

**THE LEGISLATIVE REFORM (REGULATOR
OF SOCIAL HOUSING) (ENGLAND) ORDER
2018**

**EXPLANATORY DOCUMENT BY THE
MINISTRY OF HOUSING, COMMUNITIES
AND LOCAL GOVERNMENT**

CHAPTER ONE: INTRODUCTION

1.1 This explanatory document is laid before Parliament in accordance with section 14 of the Legislative and Regulatory Reform Act 2006 (“the 2006 Act”) together with the draft of The Legislative Reform (Regulator of Social Housing) (England) Order 2018 (“the draft Order”) which we propose to make under section 2 of that Act. The purpose of the draft Order is to amend the Housing and Regeneration Act 2008 (“the 2008 Act”), to transfer the function for social housing regulation from the Homes and Communities Agency to a separate non-Departmental Public Body.

1.2 This explanatory document contains information for the Delegated Powers and Regulatory Reform Committee and the Regulatory Reform Committee.

1.3 This Order has been developed to implement the conclusion of the Tailored Review of the Homes and Communities Agency (the HCA) that responsibility for social housing regulation should be separated from the HCA (although the HCA now operates as Homes England and the Regulator of Social Housing, the HCA remains the legal entity). The HCA is a Non-Departmental Public Body (NDPB) established under the Housing and Regeneration Act 2008 to deliver Government’s housing investment programmes. The 2008 Act also created the Office for Tenants and Social Landlords (“the TSA”) as the regulator of registered providers of social housing in England. The Localism Act 2011 subsequently amended the 2008 Act to close the TSA and establish a Regulation Committee of the HCA. Responsibility for social housing regulation was transferred to the HCA, to be exercised through that Regulation Committee.

1.4 The Tailored Review of the HCA in 2016 highlighted the potential for conflicts of interest between the Regulation Committee (“the Regulator”) and the HCA. That risk of potential conflicts had increased since HCA-Investments (HCA-I) was established in 2014 to manage the HCA’s investment activity, which included secured lending in some cases to housing associations and others who are on the regulator’s register. Should a housing association be in financial distress then HCA-I and the Regulator could have different interests. The Tailored Review concluded that, in light of these changed circumstances, the social housing regulatory function should be moved from the HCA into a separate public body. The outcome of the review can be found at the following link.

<https://www.gov.uk/government/publications/tailored-review-of-the-homes-and-communities-agency>

1.5 On 30 November 2016, when publishing the Tailored Review, the Minister for Housing announced the Government’s intention to remove the social housing regulatory functions by using a Legislative Reform Order. A consultation on the proposal was undertaken between 30 November 2016 and 27 January 2017 and invited views on the proposal itself and the suitability of using this legislative vehicle. The responses to the consultation from registered providers, lenders, local authorities and representative bodies demonstrated very strong support for the proposals (93% of those that responded supported the proposal) and agreed that the preconditions for a legislative reform order are met (76%).

1.6 The Legislative Reform (Regulator of Social Housing) (England) Order 2018 amends the Housing and Regeneration Act 2008 to transfer the function for social housing regulation from the HCA to a separate public body, to be called the Regulator of Social Housing.

1.7 There will be no policy or operational changes to regulation, to regulatory powers or to the way in which the Regulator exercises its objectives as a result of this order. The statutory objectives, set out for information in the table below, are all unaffected by this Order. Similarly, there is no change to the requirement that they regulate in a manner which minimises interference and is proportionate, consistent, transparent and accountable.

Table: - The Statutory Objectives of the Regulator

Statutory Objective
Economic regulation objective
Ensure that registered providers of social housing are financially viable and properly managed, and perform their functions efficiently and economically
Support the provision of social housing sufficient to meet reasonable demands (including by encouraging and promoting private investment in social housing)
Ensure that value for money is obtained from public investment in social housing
Ensure that no unreasonable burden is imposed (directly or indirectly) on public funds
Guard against the misuse of public funds.
Consumer regulation objective
Support the provision of social housing that is well managed and of appropriate quality
Ensure that actual and potential tenants of social housing have the appropriate degree of choice and protection
Ensure that tenants of social housing have the opportunity to be involved in its management and to hold their landlords to account
Encourage registered providers of social housing to contribute to the environmental, social and economic well-being of the areas in which the housing is situated.

CHAPTER TWO: BACKGROUND

Legislative Background

2.1 The legislative framework for the regulation of registered providers of social housing in England is contained in Part 2 of the Housing and Regeneration Act 2008 (“the 2008 Act”), as amended by the Localism Act 2011 and the Housing and Planning Act 2016.

2.2 The 2008 Act established the regulator of registered providers of social housing in England. Under the 2011 Localism Act, the role of regulator was transferred to the HCA, an existing NDPB of the Department for Communities and Local Government, to be exercised through a new Regulation Committee. The Localism Act also brought about changes to the remit of regulation, providing a stronger focus on economic regulation and setting a serious detriment test in the regulation of consumer standards.

2.3 Recognising the importance of economic regulation, and to safeguard its independence, the Act required regulatory functions to be exercised by the HCA through, and only through, a separate statutory Regulation Committee appointed by the Secretary of State. Responsibility for strategic and operational decision-making of the regulatory function resides with that Regulation Committee.

2.4 The Regulation Committee has defined its purpose (in line with its statutory objectives) to be to promote a viable, efficient and well-governed social housing sector able to deliver homes that meet a range of needs. The Regulator, which makes decisions independently from the HCA, maintains a register of social housing providers (“registered providers”) which include housing associations and local authority landlords that provide low cost rental accommodation. It proactively regulates private registered providers’ compliance with economic standards (governance, financial viability, rents and value for money) and can intervene where there is a breach of consumer standards if there is judged to be a risk of serious detriment to tenants.

Rationale for the LRO

2.5 When the social housing regulation function was brought into the HCA as a result of the Localism Act 2011, the funding available for registered providers was predominantly grants. However in 2014, with the formation of HCA’s recoverable investments arm (HCA-I), the HCA has increased the funding it makes available by way of recoverable investments and loans. In some instances, this has made the HCA a secured creditor of organisations which it regulates, which presents an increased risk of a potential conflict of interest.

2.6 The Tailored Review made clear that HCA’s governance arrangements and an operational ‘ethical wall’ had ensured that information was not inappropriately exchanged between the Regulation Committee and the exercise of the investment function. However it also noted that these arrangements had not been tested (for example the organisation has not been exposed to a financial downturn), and therefore formal separation of the regulatory function was advisable to protect against future risk of a conflict materialising. This view was shared by lenders and investors consulted as part of this process.

2.7 Under the current arrangements, the Executive Team responsible for regulation within the HCA has a dual line of accountability (through the Executive Director of Regulation) to both the Regulation Committee, and to the HCA Chief Executive as Accounting Officer, but not the HCA Board. This gives the regulatory function a quasi-independent status within the Agency

2.8 Although there are processes in place to manage the potential for conflicts of interest, currently the Regulation Committee is part of the same legal entity and therefore shares the same Accounting Officer. This creates some unusual governance arrangements. Although the Regulation Committee has operational control of the Regulator, it is the HCA Board that is legally accountable in being collectively responsible for the HCA as body corporate. As HCA's secured lending to the sector it also regulates increases, the regulation and investment functions would benefit from a clearer separation and greater transparency.

2.9 Another key driver for establishing the Regulator as a standalone body is to maintain investor confidence. There is approximately £70bn private investment in the social housing sector which underpins housing associations' significant contribution to supply (up to a third of supply in England annually is from housing associations). This level of investment, and in particular the preferential borrowing rates offered to registered providers, is dependent on lender's confidence in a robust regulatory framework. Establishing the Regulator as a standalone body and addressing the potential conflict of interest will maintain lender confidence in the autonomy and continued independence of the Regulator.

2.10 The measure being proposed is solely an administrative change that transfers the Regulation Committee, regulatory staff, powers and operations to a standalone body. The Regulator's statutory objectives, functions and powers will be unchanged.

CHAPTER THREE: THE ORDER

The Power to Promote Regulatory Principles

3.1 The Order is made under Section 2 of the Legislative and Regulatory Reform Act (LRRRA) 2006 (the power to promote regulatory principles). The purpose of the Order is to ensure the function for social housing regulation is made more consistent with better regulation principles, by providing for greater accountability and transparency for regulatory activities.

3.2 By transferring the HCA's regulatory function to a standalone NDPB, this measure will create a body with exclusive focus on a single set of regulatory statutory objectives to ensure that social housing regulation governance is more *transparent, accountable, proportionate and consistent*, and better able to adapt to any changes that result from policy or legislative changes (for example, as a result of the Social Housing Green Paper expected in spring this year).

Compliance with section 3 (2) of the Legislative and Regulatory Reform Act 2006 Preconditions

3.3 The Secretary of State considers that the conditions in section 3(2) (where relevant) are satisfied for the following reasons.

Non legislative solutions

3.4 The objective of this Order; transferring the regulatory function of the HCA to a standalone public body, can only be achieved through legislation. The Regulation Committee of the HCA was created by the Localism Act 2011 amending the Housing and Regeneration Act 2008. Those amendments transferred the regulatory functions to the HCA, and it is not possible to transfer them from the HCA without further legislation. It is also not possible within the framework of the 2008 Act to delegate HCA's regulatory function to a separate entity.

Proportionality

3.5 The effect of the provision will be to set up a standalone NDPB and transfer social housing regulatory functions from the HCA to that body. It is solely an administrative change – because the statutory powers and functions of regulation are being transferred, there will no change to regulatory operations as a result of the LRO. The Secretary of State therefore considers the draft Order to be proportionate to the policy objective

Fair Balance

3.6 The draft Order will have no negative impact on the public interest as there is no person adversely affected by it. The regulation of registered providers will not be changed as a result of the draft Order. In contrast the measure is in the public interest, by providing simpler and more transparent governance for regulatory decisions and removing a potential conflict of interest.

Necessary Protection

3.7 The draft Order does not remove any necessary protections; the regulatory functions and powers will be unchanged by this measure.

Rights and Freedoms

3.8 The regulatory functions and powers will remain the same, so there will be no impact on any person's rights or freedoms.

Constitutional Significance

3.9 The Secretary of State does not consider the provision to be of constitutional significance as it will merely separate the regulation function from the HCA, by creating a separate Regulator. The draft Order will not change the regulatory functions or powers. The level of independence from Government will remain the same as now.

Other Ministerial duties under the Legislative and Regulatory Reform Act 2006

Consultation summary

3.10 The Department for Communities and Local Government carried out a consultation on the proposal between 30 November 2016 and 27 January 2017 in accordance with section 13 of the Legislative and Regulatory Reform Act 2006. Details of the consultation and the responses received can be found in Chapter 4.

Parliamentary Procedure

3.11 The Secretary of State recommends that the affirmative resolution procedure is used (as set out in section 17 of the Legislative and Regulatory Reform Act 2006). The Secretary of State believes this is a straightforward technical measure. It has a clearly defined scope and impact that is limited to the organisational form of the Regulator for Social Housing. The provision has no impact on social housing policy, the rights of tenants, or housing associations. Nor does it change the role of the Regulator. It has a positive impact on creditors by removing potential conflicts of interest, and was met with near universal support and consensus in the consultation and did not reveal any contention.

3.12 Nevertheless, the Secretary of State recognises the importance of social housing regulation and the likely level of interest in anything that pertains to it, particularly in light of the terrible tragedy of the Grenfell Tower fire. It will be for the Public Inquiry, and the Social Housing Green Paper more broadly, to consider the role and function of the Regulator. Nothing in this Order constrains those considerations or restricts the scope of possible recommendations about how the regulatory framework could be improved. On that basis, the Secretary of State believes that the affirmative resolution procedure will provide Parliament with the appropriate level of scrutiny given the nature of the Order.

European Convention on Human Rights

3.13 The Housing Minister, Dominic Raab MP, has made the following statement regarding Human Rights: “In my view the provisions of the draft Order are compatible with the European Convention on Human Rights”.

Compatibility with legal obligations arising from membership of the European Union

3.14 The Secretary of State is satisfied that the proposals are compatible with the legal obligations arising from membership of the European Union.

Territorial Extent and Territorial Application

3.15 This entire instrument applies only to England.

3.16 In the view of the department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business the subject matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter and/or the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and/or the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

Impact

3.17 There is no impact on business, charities or voluntary bodies, or the public sector as a result of this draft Order. Given the impact of the draft Order is limited to the organisational form of the HCA and Regulator of Social Housing, an Impact Assessment has not been prepared for this instrument.

CHAPTER FOUR: CONSULTATION

4.1 This chapter provides a summary and analysis of the consultation carried out by the Department for Communities and Local Government between 30 November 2016 and 27 January 2017 (in accordance with section 13 of the 2006 Act). The consultation provided an explanation of the proposed measure to transfer the function of social housing regulation from the HCA to a new standalone NDPB, the Legislative Reform Order process and invited written responses from the social housing sector, as well as other interested parties.

4.2 A total of 41 completed responses were received with 20 invalid or incomplete responses that do not feature in our analysis. Incomplete responses have however been reviewed to ensure there was no additional information raised that was not covered in other submitted responses.

4.3 The consultation document was published on Gov.UK and can be found at <https://www.gov.uk/government/consultations/social-housing-regulation-using-a-legislative-reform-order-to-establish-the-regulator-as-a-stand-alone-body>

4.4 The majority of consultation responses came from registered providers, private registered providers and housing associations. The table below provides a breakdown of consultation respondents.

Table: Breakdown of consultation respondents

Responses by Stakeholders	
Type of respondent	Number
Registered Provider	19
Lenders/ Investors	5
Representative Bodies	6
Local Authorities	2
Individual	4
Other	5
Total	41

Responses to questions

Question 1 - *Do you support the proposal to establish the social housing regulator as an independent body, maintaining the current regulatory framework and transferring all regulatory powers and functions from the HCA to the new NDPB?*

4.5 93% of respondents (38) said they supported the proposal, showing overwhelming support for the proposed reforms to the Regulator. Reasons for support for the proposal given by many respondents were that the measure would address the risk of potential conflict of interest and reaffirm the Regulator's independence. Some respondents also highlighted that the measure would uphold stakeholder and lender confidence and the importance this has for the sector. Some also remarked that they welcomed the fact that the regulatory framework would be maintained under the proposal and praised the way the Regulator currently operated.

"We fully support the proposal. In our view it is vital to ongoing funder confidence in the RSL sector that its regulator is independent and free from the potential of conflicting interests with other Agency activity in the commercial investment and land transactions sphere" (Representative body)

"The rationale is sensible and looks after the needs of the sector, without making unnecessary changes to regulation or becoming over complicated."

Source - Housing Association

"It makes sense to separate the functions of the HCA based on the review."

Source – Local Authority

4.6 Two individuals disagreed with the proposal, conveying concerns that establishing a separate body would lead to an increase in costs and that it would negatively affect the quality of social housing. One respondent did not agree or disagree with the proposal but questioned whether it would impact on fee charges. There were also some concerns that the order would recreate a previous form of the Regulator (the TSA) and the cost of establishing a separate public body.

Government Response:

4.7 In establishing the Regulator as a standalone body, there would be a need to recruit some additional posts to provide for legal and corporate services resource. However, this would not increase existing Government budgets or increase commensurate costs for the taxpayer. Value for money has been a key principle in shaping the proposal and the Regulator will seek to maximise efficiencies. For example, this could take the form of increased sharing of back office functions across the Ministry of Housing, Communities and Local Government Group and the order gives the HCA the power to share administrative functions with the Regulator. As a standalone body, the Regulator will need to continue to adhere to Value for Money (VFM) principles.

4.8 From October 2017, the HCA began charging fees to private registered providers. The transition of the regulatory function to a standalone body is independent of the measure to introduce fees, and will not impact on the level of fee charged.

4.9 This measure will not change the statutory powers and objectives of the Regulator (as amended by the 2011 Localism Act and 2016 Housing and Planning Act). It will not therefore represent a return to the Office for Tenants and Social Landlords.

4.10 This measure will formalise the Regulator's independence from the HCA, in establishing it as a separate legal entity. It will not however change the level of independence the Regulator has from the Government. Regulatory operations and

powers will remain the same, and therefore the way the social housing sector is regulated will not change as a result of the LRO.

Question 2 - *Is there any empirical evidence that you are aware of that supports the need for these reforms? Please provide details.*

4.11 Of the 35 respondents who answered this question, 27 (77%) said they were unaware of, or provided no information on, empirical evidence that supported the need for reform or failed to provide such evidence. Many nevertheless stated that the risk of such a conflict arising was sufficient reason to make the reforms and that the risk would increase as the investment role of the HCA increases. The remaining respondents referenced a number of points but did not provide any detail. These included referencing: examples from the days of the Housing Corporation where conflicts may have arisen; an example of where investment and regulatory policy produced different answers for a housing association; comparisons with other regulatory bodies which had simpler, standalone governance structures; and comparison with non-England regimes where conflicts might have arisen.

"We know of no empirical evidence of practical consequences of the conflict of interest between the roles of the HCA as a secured creditor and regulator of registered providers. Nevertheless the conflict is clearly apparent" (Consultancy)

"On the whole, this arrangement has been successful in keeping the two roles distinct. But the risk remains, so the Federation supports Government's decision to establish a separate regulatory body."

Source - Representative Body

"We have no empirical evidence here. The logic of the proposal is based on the perception of a potential conflict of interest rather than the actual event of such a conflict. If there has been such an event it is not one that we are aware of. We do, however, concur with the recommendation arising from the Tailored Review and share the perception that such a potential conflict exists."

Source – Local Authority

Government Response

4.13 The Tailored Review of the Homes and Communities Agency made it clear that there was no suggestion that there has been any materialisation of the conflict of interest to date due to 'ethical walls' and arrangements to safeguard confidential information. We therefore would not expect respondents to be aware of empirical evidence of the conflict of interest and this has been borne out by the consultation. However, we considered that it was nonetheless important to canvass views on whether respondents could see the potential for such a conflict arising. It is reassuring that no empirical evidence of conflict of interest was provided, supporting the opinion of the Review - but it was clear that respondents thought the risk was sufficient to make it necessary to make the reforms as soon as possible.

Question 3 - *Do you think that the proposed measure will make the function of social housing regulation more consistent with better regulation principles, as explained in paragraphs 15-19?*

4.14 Of the 40 respondents that directly answered this question, 35 (88%) agreed that the proposal was compliant with better regulation principles. Only one respondent disagreed, but did not give any further explanation. There was overwhelming consensus that splitting the regulatory function from the HCA would be wholly consistent with better regulation principles in addressing the potential conflict of interest, and introducing greater accountability and transparency to governance arrangements. Some respondents remarked upon the fact that the Regulator already operates in a way that is proportionate, consistent and targeted.

“The fact that the Regulation Committee will be legally accountable and responsible for the decisions it makes will make it even more efficient and robust.” (Housing association)

“Ensuring independence from HCA functions is vital to ensure that there is transparency and accountability.”

Source - Housing Association

“Ensuring that the regulation of social housing is completely separate from the investment function and delivered by an independent body would support the principles of better regulation. In particular it creates more transparent arrangements which remove even the impression of any conflict of interest.”

Source - Professional Body for Housing Associations

Government Response:

4.15 The Secretary of State is encouraged by the support shown in the consultation for the measure in upholding better regulation principles. There was a clear consistent view that establishing the Regulator as a standalone body would improve the structure of regulation so that it is more accountable and transparent. Regulatory operations will be unaffected by this measure. The Regulator will continue to operate in a way that is consistent, proportionate and targeted, in accordance with its statutory objectives.

Question 4 - Do you agree that the proposed changes meet the preconditions for use of a Legislative Reform Order as set out in paragraphs 27- 34?

4.16 Of the 34 respondents that directly answered the question, 30 (73%) agreed that the measure was compatible with preconditions for an LRO. Four respondents were equivocal in how they replied. One respondent said it would be useful if the HCA/Ministers could keep providers informed about the likely timescale within which separation will take place.

“The proposals are proportionate to the policy objectives since this is purely a constitutional change with no amendments to the Regulator’s powers or the way it operates.” (Housing association)

“The legislative changes address the need for separation of the currently conflicting funding and regulation duties that are delivered by the Homes and Communities Agency. They do so in a proportionate way that will create transparency and oversight of the social housing sector.”

Source - Housing Association

“By removing the potential conflict of interest arising from the HCA’s dual purpose, the proposal will mean social housing regulation better complies with the Government’s better regulation principles. The proposals are proportionate to the policy objectives since this is purely a constitutional change with no amendments to the Regulator’s powers or the way it operates.”

Source - Housing Association

Government Response

4.17 The Secretary of State is satisfied that this demonstrates that stakeholders agree with his view that the preconditions for an LRO are met by the draft Order. Stakeholders will be kept updated on the timescale for separation as the LRO progresses.

Other issues raised

4.18 Respondents also used this consultation as an opportunity to comment on other issues related to the Regulator but outside the remit of the consultation and this draft Order. Issues raised included:

- I. Three respondents suggested the draft Order could be used as an opportunity to reconsider the Regulator’s remit and focus. One respondent suggested Government could consider a more proactive approach to regulation, in line with the approach adopted by utilities regulation. Two respondents called for a review of the consumer standards, with one claiming that they are too prescriptive and one advocating a more proactive approach to consumer regulation.
- II. One respondent suggested that the relationship between the Regulator and Government could be redefined, so that the Regulator could be more arms-length from the Government.
- III. Two respondents used the consultation to comment on the Regulator’s relationship with the Housing Ombudsman. One respondent called for clearer demarcation of the respective roles of the two bodies “for greater ease of signposting for tenants, leaseholders and applicants”. The other respondent suggested that information sharing between the two bodies could be more explicitly defined in legislation. These points, which relate to the on-going relationship of the regulator with other bodies, are however outside the scope of this consultation.

4.19 These views will be fed into the wider review being taken forward through the Social Housing Green Paper.

Conclusion

4.20 The Secretary of State welcomes all responses to the consultation and is pleased to see representation from a range of stakeholders. Overall the consultation demonstrated overwhelming support that an LRO would be the appropriate way of delivering the proposals and that the vires and preconditions of an LRO are met. It is encouraging also to see the HCA's support for the proposal and the need for reforms.