# 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.[1] 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:

[1] House of Commons Library, *Briefing Paper: Housing and Planning Bill: Lords Amendment and Ping Pong,* 11 May 2016, p. 24.

- 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.[2]
- 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.[3]

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;
- 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

[2] House of Commons Library, *Briefing Paper*, *supra,* p. 25.

[3] Section 86(3) of the Act and Statement of Housing Minister Brandon Lewis, HC debate 3 May 2016, Hansard vol. 609, col. 68.

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.[4]

### 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

[4] House of Commons Library, *Briefing Paper*, *supra,* p. 24.

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 April 2015, on foot of policy guidance published in 2014.[5] 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.[6]

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.[7]

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"*.[8] It is therefore clear that the policy requires local housing authorities to bear the burden of

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[5] The policy was first set out in *Guidance on Rents for Social Housing*, DCLG, May 2014.

[6] HC debate 3 May 2016, Hansard vol. 609, col. 68.

[7] *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.

[8] HC debate 3 May 2016, Hansard vol. 609, col. 68.

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.[9]

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[9] HC debate 3 May 2016, Hansard vol. 609, col. 77.