

## Reducing Regulations of Social Housing: Part 4

### Introduction

1. This article summarises the important changes being made to regulation of private registered providers of social housing ('PRPs') by the Housing and Planning Act. The changes have been introduced primarily in response to the decision of the Office of National Statistics ('ONS') in October 2011 that PRPs would henceforth be classified as "public non-financial corporations" for the purposes of national accounts and economic statistics.
2. 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

3. The ONS review commenced in September 2015, following the Government's announcements about introducing the right to buy (on a mandatory basis) to PRPs.
4. 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).
5. 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.

6. 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.
7. 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).
8. 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.
9. The reclassification decision had two important consequences.
10. 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>1</sup>
11. 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,

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<sup>1</sup> <http://www.socialhousing.co.uk/would-deregulation-really-persuade-the-ons/7012789.article>

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 3.2% of GDP. Furthermore, the decision will result in bank and bond debt being *retrospectively* added back to 2008.<sup>2</sup>

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

13. 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>3</sup>

14. 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

15. The deregulation package announced by Brandon Lewis in December 2015 can be found in clause 90 and schedule 4 to the Bill. These proposals 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. Remove 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). The HCA will be able to make directions containing provisions about the timing and content of such notification. The HCA may also dispense with the requirement for notification by reference to a policy for disposals which has been adopted by the PRP. Accordingly PRPs will want to adopt appropriate policies to benefit from such dispensation. It is notable that there are no exceptions or conditions applicable to the removal of the

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<sup>2</sup> FT article

<sup>3</sup> Source: <http://www.24dash.com/news/housing/2015-12-15-Brandon-Lewis-announces-deregulation-package-for-sector>

requirement for consent to dispose of land. This appears to mean 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.

- b. Remove requirements to obtain consent for voluntary arrangements under the Insolvency Act (winding up) and restructuring, replacing these with a notification requirement (replacing ss. 16, 161 and 163 of the Housing and Regeneration Act 2008);
- c. Remove the requirement to obtain consent 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);
- d. Abolition of the disposal proceeds fund (repealing ss. 177-178 of the Housing and Regeneration Act 2008). The disposal proceeds fund is effectively a ring-fenced part of a PRPs accounts. PRPs must show the net proceeds of certain types of disposal, payments of grants, and repayments of discounts, separately in their accounts. Sums in the DPF are required to be used or allocated as directed by the HCA, and the HCA can specify a time limit after which it may require the return of unused sums. The current direction (March 2015) requires that proceeds are only used for the acquisition, construction, improvement etc. of land or buildings for letting at social or affordable rents and generally requires repayment of net proceeds 3 years from the date they were first shown in DPF. The removal of such restrictions is highly significant for PRPs, giving them substantial new freedoms and opening up new opportunities for investment of their disposal proceeds.
- e. Amend 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).

## Changes to LA powers

16. The Act introduces a new power for the Secretary of State to make regulations for the purpose of limiting or removing the ability of LAs to exert influence over PRPs.

17. Introducing this new power, Viscount Younger of Leckie said:

“Classification back to the private sector provides [PRPs] 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 ... [the amendment] 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

18. The Act introduces new provisions, including the concept of a “housing administration order”, 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>4</sup>

19. The full details of this special scheme are beyond the scope of this article, but the proposals seek to provide a more flexible framework for the regulator to intervene to prevent PRPs failing and to ensure that social housing of insolvent PRPs remains in the sector.

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<sup>4</sup> For more information see: <https://www.gov.uk/government/publications/cosmopolitan-housing-group-lessons-learned>

## Comment

20. It is fair to say that the Act as a whole has 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 high value local authority housing, and the proposed changes to secure tenancies to end the idea of a ‘home for life’.
21. The deregulation proposals are likely to lead to a sector-wide review of business structures, asset holdings and regulatory position. The Act 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>5</sup>
22. 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>6</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.
23. The Government continues to exercise significant control over PRPs via subsidy measures and will continue to do so despite the deregulation introduced by the Housing and Planning Act. 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

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<sup>5</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-A4KHaa0XAJYQFgggMAA&url=http%3A%2F%2Fwww.towers.com%2Fuploads%2Ffiles%2FDeregulation\\_measures\\_announc ed.pdf&usg=AFQjCNH5N3iKJroqCh9QEhPeOYIldW9NNA&sig2=H020N0vJNC9hTpdIOCrL3g](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwizzL_m38TKAhWH-A4KHaa0XAJYQFgggMAA&url=http%3A%2F%2Fwww.towers.com%2Fuploads%2Ffiles%2FDeregulation_measures_announc ed.pdf&usg=AFQjCNH5N3iKJroqCh9QEhPeOYIldW9NNA&sig2=H020N0vJNC9hTpdIOCrL3g)

<sup>6</sup> Source: <https://home.kpmg.com/uk/en/home/media/press-releases/2015/12/deregulation-could-see-value-of-social-housing-rise.html>

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.

24. 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. That regime also contains disposal consent requirements which will reduce, if not negate, the new freedoms to be found in the Housing and Planning Bill for those PRPs subject to that regime.

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