance will be measured. The Act defines the criteria as "criteria ... that relate to the sale of dwellings by private registered providers to tenants otherwise than in exercise of a right conferred by an Act"<sup>5</sup>.

The HCA will be obliged to provide the Secretary of State, upon request, with reports and information about private registered providers' compliance with the

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<sup>3</sup> Section 63 of the 2016 Act for grants made by the Secretary of State in respect of dwellings outside of London; and section 64 for grants made by the Greater London Authority in respect of dwellings in London.

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<sup>4</sup> Section 65(1) of the 2016 Act.

<sup>5</sup> Section 65(2)-(3) of the 2016 Act

criteria<sup>6</sup> but otherwise, it seems, has no statutory powers of enforcement. Instead, the Secretary of State “may publish information about a private registered provider that has not met the home ownership criteria”<sup>7</sup>.

The Explanatory Notes to the Bill stated that compliance with the 2015 agreement “is expected to be sufficient to meet the expected level of compliance with the home ownership criteria”. The proof of that particular pudding will, of course, be in the eating. In the meantime, the lack of any overt means of enforcing the agreement has led some to question whether what is essentially a ‘naming and shaming’ provision in the 2016 Act will be enough to compel compliance; or whether the provision for monitoring compliance with the voluntarily extension of the right to buy is not in fact a statutory damp squib.

Again, it is suggested, only time will tell. In the meantime, housing professionals, lawyers and tenants alike will continue to watch with interest.



**Dean Underwood**  
**Barrister and Chair of the Social Housing Law**  
**Association**

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## The sale of high value vacant housing: Part 4

The most eye-catching proposal on housing in the Conservative party’s 2015 general election manifesto

<sup>6</sup> Section 65(5) of the 2016 Act

<sup>7</sup> Section 65(6) of the 2016 Act

was the promise to extend the right to buy to housing association tenants. That promise would be funded by “*requiring local authorities to manage their housing assets more efficiently, with the most expensive properties sold off and replaced as they fall vacant.*”

Before the election, the Conservatives published indicative values above which any vacant local authority housing would be sold: in London, this was as low as £340,000; in the South East, £165,000; in the Midlands, Yorkshire and Humber, North East and North West between £80,000-£105,000.

The proposal was fiercely opposed by, among others, the Local Government Association, who argued that local authorities should retain 100% of the proceeds of sale of their high value vacant housing stock and that the voluntary right to buy should be funded by other means.

When the Bill was first presented to Parliament, the mechanism adopted would require local authorities to make a payment to the Secretary of State in respect of each financial year; the amount of that payment would be determined by the Secretary of State as “*an estimate of ... the market value of the authority’s interest in any high value housing that is likely to become vacant during the year*” less certain costs or deductions to be prescribed. Given the serious financial implications for local authorities posed by this clause, there was alarmingly little detail set out on the face of the Bill; the detail would be dealt with under secondary legislation – drafts of which have still not been published at the time of writing.

The Bill as presented to Parliament contained express provision requiring local authorities to account for the value of (and, by necessary implication, to sell off) a proportion of its housing stock, as promised in the Conservative manifesto. However, it contained no express provision, as had also been promised in the manifesto, that guaranteed the replacement of housing stock that was sold off during the course of the year. The government eventually introduced an amendment which would guarantee a one-for-one replacement for local authorities outside of Greater London and a two-

for-one replacement for Greater London authorities.

The House of Commons and the House of Lords fought a pitched battle over Lords amendments which sought to make express provision for local authorities to retain at least some of the proceeds of sale which would then be applied to the provision of a replacement property for the one which has been sold. Lord Kerslake, in proposing the amendment, observed that this was consistent with the manifesto promise that high value vacant housing would not only be sold off, but replaced. The government, however, flatly rejected these “wrecking amendments” which would significantly reduce the funding available for the voluntary right to buy and therefore, in the government’s view, frustrate a manifesto commitment.

One potentially important concession made by the government during the passage of the Bill was to replace “high value” housing with the phrase “*higher value*” housing. The rationale was explained, on the government’s behalf, by Baroness Williams, who said that the government had acknowledged concerns that defining “high value” housing liable to be sold by reference to national or regional thresholds could lead to a significant proportion of dwellings in local authorities with acute levels of housing demand falling within that definition. The amendment, adopting the phrase “higher value” housing, means that the housing stock liable to be sold under these reforms will be defined as a proportion of the housing stock in a local authority’s own area – i.e. within an inner London borough, where all houses are objectively “high value” when compared against national or regional property prices, only a proportion of those houses will be “higher value”. This represents an important departure from the approach indicated in the Conservative manifesto.

However, at the time of writing, no information has been published about the detail of how the government will calculate higher value houses. Fundamentally, it seems unlikely that money raised by the sale of higher value vacant housing stock will be sufficient to fund both the cost of the voluntary right to buy and the replacement of the housing stock that has been sold. Moreover, in

heavily developed local authority areas, it is also highly unlikely that replacement housing stock will be constructed in the same areas as the high value stock which has been sold. Unsurprisingly, there is no express provision requiring the replacement housing stock to be of the same tenure as the high value stock which has been sold. Therefore it seems almost inevitable that the result will be a drastic erosion of social rented stock and a hastening of the decline in the number of council houses, especially in areas with high property prices.

If this does come to pass, it will not trouble the government who have made it plain that the object of the Act is to privilege home ownership over – and, in many cases, at the expense of – other forms of tenure, especially the social rented sector.



**Matt Lewin**

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## **Rents for high income social tenants: Part 4**

As anticipated, the Housing and Planning Act introduces new rules intended to ensure that social housing tenants on higher incomes will begin paying market rate (or near market rate) rents on their properties. Local housing authorities will now be required to implement so-called ‘pay to stay’ schemes on a mandatory basis, subject to Regulations which will be enacted in due course.

This was a key plank of the Government’s programme for social housing reform, unveiled in the post-election



emergency budget in July 2015 and rigorously defended during the bill's passage through Parliament, despite attempts by the House of Lords to water down the proposals.

The provisions as enacted – set out in Part 4, Chapter 3 of the Act - are relatively sparse and lacking in detail. In reality, the legislation does little more than set out a skeleton framework of regulatory powers; the Government's clear preference was to leave the practicalities of the policy to be worked out in Regulations.

This is to be welcomed insofar as the legislation allows a great deal of flexibility in implementing the policy and adapting to changing needs and circumstances over time. In response to the criticism of the Lords, the Government also gave a commitment that any Regulations enacted under this Chapter of the Act will be subject to the affirmative resolution procedure, therefore requiring the approval of both Houses of Parliament.<sup>8</sup> It is therefore anticipated that Parliament will retain a great degree of scrutiny of the implementation of these provisions moving forward.

On the other hand, there is still much we don't know. Despite the various undertakings given by Government members in the Commons and Lords as to how the policy will be enforced, no draft Regulations have yet been circulated nor have there been any announcements as to the timeframe when they can be expected.

### **New rules for local housing authorities**

For now, what we know can be summarised as follows:

- Local housing authorities will be required to charge higher rent to a "*high income tenant of social housing*": s80(1).
- The provisions apply compulsorily to local housing authorities in England as defined by s1 of the Housing Act 1985: namely, district councils and London borough councils.

- The definition of a "*high income tenant*" will be set by Regulations in due course. However, the Government has always stated its preference to apply the policy to tenants earning above £31,000 in London or £40,000 in the rest of England. Interestingly, "*tenants*" are defined as including those with a "*licence to occupy*": s91. The legislation therefore seems clearly intended to apply to all sorts of tenants and occupants who have less than a secure tenancy of their homes.
- The increased level of rent which "*high income*" tenants will be required to pay will be set by Regulations. This may be either full or partial market rent, or may be determined by reference to a different formula: s81(2).
- During the debates in both Houses, the Government expressed its intention that increased rent will be subject to a taper of 15% or an extra 15p in rent for every pound earned above the income threshold. The Government originally planned for a 20% taper, to which the Lords responded with an amendment bringing the figure down to 10%. The Government compromised at 15% and gave a commitment to review and uprate the thresholds each year in line with the Consumer Price Index.<sup>9</sup>
- Local housing authorities can expect to have to pay the additional revenue generated through the policy to the Minister: s86(1). However this is likely to be subject to a concession that local authorities can retain the "*administrative costs*" of implementing the policy.<sup>10</sup>

Although the precise definition of what will be counted as "*income*" as yet remains unclear, Baroness Williams in the Lords gave undertakings on behalf of the Government as follows:

- No household in receipt of Universal Credit or Housing Benefit would be subject to the policy;

<sup>8</sup> House of Commons Library, Briefing Paper: Housing and Planning Bill: Lords Amendment and Ping Pong, 11 May 2016, p. 24.

<sup>9</sup> House of Commons Library, Briefing Paper, *supra*, p. 25.

<sup>10</sup> Section 86(3) of the Act and Statement of Housing Minister Brandon Lewis, HC debate 3 May 2016, Hansard vol. 609, col. 68.

- Income would be defined as “*taxable income*” which would take account of employment earnings, pension income and investment income but not Child Benefit, Disability Living Allowance or Tax Credits;
- Regulations can require ‘household income’ to be taken into account (s81(2)(e)), and a household will be defined as the tenant, any joint tenants and their spouses, partners or civil partners. However within a household only the incomes of the two highest earners would count, and the incomes of non-dependent children would not count unless they are on the tenancy agreement and they are one of the two highest earners.<sup>11</sup>

### Private registered providers

The Act makes it clear that different rules will apply to private registered providers of social housing. Whereas local housing authorities will be compulsorily required to implement pay to stay rules, private providers who voluntarily choose to do so are only required to publish their pay to stay policy, and to include provisions for reviews and appeals of decisions made under the policy: s89(1). Notably, the Act makes no provision for regulation of the use of private providers’ additional receipts. In contrast to local housing authorities, therefore, it appears that private providers will be allowed to use the revenue as they wish.

While HMRC may also disclose information about income to private registered providers (s90), there is no equivalent provision empowering private providers to “*require*” that tenants disclose evidence of their income. Private providers voluntarily adopting pay to stay schemes will therefore need to carefully consider whether and how to require tenants to declare income as a provision within their policies or tenancy agreements.

### Enforcement of the policy

The Act takes a significant step forward from the previous voluntary pay to stay policy by providing powers to source and rely on data about tenants’

income:

- Under the Regulations local housing authorities can be empowered to require tenants and prospective tenants “*to provide information or evidence for the purpose of determining whether the local housing authority is obliged to charge a specific level of rent and what that level is*”. Tenants who fail to comply can be sanctioned by charging them the maximum rent available: ss82(1), (2), (4);
- HMRC may disclose information to local housing authorities for the purpose of setting tenant and prospective tenants’ rent levels: s83.

Nonetheless housing authorities should anticipate a number of ‘hot points’ when it comes to implementing the scheme. Firstly, obtaining declarations of income from tenants is likely to be labour-intensive and to require careful assessment and implementation of data protection rules and procedures.

Secondly, s85 provides that Regulations may give housing authorities power to “*change the rent payable under the tenancy for the purpose of complying with the regulations*” and may set out “*the procedure for changing rent*”. Presumably this procedure is intended to prevent housing providers from the logistics of renegotiating each of their individual tenancy agreements, but it remains to be seen what form it will take or whether it will be amendable to challenge.

Thirdly, tenants will of course have the right to request of review of decisions to increase their rent. This may be particularly complex where a tenant’s income changes over time or fluctuates above and below the threshold level. Regulations may provide for further rights of appeal to the First Tier Tribunal and presumably beyond (s85(3)), so local authorities should prepare themselves for the need to defend their decisions in the courts.

### Conclusion: all about the money?

Overall the Housing and Planning Act mandates the implementation of a bigger and bolder pay to stay policy than any which has come before. It replaces the existing voluntary policy which came into force on 1

<sup>11</sup> House of Commons Library, *Briefing Paper, supra*, p. 24.

April 2015, on foot of policy guidance published in 2014.<sup>12</sup> That policy had permitted local authorities to voluntarily charge full market rent to tenants earning over £60,000 per year, whether they lived inside or outside of London. However during debate in the Commons, Housing Minister Brandon Lewis admitted that the Government was unaware of any local authorities who had in fact implemented the voluntary policy.<sup>13</sup>

A 2012 Public Consultation on 'pay to stay' made it clear that local authorities worried that the administrative and labour costs of implementing the policy would outstrip any additional revenue generated, particularly in areas with low numbers of 'high earning' tenants. The Coalition Government also acknowledged at the time that local authorities faced serious limitations in implementing the policy without power to access data about tenants' incomes.<sup>14</sup>

It is perfectly clear from the Parliamentary debates that the decision to introduce mandatory pay to stay policies in the face of local authority reluctance is grounded in the desire to generate additional revenue from local authority housing stock. The Minister rejected a Lords' amendment which would have kept the policy voluntary by arguing this would "*substantially reduce the revenue*" generated by the policy, and acknowledged that the Government's intention was of "*using the funds raised to reduce the national deficit*".<sup>15</sup> It is therefore clear that the policy requires local housing authorities to bear the burden of additional work and enforcement duties without any expectation of benefit to themselves nor any chance of reinvestment of additional revenue into the social housing sector.

The Minister also argued that the policy should be mandatory as it would be unfair to tenants if the policy were applied inconsistently, that is, if tenants in certain areas faced possible rent increases while tenants in neighbouring areas did not. However it is not clear how that argument is consistent with s81(2)(a), which provides that "*high income*" tenants can be defined "*in different ways for different areas*".

During the Lords' debates Labour had raised concerns that the policy would disincentive tenants to work, especially those whose incomes fell just over the wrong side of the threshold, or that it would have the effect of pushing secure tenants into the private rented sector. This was consistently denied by the Minister, who stated that the intention was not to force people from their homes, but rather that "*as people earn more money, they should contribute a little more into the system*". It remains to be seen whether the policy will achieve that aim.<sup>16</sup>



**Tara O'Leary**

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## Reducing regulation of social housing: Part 4

### Introduction

This article summarises the important changes being made to regulation of private registered providers of social housing ('PRPs') by the Housing and Planning Act 2016. The changes have been introduced primarily in response to the decision of the Office of National

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<sup>12</sup> The policy was first set out in *Guidance on Rents for Social Housing*, DCLG, May 2014.

<sup>13</sup> HC debate 3 May 2016, Hansard vol. 609, col. 68.

<sup>14</sup> *High Income Social Tenants: Pay to Stay Consultation paper*, DCLG, June 2012, and *High Income Social Tenants Pay to Stay Consultation Paper: Summary of Responses*, DCLG July 2013.

<sup>15</sup> HC debate 3 May 2016, Hansard vol. 609, col. 68.

<sup>16</sup> HC debate 3 May 2016, Hansard vol. 609, col. 77.

Statistics ('ONS') in October 2015 that PRPs would henceforth be classified as "public non-financial corporations" for the purposes of national accounts and economic statistics.

The changes have not attracted a great deal of debate during the passage of the bill compared with some of the more controversial aspects around starter homes and the sale of high value social housing. Nevertheless, they are highly significant for PRPs and potentially create new opportunities for growth and new business models. This in turn may have a significant impact on the social housing sector.

#### **The ONS review and the decision to reclassify**

The ONS review commenced in September 2015, following the Government's announcements about introducing the right to buy (on a mandatory basis) to PRPs.

Although the ONS did not examine the implications of the RTB proposals, they were widely seen as having been a trigger for the review. Readers will recall that the 2015 Conservative manifesto had included a commitment to extend the RTB to housing association tenants; a controversial announcement which led to threats of a legal challenge based on Article 1, Protocol 1 ECHR (the right to peaceful enjoyment of possessions).

This was subsequently resolved in October 2015 when the National Housing Federation agreed a deal with the Government which would see the RTB being offered on a voluntary basis, rather than being imposed through primary legislation.

The ONS focussed in particular on the extent to which PRPs were integrated within a system of statutory regulation, and the extent of state control over the running of PRPs.

The ONS was persuaded by the following provisions of the Housing and Regeneration Act 2008:

- a. Powers to refuse consent for, or set conditions on, the disposal of PRPs' assets (ss. 172-178).
- b. Powers to direct PRPs as to the use of proceeds from assets disposals (ss. 177-178).
- c. Power to refuse consent over disposals of housing stock even following de-registration of a PRP (s. 186).
- d. Powers to refuse consent for the voluntary winding-up, dissolution, and restructuring of a PRP (ss. 160-166).
- e. Powers over the management of PRPs, in particular the power to appoint managers and officers (ss. 151-157, 246-252, 261(3) and 269).

Each of the above powers were given to the Homes and Communities Agency, which the ONS continues to classify as part of central government given its regulatory function and the fact that the Government directly controls all funding, appoints and removes all board members and key personnel.

The reclassification decision had two important consequences.

First, it created significant uncertainty in the sector. This acts as a powerful disincentive to investment; with knock on ramifications for PRP budgets and future plans for development and expansion. This is highly unfortunate at a time when the Government is seeking to boost the supply of new housing, including affordable housing.<sup>17</sup>

Secondly, and more fundamentally from a political perspective, the reclassification of PRPs to the public sector has implications for the Government's own budgets. The ONS' decision has the effect of transferring all PRP assets and more importantly, debts, onto the Government's balance sheet. This resulted in the sudden addition of £64bn of extra Government debt, or an overnight increase of 4%. This is equivalent to

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<sup>17</sup> <http://www.socialhousing.co.uk/would-deregulation-really-persuade-the-ons/7012789.article>

3.2% of GDP. Furthermore, the decision will result in bank and bond debt being retrospectively added back to 2008.<sup>18</sup>

Little wonder, then, that the Government was keen to reverse this change as soon as possible.

In December 2015 Brandon Lewis, housing minister, announced that the Government would be bringing forward “a package of amendments to the Housing and Planning Bill to deregulate the social housing sector”. He was explicit that one of the Government’s main intentions was “to enable the Office for National Statistics to return the sector entirely to private”.<sup>19</sup>

The opportunity to bring forward measures seeking to reverse the ONS decision arrived very quickly via the medium of the Housing and Planning Bill.

#### **Removing HCA regulation (s92 and Schedule 4)**

Schedule 4 to the original Bill (now seen at section 92 and, especially, Schedule 4 to the 2016 Act). These provisions, referred to as “Reducing regulation of Social Housing” at the head of Chapter 4, aim to remove the aspects of governmental control which were considered by the ONS to be indicative of the public nature of PRPs. Schedule 4 addresses each offending aspect of the Housing and Regeneration Act 2008, and therefore includes the following elements:

- a. Removes the requirement for PRPs to obtain consent for disposals of land, replacing this with a requirement to notify the HCA when a disposal takes place (repealing ss. 172-175 of the Housing and Regeneration act 2008 and replacing s. 176). HCA directions can make provision about timing and content of notification: Part 1 of Schedule 4.
- b. As for dispensing with notification, HCA can do this by reference to any policy for disposals adopted by the PRP – i.e. PRP would adopt a

policy and notification would then be dispensed with providing within scope of policy: amended s176 of the 2008 Act to be brought in by paragraphs 15 and 16 of Part 1 to Schedule 4 of the 2016 Act..

c. Removes requirements to obtain consent for voluntary arrangements under the Insolvency Act (winding up) and restructuring, replacing these with a notification requirement (replacing ss. 16, 160 and 163 of the Housing and Regeneration Act 2008): paragraphs 24 to 26 to Part 2 of Schedule 4 to the 2016 Act;

d. Removes the requirement to obtain consent to changes to registered society rules, charitable objectives or company articles, or changes of name and registered office, replacing these with notification requirements (repealing ss. 211-214 of the Housing and Regeneration Act 2008 and inserting new ss. 169A-C): paragraph 29 to Part 2 of Schedule 4 to the 2016 Act;

e. Abolition of the disposal proceeds fund (repealing ss. 177-178 of the Housing and Regeneration Act 2008): Part 3 of Schedule 4 to the 2016 Act.

f. Disposals proceeds fund:

- Effectively a ring-fenced part of PRPs accounts. They must show the net proceeds of certain types of disposal, payments of grant and repayments of discount separately in their accounts and then use or allocate the sums in the DPF only as directed by the HCA.

g. The HCA has various powers including:

- To direct how sums in DPF must be used or allocated
- To specify the time limits after which it may require the return of unused sums in DPF to the HCA or GLA

h. Current direction (March 2015) requires:

<sup>18</sup> FT article

<sup>19</sup> Source: <http://www.24dash.com/news/housing/2015-12-15-Brandon-Lewis-announces-deregulation-package-for-sector>



- Proceeds from disposals in G. London to be used or allocated in G. London and the same for proceeds from outside G. London
- Proceeds can only be used for the acquisition, construction, improvement, repairing etc of land or buildings for letting at social or affordable rents
- Where proceeds are from shared ownership (for profit making PRPs only), the proceeds can be ploughed back into further shared ownership housing.
- Repayment of net proceeds to HCA and GLA is generally 3 years from date first shown in DPF.

The 2016 Act also amends powers which currently exist to appoint new officers to ensure 'proper management' of PRPs so that they are restricted to situations where this is necessary for compliance with any legal requirements (amending ss. 269 and 275 of the HRA 2008): Part 4 of Schedule 4.

There are no exceptions or conditions applicable to the removal of the requirement for consent to dispose of land. This means that PRPs will have the same freedom to dispose of any land, regardless of its origin. In other words it will make no difference whether the land was originally transferred from local authority or other public ownership or whether it was acquired by the PRP on the open market.

#### **Changes to LA powers (s93)**

There is a new power envisaged by s93 of the 2016 Act for the Secretary of State to make regulations "for the purpose of limiting or removing the ability of local authorities to exert influence over private registered providers" (s93(1)).

Viscount Younger of Leckie (introducing new power to make regulations) said this:

*"Classification back to the private sector provides them with the ability to access private finance to allow them to continue with their development. These amendments*

*support this aim ... Local authority control over housing associations was not one of the reasons why the Office for National Statistics reclassified the sector last year. However, we believe that certain governance arrangements may be seen as public sector control and could jeopardise the reclassification of housing associations."*

*"Amendment 78A relates to the rights of local authorities to nominate housing association board members and act as shareholders. This could allow local authorities, in a minority of housing associations, to block major constitutional changes. Such arrangements are typical in organisations which hold stock that was previously owned by the local authority".*

#### **New insolvency regime for PRPs (ss95-108)**

The Act introduces new provisions, at sections 95 to 108, including the concept of a "housing administration order" (s95), to deal with failures of larger or more complex PRPs in England.

The provisions are a response to the perceived weaknesses in the system which were revealed by the insolvency of Ujima Housing Association in 2007 and the rescue of Cosmopolitan Housing Association by the Sanctuary Group in 2013<sup>20</sup>. The details of this special scheme are beyond the scope of this article, but the provisions seek, as is clear from section 96, to provide a more flexible framework which would allow a court-appointed housing administrator provide for 'normal administration' (s97) and keep social housing in the regulated sector (s98).

#### **How was the Bill received?**

It is fair to say that the Bill as a whole received a mixed reception. However, much of the attention to date has been on the more controversial aspects relating to starter homes, the sale of higher value local authority

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<sup>20</sup> For more information see:

<https://www.gov.uk/government/publications/cosmopolitan-housing-group-lessons-learned>

housing, and the proposed changes to secure tenancies to end the idea of a 'home for life'.

The deregulation proposals are likely to lead to a sector-wide review of business structures, asset holdings and regulatory position. The Bill presents new opportunities for PRPs. For example, it has been suggested that PRPs may be keen to take advantage of the freedoms on disposals to create new entities outside the scope of what remains of the HCA's regulation, and to dispose of assets to those new entities, which would then operate in the private sector.<sup>21</sup>

Others have suggested that the deregulation measures proposed in the Housing and Planning Bill are likely to have an effect on the value of PRP's assets. The consent requirements and restrictions on disposals which currently exist have the effect of depressing the market value of social housing units; once these are removed and there are no restrictions on disposals then the market value may well increase. It has been suggested that PRPs might seek to take advantage of the potentially higher disposal receipts to mitigate the adverse impacts of the 1% rent reduction and other restrictions which may follow on from the ONS reclassification<sup>22</sup>. Clearly, the removal of these restrictions will make sale on the open market a more attractive commercial proposition than a discounted sale to an existing tenant via the voluntary RTB.

However, some commentators have questioned whether the Government's deregulation package will actually be sufficient to reverse the ONS' classification decision of October 2015<sup>23</sup>. It has been pointed out that

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<sup>21</sup> Source:

[https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwizzL\\_m38TKAhWH-](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwizzL_m38TKAhWH-)

<sup>22</sup> Source: <https://home.kpmg.com/uk/en/home/media/press-releases/2015/12/deregulation-could-see-value-of-social-housing-rise.html>

<sup>23</sup> Source: <http://www.socialhousing.co.uk/would-deregulation-really-persuade-the-ons/7012789.article>

the ONS is an independent body which is not beholden to the Government's will, and any future review of the sector will take into account the legal framework then existing, including measures in the Housing and Planning Bill when it becomes law.

Although RTB and pay to stay will no longer be forced on PRPs, there remains a clear expectation, backed up with statutory machinery for paying grants and obtaining information which suggests that these elements of the Bill are somewhat less 'voluntary' in reality than would first appear to be the case. Furthermore, the Government intends to fund the voluntary RTB via receipts from the disposal of local authority-owned 'high value housing', and concerns have been raised as to the extent to which this has been fully and accurately costed. The link between the new policy and the availability of funding to pay the grants foreshadowed in the further emphasises the extent Governmental control over the sector, contrary to the intentions of other parts of the Bill.

In addition, the Government continues to exercise significant control over PRPs via subsidy measures and will continue to do so despite the deregulation proposed in the Housing and Planning Bill. Most recently the Government has imposed a requirement (in the 2015 budget) for PRPs to reduce rents by 1% each year for the next four years in a bid to reduce the housing benefit bill. This amounted to a reversal of the previous Government's 10 year rent formula, intended to promote certainty for landlords, which only came into effect in 2015. This level of Governmental control over the activities of 'private' bodies might legitimately be seen as being equally indicative of public sector status as some of the provisions of the Housing and Regeneration Act 2008 which the Government is seeing to relax. On the other hand, this aspect of Governmental control does not seem to have been material to the ONS' classification decision.

### Conclusion

As a result of the October 2015 ONS reclassification, the treatment of PRPs for public accounting purposes is

brought into line with the courts' assessment of their status for the purposes of judicial review and the Human Rights Act.

This 'public' status has been unwelcome for PRPs from a legal perspective because of the increased exposure to the financial and public relations costs of litigation. It is now unwelcome for the Government as well, in light of the sudden increase in public debt.

The deregulation proposals are likely to go a long way towards reversing the ONS' decision (although this is not guaranteed), but they are very unlikely to have any impact on the legal position. As can be seen from the above summary of the Weaver judgment, the level of regulation was only one factor leading to the conclusion that PRPs were exercising public functions. Factors relating to public subsidy and the connection with local authority allocation powers were arguably of greater import, and the Bill does not make any changes in these areas.

It will also be noted that the proposals in the 2016 Act do not do away with regulation completely. There is a clear reduction in oversight, but regulation still remains in respect of governance and financial viability. In addition, those PRPs which are charitable institutions remain subject to regulation by the Charity Commission (though recent commentary has suggested some are looking to disapply charitable status for this reason). That regime also contains disposal consent requirements which will reduce, if not negate, the new freedoms to be found in the 2016 Act for those PRPs subject to that regime.



**Emma Dring**

## Phasing out of tenancies for life: Part 4

A particularly controversial feature of the Housing and Planning Act 2016 – to be found at s118 and Schedule 7 – is its requirement that most new local authority tenancies will be granted subject to a fixed term of between two and ten years. This is achieved by inserting a new section 81A to the Housing Act 1985, under the heading “*phasing out of tenancies for life*”. The ten-year limit was increased from five years following the ‘ping pong’ debate between the Commons and the Lords in the weeks leading up to assent.

Subject to limited exceptions, this essentially puts an end to the long-held expectation that a secure tenancy is a tenancy for life.

A further nail in this coffin is seen in amendments to succession rights. Section 120 and Schedule 8 to the 2016 Act amend the 1985 Act to provide that any new succession after the commencement of the reforms will be for a fixed term of 5 years.

Authorities remain free to extend these succession rights in the tenancy agreement. This removes the previous distinction, introduced by the Localism Act 2011, between tenancies entered into before and after 1 April 2012: in other words, where a tenant dies after the commencement of the changes, there can be no succession to anybody other than a spouse, civil partner or person living with the tenant as a partner – unless the tenancy agreement provides otherwise (and many do). Even then, the successor is entitled only to a fixed term ‘secure’ tenancy of 5 years: section 89(2A) Housing Act 1985.

A new section 81B of the 1985 Act will provide that “old-style” indefinite term secure tenancies may only be granted in accordance with regulations made by the Secretary of State – the details of which have yet to be confirmed, and must first be subjected to Parliamentary debate – or where an authority offers the tenancy to

replace a previous old-style secure tenancy, where the tenant has not made an application to move. It follows that the precise scope of this exception is yet to be defined, and it seems unlikely that these regulations will simply be waved through the negative resolution procedure without controversy.

Between 6 and 9 months prior to the expiry of the fixed term, local housing authorities must carry out a review to decide whether or not to offer a new fixed-term tenancy: section 86A Housing Act 1985. There is no requirement that any new tenancy will relate to the same property. If no such offer is made (or is not taken up), a mandatory ground for possession will arise. This essentially imports a review of the tenant's ongoing 'need' for the tenancy – and puts pressure on both successors and ordinary tenants to exercise their right to buy.

Three 'Options' are provided for the authority on the review: Option 1 is to grant a new fixed term secure tenancy over the same property; Option 2 is to seek possession of the property but offer a new fixed term secure tenancy over a different property; Option 3 is to seek possession without offering a new tenancy at all. In any case, the authority "must" offer advice on other housing options, including the exercise of the right to buy "if the landlord considers that to be a realistic option for the tenant" (section 86A(6) HA85). Where the authority decides to seek possession of the property, the tenant has a right to request a reconsideration of a decision under section 86C within 21 days of notification of the decision, subject to further regulations.

Challenges to the length of a new fixed term secure tenancy can be made under section 81D, again within 21 days of receipt of the offer. Authorities will be relieved to note however that this right of appeal is constrained: section 81D(2) provides that "The sole purpose of a review under this section is to consider whether the length of the tenancy is in accordance with any policy that the prospective landlord has about the length of secure tenancies it grants." It follows that if a robust policy is drafted and clearly followed, challenges

under this section are unlikely to succeed.

Proceedings for possession under the new mandatory ground at section 86E must be brought within 3 months of the end of the fixed term tenancy. Section 86D provides that a new 5-year fixed term tenancy arises upon the expiry of the fixed term, so the tenant does not become a trespasser whilst possession proceedings are ongoing – but this new tenancy does not affect the availability of the mandatory ground, and possession of the new fixed term tenancy can still be sought under the familiar grounds as well (which may be especially helpful if the 3 month deadline is missed).

Importantly, section 86E(3) provides that "the court may refuse to grant an order for possession under this section if the court considers that a decision of the landlord under section 86A or 86C was wrong in law". It is by this route that tenants are entitled to challenge the lawfulness of the review process in possession proceedings before the County Court. Authorities will need to ensure that their policies and procedures reflect the pending guidance from the Secretary of State.

The rationale for these reforms, it seems, is twofold: promote social mobility by encouraging secure tenants to see their home as a short- or medium-term stepping stone rather than a permanent home; and incentivise tenants to manage their tenancies responsibly to avoid giving the authority any additional reasons not to renew the fixed term.

On one view, this fits well with government rhetoric around social mobility and empowering local communities to manage the housing crisis in the most effective way for them. For housing authorities, however, many questions remain. What factors should structure authorities' discretion in fixed term cases? What are the boundaries of that discretion? Where is there scope for legitimate dissent between authorities on policy decisions on extensions to fixed terms, and to what extent is it appropriate for local feeling to influence these decisions? Section 81A(5) in particular promises new guidance on these questions, and obliges authorities to have regard to the same.

There is a statutory exception to the maximum fixed term which applies to households that have informed the authority “in writing” that a child under the age of 9 will live in the dwelling-house (section 81A(3)). The tenancy may be granted for more than ten years to such families to last until the youngest child is 19. Seemingly, this exception acknowledges a need for stability in children’s lives, supporting the relatively uncontroversial view that the best interests of children will play a key role in decisions relating to grants and renewals of fixed term tenancies. Whilst authorities appear to enjoy a broad discretion on how to make best use of housing stock in individual cases in their local area, the Act only extends the maximum term in such cases, and does not mandate the grant of a fixed term that will last until the child attains the age of 19. It is hoped that the statutory guidance will deal with the question as to the circumstances in which authorities are expected to grant a shorter fixed term to a family to whom the longer fixed term is ostensibly available, though the wording of section 81D suggests that this will essentially be a policy decision to be taken by authorities themselves.

Fixed term tenancies are not new: the introductory tenancy regime has been in place since 1997, and has given authorities a great deal more flexibility in evicting problem tenants during the fixed term trial period. Indeed, new introductory tenancies will need to be granted for a fixed term of between two and five years (new section 124A Housing Act 1996), signalling that introductory tenancies are here to stay. What is new, however, is the requirement to reassess continuing entitlement to new secure tenancies every few years, signalling an important ideological shift in social housing policy.

As Conservative peer Baroness Evans put it (HL Deb 18 April 2016, vol 771, col 509), the aim of these reforms is to “*ensure that social housing is focused on those who really need it, for as long as they need it, and that tenants are provided with more appropriate tenancies as their needs change over time*”. Bound up in this statement is an implication that many secure

tenants are under-occupying their social homes, whilst many simply don’t “*really need*” a social home at all.

At risk of over-analysis, there are hints here at a distinction between ‘need’ and ‘real need’ – and, from there, a parallel with the concept of deserving and undeserving poor. Whether or not this is ideologically palatable is a matter for the reader, but it does highlight an important consequence of reliance on local decision-making in this system: the question whether a tenant is in ‘real need’, ‘some need’ or ‘no need’ of a social home is a decision that is ripe for legal challenge, and will depend to a great extent on the interaction between national guidance and local policy. In my view, authorities should prepare to face public law defences to possession claims arising from decisions to renew or not to renew lapsed fixed term tenancies, which could raise issues similar both to reviews of decisions to seek possession on a mandatory ground, and to homelessness appeals on issues such as priority need, intentionality, and suitability (of location, physical features, and tenure).

It follows that the new Act confers additional flexibility on local housing authorities in the management of their stock, at the cost of significant additional administrative and legal burdens of review and appeal. Authorities already have the discretion to seek to bring a tenancy to an end where there are clear behavioural grounds for doing so; these reforms essentially place an onus onto tenants to demonstrate their ongoing ‘real need’ for their social home, with a corresponding burden on authorities to verify the same. The reforms will also make it more difficult for long-term subletting to go undetected, as the tenant will essentially need to remain engaged with the authority in order effectively to participate in the fixed-term review process. It follows that there will be greater turnover in social homes in the medium to long term, enabling more families in pressing need to be accommodated within existing stock.

It would appear that in order to give effect to Parliamentary intent, courts deciding these challenges must be prepared to uphold the proposition that several



years of paying rent on time and being a good neighbour is not enough, without more, to justify the grant of a new tenancy. The greatest impact may therefore be felt by so-called 'model' tenants, facing repossession through effluxion of time alone, who would otherwise have expected to continue indefinitely in their homes as secure tenants. Such tenants might otherwise have taken advantage of social rent for a longer period to save up for a deposit to exercise their right to buy. Could it be that occasional miss-management of a rent account in fact strengthens a tenant's case for being in ongoing 'real need' of a social home?

Subject to guidance and regulations, these reforms appear to make room for an expectation that where a tenant is in employment, such that a private sector rent (perhaps abated by Housing Benefit) would be affordable, they are no longer in 'real need' of a social home, and should either purchase their existing home or move into the private sector. In practice, there is a risk of conflation between 'real need' and desirability as a tenant: careful policy – and careful training – will be essential to lawful decision-making in this controversial field.

Of course, these changes are likely to free up social homes for those in priority need of accommodation, by empowering authorities more readily to identify issues such as fraud and under-occupation, giving rise to a more efficient use of housing stock. Trading away the right to stay in a home that is larger or cheaper than strictly required – which might be considered to be a relative luxury – is perhaps an inevitable consequence of the huge pressure that authorities face to abate long waiting lists of families eligible for housing support. On one view, it is no different to being asked periodically to re-apply for benefit in order to show that the conditions for eligibility still exist.

A hidden cost of these reforms, however, is likely to be found in claims for housing benefit, as more social tenants are 'encouraged' to transition into rising private sector rents whilst remaining on relatively low incomes. The comparative lack of security of tenure in the private rented sector may lead to tenants finding themselves

unintentionally homeless once again – and being put to the bottom of the queue for housing assistance as a result.

Authorities must anticipate challenges to decisions not to renew fixed term tenancies, even though the force of Parliamentary intent is likely to present tenants with an uphill struggle. By their nature, these challenges will take several years to come to light, and the law is likely therefore to be slow to develop, giving rise to a degree of uncertainty in the medium term. However, if these decisions are to withstand scrutiny, robust and well-written policies will need to be drafted and adopted in advance, with an eye to national guidance, secondary legislation, and emerging case law on the subject. The question of what amounts to 'real need' at a local level is likely to be highly controversial, so authorities would be well advised to start the process of settling these policies now.



Richard Hanstock

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## Housing regulation in England:

### Part 5

The 2016 Act furthers the Government's objective to improve the standard of private rented sector accommodation by preventing those made the subject of a banning order under section 16 of the 2016 Act from holding a licence to let accommodation falling within a local authority additional or selective licensing scheme.

Section 25 of the 2016 Act gives effect to Schedule 2,

which amends Parts 2 and 3 of the Housing Act 2004 ('the 2004 Act'), so that:

- local housing authorities are unable to grant a licence under section 64 (additional licensing) or section 88 (selective licensing) if a banning order is in force against a person who owns an estate or interest in- and is a lessor or licensor of the house in question, or part of it<sup>24</sup>;
- a person is not 'fit and proper' to hold a licence under either section 64 or 88, if a banning order is in force against him or her<sup>25</sup>; and
- local housing authorities are obliged to revoke a licence granted under Part 2 or 3 of the 2004 Act if a banning order is made against the licence holder or against a person who owns an estate or interest in- and is a lessor or licensor of the house in question or part of it<sup>26</sup>.

In the event of a banning order, the 2016 Act also relieves local housing authorities of the need to serve an applicant or licence holder with notice under paragraph 5 of Schedule 5 to the 2004 Act, and to consider any representations made in accordance with the notice and not withdrawn, before they either refuse to grant- or revoke a licence under Part 2 or 3 of the 2004 Act<sup>27</sup>.

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<sup>24</sup> Schedule 2 to the 2016 Act, paragraphs 2 and 7

<sup>25</sup> Schedule 2 to the 2016 Act, paragraphs 3 and 8, amending ss.66 and 89 of the 2004 Act respectively

<sup>26</sup> Schedule 2 to the 2016 Act, paragraphs 6 and 11, inserting new ss.70A and 93A into Parts 2 and 3 of the 2004 Act respectively. In such cases, the notice informing the applicant that his or her licence has been revoked, under paragraph 24 of Schedule 5 to the 2004 Act, must specify when the revocation takes effect; and that date cannot be earlier than the end of the period of seven days, beginning with the day on which the notice is served: new sub-sections 70A(3-4) and 93A (3-4)

<sup>27</sup> Schedule 2 to the 2016 Act, paragraph 12(2) and 12(3)

In such cases, there is no right to appeal the local housing authority's decision<sup>28</sup>.



**Dean Underwood**

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<sup>28</sup> Schedule 2 to the 2016 Act, paragraph 12(4)

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