

# Briefing

## TSA consultation: Revised Regulatory Framework

Contact: John Bryant

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Team: Neighbourhoods

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Tel: 020 7067 1082

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Email: [john.bryant@housing.org.uk](mailto:john.bryant@housing.org.uk)

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Date: November 2011

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Ref: NS.RE.2011.BR.17

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## Introduction and Summary

The TSA has launched its formal consultation on the new regulatory framework. The consultation runs until 10 February 2012, and it is planned that the new framework will come into effect on 1 April 2012 to coincide with the abolition of the TSA and the transfer of its regulatory function to a special committee of the HCA.

The consultation consists of three documents. The main consultation paper contains the proposed framework itself together with explanatory material. There is a separate document about the rent standard and another very substantial paper setting out proposed guidance on how the regulator will use its powers.

The draft framework incorporates some significant changes to take account of the new investment framework, ministerial directions to the regulator, and provisions in the Localism Act 2011 that amend the regulator's powers. This briefing outlines the proposed framework, highlighting changes from the existing regulatory framework as introduced in April 2010 and amended in April 2011.

Regulation of finance and governance is, to a large extent, maintained as under the previous regulatory regime. Effective regulation in these areas supports the reputation of the sector and maintains the confidence of lenders. It is important that the regulator should have robust powers to act if an association falls into serious financial difficulties. Therefore the Federation supports the bulk of the proposed Economic standards, although it has serious concerns about the proposed approach to Value for Money.

There are major changes in the regulation of housing management and service delivery (the "Consumer standards"). These changes are largely due to the new "backstop" role of the regulator as discussed below. This means that there will be far less day-to-day regulatory involvement in matters of service delivery than was accepted as the norm only a few years ago. To that extent the draft framework is a welcome continuation of an established trend.

However, this does not alter the fact that there are a number of areas of the Consumer standards that give rise to concern. These include some elements that reflect unhelpful Directions by the Secretary of State using his powers under section 197 of the Housing and Regeneration Act 2008.

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### 1.0 Arrangement of the standards

There are seven standards, divided as follows between Economic standards and Consumer standards.

#### ***Economic standards***

- Governance and financial viability
- Value for money
- Rent

#### ***Consumer standards***

- Tenant and involvement and empowerment
- Home
- Tenancy
- Neighbourhood and community

Compared with the 2010 framework, Rent regulation (formerly included in the Tenancy standard) has been separated out as its own standard (thereby increasing the total number from 6 to 7).

The distinction between Economic standards and Consumer standards is fundamental to the new framework. Economic standards remain subject to the same level of regulatory enforcement as under the Housing and Regeneration Act 2008: that is, any breach of a standard allows the regulator to use its enforcement powers. If a Consumer standard is breached, however, the regulator may use its enforcement powers only if it thinks there is a risk of “serious detriment” to tenants or potential tenants. This is considered in section 5.0 of this briefing.

A further distinction is that whereas Consumer standards apply to all registered providers, Economic standards apply only to private registered providers, chiefly housing associations. They do not apply to local authority landlords.

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## 2.0 Economic standards

### 2.1 Governance and Financial Viability standard

#### *Governance*

There is no substantial change to the standard in the 2010 framework, although there is some clarification of what the regulator expects effective risk management to constitute.

The specific expectations include highlighting the need for transparency in code of governance compliance, for clear arrangements to demonstrate probity, and for effective strategic planning at board level. There is a requirement to inform the regulator of any material non compliance with the Economic standards (including an annual report on any losses arising from fraud).

#### *Financial viability*

The viability elements of the standard are carried forward from 2010. The Federation supports the maintenance of the regulator’s role on matters of financial viability.

## 2.2 Value for Money standard

Although the name of the standard is unchanged, the proposed Value for Money standard represents a complete change of content and emphasis. Whereas the previous standard was essentially about the efficiency of service delivery, the proposed new standard is much more about the efficiency of the organisation as a whole.

The TSA's stated intention for the standard is to ensure that "providers' boards maintain, and are transparent about, a view in the round of the optimum sustainable performance of all their assets" to meet their organisation's objectives.

To this end, each provider should, annually, publish a "robust self assessment" about how it is achieving value for money. This should demonstrate to stakeholders an understanding of costs and how efficiency gains are being delivered. The assessment should cover such matters as the most effective use of the organisation's assets, the opportunity cost of its decisions, and consideration of whether options such as mergers, partnership working and outsourcing might be more efficient.

As it stands it represents a misconceived and potentially counter-productive approach to this important issue. Although the standard ostensibly conforms to the principle of coregulation, it discloses an excessive degree of regulatory interest in matters that are properly the concern of Boards. The risk is that the standard could encourage the regulator to seek to influence an organisation's business strategy.

It will be important that the regulator, in applying this standard, is mindful of its statutory obligations to regulate in a manner that minimises interference and to have regard to the importance of providers' being free to decide how to provide services and conduct business.

## 2.3 Rent standard

Rent regulation has been separated out from the Tenure standard, thus increasing the total number of standards from 6 to 7.

The revised regulatory framework, read alongside the separately-published Annex E (Rent Standard Guidance), confirms that the approach to increasing social rents remains in line with the rent restructuring guidance that was issued in 2001. The annex confirms that rents can be increased by a limit of the Retail Price Index (RPI) + 0.5% in a single year.

The annex also reaffirms that the relevant rate of RPI to be applied for the year beginning 1 April is taken as the rate for the previous September. For

rent increases from 1 April 2012, for example, this means that the relevant rate is 6.1% comprising RPI at 5.6%+0.5%.

The provisions for moving towards target rent also remain in place. Rent caps for social housing will increase by RPI+1% each year and target rents by RPI+0.5%. Registered Providers can vary their rent increases upwards or downwards by £2 per week to enable them to move rents towards target. The Rent standard also confirms that a tolerance level of 5% for general needs housing and 10% for supported and sheltered housing remains in place, meaning that associations can set their rents if they choose either above or below target to the limit of this tolerance, with the proviso that they remain below the overall rent cap level.

The Federation is pleased that Government in directing the regulator on rent has reaffirmed its commitment to retain the link between RPI and rent levels and its intention to use the September RPI benchmark to set rent levels. This is important in light of the increasing pressures on housing association balance sheets including the introduction of the Affordable Rent development model.

The standard also provides for the Affordable Rent model, which will apply only where there is a delivery agreement with the HCA or (in London) the GLA. Affordable Rent is set at a level not exceeding 80% of the market rent as determined in accordance with a method recognised by RICS. The Affordable Rent of a property increases each year by RPI+0.5%, but it must be rebased if the property is relet, either to the same or a different tenant. This includes reletting at the end of a fixed term, but the framework helpfully clarifies that the confirmation of a tenancy at the end of a probationary phase does not count as a reletting for this purpose even if, for technical reasons, a fresh tenancy is granted.

Following conversations with the Federation and our members during the bidding round, the HCA published additional information on housing for vulnerable and older people with the Affordable Homes Programme. The Affordable Homes Framework states that rent levels of up to 80% of market rents are inclusive of service charges. The Framework acknowledges that housing for vulnerable people includes a range of services needed for that specific accommodation. The rent standard guidance reiterates this guidance. Comparison rents used to calculate 80% of market rents should be of similar types and model of service in the local area. Where there are no similar services locally, providers should use similarly serviced properties from outside their area and make their best assessment of what the market rent would be in their area.

### 3.0 Consumer standards

#### 3.1 Tenant Involvement and Empowerment standard

Much of this standard is carried forward unchanged from the 2010 framework, so that landlords are still required to offer suitable choices, information and communication to their tenants, and maintain effective and accessible mechanisms to receive and resolve complaints. They are also required to provide mechanisms for tenants to influence and be involved in housing management and service delivery.

The existing requirement to formulate “local offers” is also maintained, as is the expectation that providers will treat tenants fairly, with respect, and with an understanding of their diverse needs. The requirement to provide tenants with timely and accessible information about the landlord’s performance (among other matters) has been moved into this standard (it was formerly in the Neighbourhoods and Community standard).

There is a significant new requirement, however, to allow tenants the opportunity to be involved in undertaking a range of repair tasks, and to share in savings made. This is required by a ministerial Direction to the regulator, and represents the so-called Tenant Cashback scheme.

While there is no objection to such a scheme if a landlord, in association with its tenants, chose to deliver part of its repair service in this way, the Federation is strongly of the view that it is an abuse of regulation to seek to enforce such an approach. This requirement represents one of the least satisfactory elements of the proposed framework and one concerning which we will be in close discussion with the TSA.

#### 3.2 Home standard

The Home standard is carried forward without substantial change from the 2010 framework. It reiterates the Decent Homes Standard, although this is very much a minimum requirement and landlords will need to meet any higher standards of design and quality that applied when the home was built if these were required as a condition of public funding. In practice this will be Code Level 3 as a minimum and now Code Level 4 in London. Consequently, it would be prudent for members to consider what the on-going maintenance implications are when deciding to develop to higher standards. The standard clarifies the regulator’s power to grant a temporary waiver.

### 3.3 Tenancy standard

#### *Allocations and mutual exchange*

The proposed revised Tenancy standard includes an expanded section on allocations containing new requirements on mutual exchange that essentially require housing associations to sign up with at least one of the four major online house swap providers that currently make up HomeSwap Direct.

The standard provides that landlords must enable tenants to register an interest in swapping their home on a mutual exchange service without paying a fee. The provider of the service to which the landlord is subscribed must be signatory to an agreement, "such as HomeSwap Direct", which allows tenants to access matches across "the greatest practicable number" of mutual exchange services.

Landlords are obliged to provide tenants with free access to a single internet-based mutual exchange service - not several. If a tenant, by using the service provided by his or her landlord, discovers several matches with properties hosted by other providers, there is no obligation on the landlord to pay the costs of subscribing to additional services so the tenant can view them.

Landlords must take "reasonable steps" to publicise this service and provide "reasonable support" to help tenants who do not have internet access to use the service.

In the Federation's view, these requirements concerning exchanges effectively micro-manage the way landlords approach this important issue.

Other requirements in relation to allocations remain unchanged from the 2010 framework.

#### *Tenure*

Provisions about tenure, which closely reflect a Direction by the Secretary of State, are substantially revised from the original framework issued in 2010. This is chiefly to take account of the availability of fixed-term tenancies.

The framework removes the traditional requirement that landlords should use the most secure form of tenancy compatible with the purpose of the housing. Instead, it says that landlords should grant tenancies that are compatible with the purpose of the accommodation, the needs of individual households, the sustainability of the community, and the efficient use of their housing stock.

Providers are required to have clear policies about the type of tenancies they will grant. They remain free to use traditional full assured periodic (so-called "lifetime") tenancies if they think this is more appropriate. The policy should take account of the needs of vulnerable households. There is no requirement that a landlord's tenancy policy should be the same in all types of housing or in all the areas in which it operates.

A key change is that the use of fixed-term tenancies is no longer restricted to property let at Affordable Rents: in other words, there is no longer any linkage between rent levels and tenure type. Any new tenancy, at whatever rent level, may be granted on a full periodic assured (“lifetime”) or fixed-term. In either case, it may be preceded by a probationary phase that lasts twelve months. The probationary phase can be extended by a further six months where the association can show cause.

Where fixed-term tenancies are used, the term should be a minimum of five years (in addition to any probationary phase) unless the association’s letting policy provides for a shorter term (down to a minimum of two years) to be used in exceptional circumstances. The standard does not specify what “exceptional circumstances” might apply, so this is a matter for landlords to decide.

Landlords using fixed-term tenancies should also have a policy about the circumstances in which tenants will be granted a further tenancy (whether of the same or a different property) at the end of the fixed term.

An important new requirement, which will apply in respect of all new tenancies (whether “lifetime” or fixed-term), is that landlords must formulate a policy on succession. This reflects new provisions in the Localism Act. The Act maintains existing statutory succession rights for assured tenancies (essentially, a resident spouse, civil partner or unmarried partner is entitled to succeed on the death of a sole tenant who was not a successor), but allows for additional succession rights to be contractually conferred in the tenancy agreement. Landlords must therefore consider what additional succession rights (if any) they wish to incorporate in their tenancy agreements. In doing so they must have regard to the needs of vulnerable family members.

Tenants who choose to move within the social rented sector (whether or not they change landlord) should be granted a new tenancy offering at least as much security as the old one. But this does not apply to tenants moving into an Affordable Rent property; nor does it apply to tenants who entered the social housing sector after the Localism Act took effect.

The standard also requires landlords to provide for internal appeal mechanisms allowing tenants to challenge decisions such as extending a probationary phase, the grant of a fixed-term tenancy, or the refusal to grant a further tenancy at the end of a fixed term.

Although the use of fixed-term tenancies represents a major shift in established practice, the Federation agrees that it is right to give landlords this additional flexibility so that they can decide how to make best use of their stock to meet need. The Federation has already made available a model fixed-term tenancy for use by members and will revise this shortly (as well as the model periodic tenancies) to take account of the legal and regulatory changes scheduled for April 2012.

### 3.4 Neighbourhood and Community standard

This standard is carried forward largely unchanged from the 2010 framework. The requirement for local area co-operation now refers to “relevant partners” rather than specifically to Local Strategic Partnerships.

Requirements on housing associations to set out in an annual report how they are meeting their obligations under this standard have been removed, and replaced with new requirements in the Tenant Involvement and Empowerment standard.

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### 4.0 Regulating the Economic standards

Unlike Consumer standards, which apply to all registered providers including local authorities, the Economic standards apply only to non-public providers, including housing associations.

The standards recognise the lead responsibility for Boards for their organisations’ financial health, and the regulator will seek assurance through a risk-based approach to ensure that its resources are focused on organisations most exposed to risk. Organisations with no indication of risk can expect minimal levels of regulatory engagement. The regulator will carry out further work on risk assessment during 2012.

Whilst not prescribing procedures, the regulator seeks regular returns and assurances from providers regarding financial health, strength and liquidity.

Regulatory assessments will continue to be published for providers with more than 1000 units. Assessments will not normally be published in respect of smaller providers, who will be subject to lesser reporting requirements.

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### 5.0 Regulating the Consumer standards

The paper proposes fundamental changes to the way the Consumer standards will be regulated. Landlords’ governing bodies are responsible for compliance and “the regulator has no role in monitoring providers’ performance or compliance.” This is a complete departure both from established regulatory practice and from the approach to the economic standards (see above). It means that there will be no day-to-day regulatory involvement in housing management and service delivery.

This is a most welcome development and one that the Federation has been striving to achieve for many years. It will allow landlords the space they need, working with their tenants and other stakeholders, to develop their housing management to meet their own circumstances and needs, rather than the requirements of the regulator.

The Localism Act provides that, in respect of the consumer standards, the regulator's enforcement powers are available only if it thinks that the breach of a standard will give rise to actual or potential "serious detriment" to tenants or applicants for housing. This means a significantly higher threshold than needs to be met to justify enforcement in the respect of the economic standards.

Although the paper acknowledges that "it is not feasible or desirable" to produce a definition of serious detriment (a sentiment with which the Federation agrees), it then devotes several pages to a discussion on the subject, including a number of examples. The Federation is not persuaded that it is helpful to try to anticipate in this degree of detail the circumstances in which a question of serious detriment may arise; it can almost be guaranteed that the real circumstances, when they (inevitably) occur, will be more complex and nuanced, and possibly entirely different in character, from the somewhat abstract examples set out in the paper.

It is important, however, to set out the overall approach that will be taken, and the Federation agrees that "serious detriment" represents a relatively high bar, including such matters as the degree of harm (actual or potential), the number of persons actually or potentially affected, and whether the issues under consideration indicate a recurrent or systemic problem in a particular provider.

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### 6.0 Intervention and enforcement

Except for the "serious detriment" test in respect of consumer standards (see above), the Localism Act does not substantially amend the regulator's powers of intervention and enforcement. The TSA proposes, therefore, that existing arrangements from the 2010 framework should largely be carried forward.

The paper, accordingly, sets out a graduated approach to the use of powers and notes the regulator's continuing obligation to regulate proportionately and minimise interference. Annex E to the paper, published as a separate document, provides further information.

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### 7.0 Registration and deregistration

Arrangements for registration and deregistration remain largely unchanged from the 2010 framework, although the proposed new registration criteria reflect the regulator's revised role regarding consumer protection.

Given the fact that the registration criteria are tied to the 2008 Act and there are aspects the regulator is not able to change, the proposed criteria are sensible. The Federation has voiced its concern regarding the requirement in the 2008 Act that a provider has to be a landlord if it is eligible to be registered (i.e. non-stockholding parents cannot be registered providers) and we have secured a commitment from the Government that it will continue the waiver

that allows existing non-stockholding registered providers to remain on the register. This waiver will not be withdrawn in 2013 as had previously been announced.

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## 8.0 Conclusion

The paper, taken as a whole, represents a comprehensive revision of regulatory arrangements. On balance (and despite strong reservations on a number of specific issues, such as the Value for Money standard and Tenant Cashback), the Federation regards the overall effect of the proposals as a welcome reduction of the regulatory burden on the sector, particularly in respect of the Consumer standards.

While we have been able to put forward an initial view on several points, the development of a full response will be based on consultation with members over the next few months. Details of this will be announced shortly. Meanwhile, any member wishing to comment on issues arising from this consultation, or raise any queries, is encouraged to contact John Bryant at [john.bryant@housing.org.uk](mailto:john.bryant@housing.org.uk) or 020 7067 1082.