

Issued: 12 January 2016

Revised: 14 April 2016

Further revised: 3 October 2016

Further revised: 15 February 2017

Briefing:

Deregulation

Deregulatory measures introduced in response to the ONS reclassification of housing associations

Summary of key points:

The Government has introduced a suite of measures to address the regulatory issues which led to the statistical reclassification of housing associations as public bodies. These include:

- Removal of the consents regime for the disposal of stock
- Abolition of the Disposal Proceeds Fund
- Removal of the regulator's powers over constitutional changes
- Limitation of the regulator's powers to appoint managers and officers
- Restrictions on influence by local authorities over housing associations (particularly, stock transfer organisations)
- Introduction of a new special administration regime to protect social housing assets in the case of insolvency

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1. Introduction

In October 2015, the Office for National Statistics (ONS) announced that housing associations would be reclassified as public bodies. The Government made an immediate commitment to bring in changes to reverse this decision. These deregulatory changes will be implemented through the Housing and Planning Act 2016.

The Government included a number of provisions in the Act to address the regulatory issues that led to the statistical reclassification of housing associations. In addition, the Act addresses a specific issue regarding local authority control, which, if not addressed, might lead ONS to retain LSVTs as 'public' even if the rest of the sector were reclassified as 'private'.

In general, the deregulatory measures in the Act will be positive for housing associations, putting Boards back in control of decision-making. In particular, the Federation has for many years been making a strong case about the damaging effects of the consents regime for disposals, so the abolition of this regime is very welcome. We are pleased too that Government chose to preserve the voluntary status of the Pay to Stay policy for housing associations, and the fact that associations retain the freedom to grant lifetime tenancies is also very positive.

This briefing states the position as of 15 February 2017. As the deregulation measures are implemented over the next few months, it is likely that the briefing will be further revised, possibly more than once.

2. The ONS decision

In 2015 the ONS undertook a review of the statistical classification of "private registered providers" of social housing in England (PRPs). The conclusion of this review, announced on 30 October 2015, was that PRPs should be reclassified as Public Non-Financial Corporations rather than Private Non-Financial Corporations as formerly.

The review focused on the existing legislative and regulatory environment, specifically measures introduced in the Housing and Regeneration Act 2008. The ONS initially backdated the reclassification to the 2008 Act, but on 30 September 2016 it announced that the backdating would be extended to the Housing Act 1996 (although the further backdating has little practical effect except for the revision of retrospective Government accounts).

The ONS judgement identified five areas of concern. Each area of concern must be addressed in order to return housing associations to being classed as private bodies. The issues identified by the ONS are summarized below.

- Government consent powers over, and power to set conditions on, disposals of social housing assets.
- Government powers to direct the use of disposal proceeds.
- Government consent powers over disposals of housing stock following a registered provider's deregistration with the HCA.
- Government consent powers over the voluntary winding-up, dissolution, and restructuring of a registered provider.
- Government powers over the management of a registered provider, in particular the power of the HCA to appoint managers and officers to the provider.

On 30 September 2016 the ONS issued a similar ruling extending the reclassification to housing associations in Scotland, Wales and Northern Ireland.

3. Government deregulatory measures

"We will bring forward measures that seek to allow housing associations to become private sector bodies again as soon as possible."

DCLG spokesperson

The Government made good on this commitment by including a number of provisions in the Housing and Planning Act that are designed to address the ONS's concerns. In addition, amendments were brought to address a specific concern relating to LSVTs. The Act received royal assent on 12 May 2016, but the deregulatory measures would not have effect until the necessary commencement order was laid before Parliament.

On 30 January 2017 a commencement order was laid (SI 2017/75) the brings into effect most of the deregulatory provisions of the 2016 Act. By virtue of this order:

- From 3 February 2017, the Secretary of State is formally empowered to issue regulations limiting the influence of local authorities over housing associations. The anticipated content of these regulations is outlined below.
- From 6 April 2017, the extensive deregulatory measures in Schedule 4 to the Act will take effect. This includes the abolition of the disposals consent regime.

In general, the Federation supports these changes proposed by Government, and is pleased they have been put on the statute book so quickly. While we may have reservations on some specific points, the overall package of changes represents a substantial and timely response to the ONS decision.

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Consent over disposals

Hitherto, housing associations have been required to obtain consent from the regulator in relation to any disposals of social housing. The regulator was also able to attach conditions to consent over disposals. These were far-reaching powers, particularly since the term 'disposal' covered not only outright sales but also actions such as granting a lease or using the property as security for a loan. Remarkably, the regulator retained powers of consent over disposals even when an organization had deregistered.

With effect from 6 April 2017, the Housing and Planning Act removes the consents regime in its entirety. This applies to both registered and deregistered providers and to both empty and tenanted stock. There is a new requirement for associations to notify the regulator of disposals and the HCA has advised that it will set out in March 2017 how this should be done; it is anticipated that in most circumstances, notification will be *post hoc*.

The Federation welcomes the removal of the consents regime. The operation of the regime has been intrusive and burdensome and it has often hampered housing associations' efforts to make the most effective use of their assets to deliver their social purpose. We recognize that, in order to address the concerns raised by the ONS, it is necessary to abolish the consents regime entirely and accordingly, we support this move even though it goes well beyond the substantial easing of the regime that we had previously called for.

Under the consents regime, disposals of tenanted stock occurred only in exceptional circumstances, and usually inside the social rented sector from one housing association to another. We anticipate that housing associations will continue to operate in this way with regard to tenanted stock.

A particularly welcome provision is that the HCA is deemed to have approved any disposal for which consent was required under section 172 of the Housing and Regeneration Act 2008, even if for some reason the consent was not obtained. This will remove doubt about the legitimacy of these disposals. This is set out in paragraph 6 of the Statutory Instrument that commences the relevant legislation (SI 2017/75).

Use of disposal proceeds

Housing associations have hitherto been required to show the net proceeds of certain types of disposal, payments of grant, and repayments of discount separately in their accounts as a Disposal Proceeds Fund (DPF). The regulator has powers to direct how disposal proceeds are used.

The proceeds of disposals taking place after 6 April 2017 will not be accounted for through the DPF. This means, in effect, that the DPF will gradually be run down over the next few years. The

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DPF will officially cease to exist on 6 April 2020, although it is anticipated that, in practice, associations' DPFs are likely already to be devoid of funds before that date.

These changes apply only to DPF and do not affect the continuation of the Recycled Capital Grant Fund (RCGF). RCGF does not raise the same issues for classification purposes as it applies only to grant, whereas DPF, in relation to the disposals to which it applies, covers proceeds generally (not merely the grant element).

Powers over constitutional changes

Hitherto, housing associations have generally required consent from the regulator before undertaking certain organizational changes, including mergers, acquisitions and restructures.

With effect from 6 April 2017, this requirement will no longer apply. There will be a requirement for housing associations to notify the regulator of significant changes. We expect the The regulator can give directions about the timeframe within which notifications should be made.

Powers over management

The regulator's powers to appoint or remove managers and officers have not been abolished by the Housing and Planning Act, but from 6 April 2017 they may be used only where there are possible breaches of legal requirements. In practice, the regulator has exercised these powers very sparingly, and it anticipated that this approach will continue.

Local authority influence

Please note:

- (1) These provisions chiefly affect LSVTs
- (2) These provisions take effect on 3 February 2017. This empowers the Secretary of State to issue regulations, which are expected shortly.

In considering its response to the ONS decision, the Government identified particular concerns relating particularly to large-scale voluntary transfer organisations (LSVTs). The risk is that if these issues are not addressed, it is possible that ONS may continue to regard these associations as public even if the rest of the sector is reclassified as private.

Accordingly, the Government included measures in the Housing and Planning Act Bill to address these concerns. Although these provisions apply in theory to the sector as a whole, they are unlikely to have any practical impact except for LSVTs.

The Act gives the Secretary of State power to make regulations in the following areas.

- 1. Reservation of board places for persons nominated by the local authority.** This is significant because one of the main tests applied by ONS is whether a state body (such as a local authority) can make appointments to the board. Section 93 of the Housing and Planning Act allows the Secretary of State to issue regulations restricting the ability of

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local authorities to make appointments, and we understand the Government's intention to be that the proportion of LA nominees on a registered provider's board should not exceed 24%. This limit will not prevent associations from recruiting members or officers of local authorities to the board, but anyone recruited in this way would serve on the board purely in an individual capacity like any other board member. The power relates to appointments (including reappointments) so it will not stop a local authority appointee from serving out his or her current term of office, but the Secretary of State has a further power to make regulations allowing an association to remove a local authority appointee before the end of his or her term.

2. **Local authority voting rights and constitutional veto.** Some LSVT constitutions confer special voting rights on the local authority, potentially including a veto on constitutional changes. The Secretary of State has power to require local authorities to reduce or eliminate these rights, and to refrain from obtaining them in future.

Regulations under these powers can override any relevant rights for the local authority whether created by contract or by the housing association's rules. The Act also allows the Secretary of State to impose changes on an association's constitution, but again, only in respect of the issues identified above. (In practice, however, if certain provisions in an association's constitution have ceased to have practical effect because the local authority is no longer able to exercise the rights conferred on it, the Federation is likely to advise members that they should take early action to remove the redundant provisions from their constitutions.)

Special administration regime

The 2016 Act also introduces a new special administration regime to protect social housing assets in the case of insolvency. Under this new scheme, the administrator will be appointed by the courts, rather than by Government or the regulator.

The new special administration regime will see the affairs, business and property of a PRP managed by a court-appointed 'housing administrator'. The role of the administrator is to ensure that the registered provider's social housing remains in the regulated housing sector either through rescue or transfer to another registered provider. The housing administrator will be expected to act in a way that best protects the interests of creditors and the social housing stock.

Note that the special administrative regime is not included in the recent commencement order; there is therefore no date as yet for it to come into effect.

4. Other policy changes

Although the ONS decision was based on legislation affecting housing associations as at October 2015, it also had implications for certain Government policies, which could have been viewed as introducing new state controls and therefore could impact future ONS decisions.

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Pay to Stay

Following the ONS ruling, the Government reviewed its stated intention to impose a 'Pay to Stay' scheme on all social landlords. Housing associations were immediately excluded from the proposed requirement, although the initial intention was the local authority landlords would still be subject to it. (Later on, for unrelated reasons, it was decided that 'Pay to Stay' would not be mandatory for any social landlord.)

Ending lifetime tenancies

At the 2015 summer Budget, the Government announced its intention to review the use of lifetime tenancies with a view to limiting their use. Accordingly, provisions were included in the Housing and Planning Act to prevent local authority landlords from granting new lifetime secure tenancies.

Prior to the ONS decision, the Government's intention was that this requirement would cover housing associations as well (probably through HCA regulation rather than direct legislation). However, the ONS ruling prompted a rethink. During the Commons debate on the new clauses in the Housing and Planning Bill, the Parliamentary Under Secretary of State, Marcus Jones, said:

"We want housing association landlords and tenants to reap the benefits from shorter-term tenancies as well. However, we clearly need to consider any changes to housing associations in the light of the recent decision of the Office for National Statistics on classification. We are working through the ONS reclassification decision and considering the options but, given the complexity of the matter, careful consideration is needed. We will continue to work closely with the housing association sector, the social housing regulator and other stakeholders to finalise the deregulatory package, and we will consider any changes to lifetime tenancies in the context of that work."

This effectively acknowledged, as CLG has confirmed, that the ONS ruling obliged the Government to resile from its previous intent. Associations have been free since 2011 to offer fixed-term tenancies where they see fit, and many have chosen to take advantage of this option. It is very welcome that the deregulatory climate engendered by the ONS ruling means that associations have retained control over the types and length of tenancies they choose to offer.

5. Next steps

The bulk of the deregulatory provisions of the Housing and Planning Act 2016 will take effect on 6 April 2017. It is expected that the remaining provisions will follow fairly soon after.

It is likely that once these changes have come into force, the Government will ask the ONS to carry out a new review into the classification of the housing association sector. We understand that the timing of such a review would be determined by the ONS.

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6. Useful links

- Housing and Planning Act 2016:
<http://www.legislation.gov.uk/ukpga/2016/22/contents/enacted>
- Commencement No. 4 and Transitional Provisions Regulations 2017 (SI 2017/75):
http://www.legislation.gov.uk/uksi/2017/75/pdfs/uksi_20170075_en.pdf

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