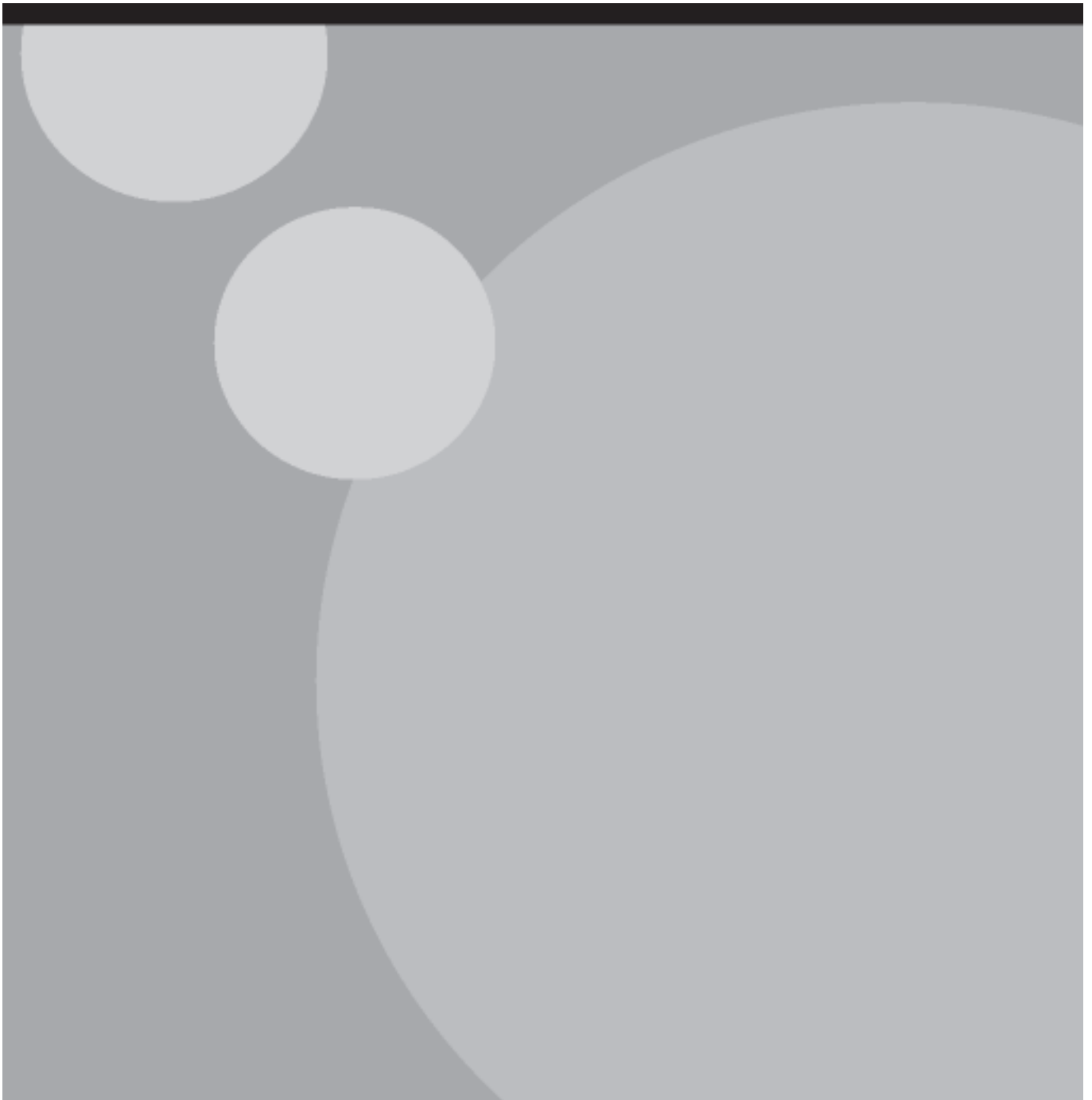




Review of social housing regulation





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October 2010
Department for Communities and Local Government

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SUMMARY OF FINDINGS

- In line with the Government's commitment to reduce the number of quangos, the Tenant Services Authority (TSA) should be abolished and its economic regulation and backstop consumer regulation functions transferred to the Homes and Communities Agency (HCA), generating efficiency savings in back-office functions and exploiting synergies across investment and regulation.
- In order to ensure the continued independence of regulation, these functions should be vested in a statutory committee within the HCA, legally separated from HCA's investment functions and with its membership appointed by the Secretary of State.
- The role of consumer regulation should be refocused on setting clear service standards for social landlords and addressing *serious* failures against those standards.
- This is a localist solution to resolution of tenants' problems. Local mechanisms should be used to address routine problems, with an enhanced role for elected councillors, MPs and tenant panels in the complaints process. This will enable tenants to hold their landlord to account and press for better services.
- Inspection of social landlords should only be used where there are grounds to suspect a serious failure against the standards, but the regulator should be free to commission inspections from the open market.
- In order to maintain lender confidence and protect taxpayers, proactive economic regulation of housing associations should continue as now but with more focus on value for money for the taxpayer.

Section 1

Introduction

- 1.1 In June 2010 the Rt. Hon. Grant Shapps MP, Minister for Housing and Local Government, announced a review of the role and purpose of the TSA and the framework for social housing regulation.
- 1.2 The review was set in the context of the following published Government objectives:
- reducing the number and cost of quangos
 - reducing administration costs and ensuring value for money of public investment
 - cutting unnecessary regulation and inspection
 - ensuring there is a robust, transparent and independent framework of economic regulation for social housing
 - ensuring there is a regulatory environment that ensures housing associations continue to command the confidence of lenders and can continue to attract investment at competitive rates
 - supporting a supply of affordable housing
 - ensuring social housing tenants are adequately protected and empowered.
- 1.3 The terms of reference for the review were as follows:
- review all TSA functions, making recommendations on whether they should be retained, altered or eliminated
 - make recommendations on where TSA functions should be located and how any institutional changes should be effected
 - review the options for funding the future regulatory model
 - review the need for separate regulation and inspection of the landlord function
 - review and establish a new policy and any necessary institutional arrangements for the handling of complaints from social tenants about the performance of their landlord that achieve greater levels of local accountability
 - map out the implications for organisations affected by the review's recommendations
 - develop an implementation plan for its recommendations.

Section 2

Context

Why regulate social housing?

- 2.1 The review starts from the presumption that any level of state intervention should be justified. The rationale for state intervention (through regulation) in the provision of social housing is based on:
- The **lack of competitive pressures** towards good, efficient service provision; and
 - The **presence of substantial public subsidy**.
- 2.2 There is also a specific factor that provides an additional reason for regulation: more than £40bn of **private sector lending to housing associations** has been made on the basis that they are regulated.
- 2.3 Together these factors suggest a clear public interest in some level of regulation of social housing provision. The precise level of intervention that is appropriate is discussed below.

The current system of regulation

- 2.4 The current regulatory system came into effect on 1 April 2010, implementing the recommendations of Professor Martin Cave's independent review of social housing regulation published in June 2007.¹
- 2.5 The Cave Review's key recommendation was to establish **a single regulatory system** for social housing provision in England delivered by a single **standalone regulator**, independent of government. The TSA was established as the social housing regulator by the Housing and Regeneration Act 2008 (the 2008 Act) and came into being on 1 December 2008.
- 2.6 The scope of TSA regulation covers **consumer and economic issues**. The principal regulatory tool in the current system is **standards**. There are currently six largely outcome-focused standards, which landlords are obliged to meet, covering consumer and economic issues. There is a high degree of support across the social housing sector for the standards framework.
- 2.7 The regulator has a range of **monitoring powers** which it can use, at its own discretion, to assess landlords' performance against the standards. It can, for example, commission inspections and require landlords to supply performance information. In more serious cases, where the regulator suspects mismanagement by a landlord, it can hold a statutory inquiry.

¹ <http://www.communities.gov.uk/documents/housing/pdf/320365.pdf>

2.8 Where a landlord breaches one or more of the standards, the regulator can use its **enforcement powers**. These range from issuing an enforcement notice to (in extremis) requiring the landlord to transfer the management of its homes to another provider. The regulator is required to ensure that any interventions are proportionate to the materiality and frequency of breaches, there is no distinction between when the regulator can act on consumer or economic regulation matters.

Drivers for change

2.9 There are three important drivers for change:

- The Government's localism agenda, which aims to enhance power and accountability at the local level, while refocusing the role of central government on those issues where it is best placed to act.
- The imperative to make significant financial savings across government, in order to reduce the fiscal deficit.
- The Government's policy objective to reduce the number of quangos.

2.10 These drivers for change have implications for the future function and form of social housing regulation and are considered as part of the review. In particular, they require consideration of:

- The appropriate role of the state in securing desired outcomes through regulation, versus the role of local, non-state mechanisms.
- How the cost of regulation – both to landlords and taxpayers – can be reduced.
- The future role of regulation in maximising the value for money from public investment in social housing.
- Whether responsibility for regulation can be transferred elsewhere in order to achieve a reduction in the number of quangos.

Section 3

A revised model of regulation

Outcomes

- 3.1 Drawing on the Terms of Reference and the analysis set out above, the review considers that the reformed system should be designed to achieve the following outcomes.
- 3.2 In terms of **consumer protection**:
- social housing is well managed and of appropriate quality
 - social housing tenants have an appropriate degree of choice and protection and have the opportunity to be involved in the management of their homes and to hold landlords to account; and
 - social housing provision makes a contribution to the social and economic well-being of the areas in which it takes place, including (for example) to broader environmental objectives.
- 3.3 In terms of **economic** outcomes:
- taxpayers are protected – landlords operate efficiently, value for money is obtained from public investment in social housing, public investment is safeguarded and not misused and unreasonable burdens are not imposed on public funds; and
 - social housing supply – private sector investment in social housing is retained and expanded and housing associations remain financially viable and properly managed (consistent with their independent status).
- 3.4 These outcomes are a continuation of existing policy, the main focus of the review is on how these outcomes are achieved.

The regulatory system

Core elements

- 3.5 The review recommends that **many of the fundamental building blocks of the current regulatory system should remain in place**:
- the coverage of regulation (i.e. social housing, as defined in the 2008 Act), with a single social housing regulator
 - the regulator's standard-setting powers, and the Secretary of State's limited powers of direction in relation to standards

- the arrangements for landlords to register with the regulator and the registration requirements set by the 2008 Act
- the regulator's powers with respect to the accounts and constitutions of housing associations, and the arrangements for dealing with cases of insolvency
- the regulator's current role in regulating stock disposals by housing associations
- the regulator's enforcement powers

Co-regulation

3.6 The review recommends that the principle of **co-regulation should be retained and enhanced**. We identify the following key elements of co-regulation:

- Fundamental responsibility for effective service delivery lies with landlords, not the regulatory system
- Landlords are accountable to their tenants, not to the regulator. Tenants must therefore have the information and opportunities they need to hold landlords to account and to shape service delivery
- Landlords should make robust and honest self-assessments of their own performance, drawing on external validation (such as peer review) as needed
- The regulator should set clear outcome-focused standards, to be complemented by more specific local offers agreed between landlords and tenants. Regulatory intervention should be justified and proportionate.

3.7 The review's recommendations will result in the system becoming more co-regulatory – with a clearer role for tenants in scrutinising performance and greater freedom for landlords to deliver high quality services, while the regulator's attention will be focused on serious failures.

Minimising costs

3.8 We have considered how the aim of minimising the cost of regulation can be reflected in the overarching regulatory framework, in a way that is consistent with the objectives set out in the terms of reference.

3.9 The review recommends that the regulator should have **an overarching statutory duty to regulate in a manner which minimises interference**. This duty should also require the regulator to regulate in a manner that is, as far as possible, proportionate, consistent, accountable and transparent. The proposed duty is similar in scope to the TSA's tenth statutory objective. The conversion of this objective to a statutory duty reflects the Government's intention that proportionality and minimal interference should shape the exercise of all regulatory functions.

Consumer protection and economic regulation

- 3.10 The review concludes that **consumer and economic issues require substantially different levels of regulatory activity** in order to achieve the desired outcomes outlined above. We recommend that this distinction should be reflected in legal framework for regulation. The rationale for this conclusion is set out in the following two sections of the report.

Section 4

Consumer protection

Introduction

4.1 The review has used the term consumer protection to encompass a range of possible activities and structures to protect tenants and correct for the fact that they have limited or no choice about the services they receive. We have identified the core elements of consumer protection as:

- setting clear service standards
- identifying, escalating and addressing failures against the standards
- scrutinising landlords' overall performance and pressing them to improve continuously.

Identifying and addressing failures against the standards: the role of complaints

4.2 The regulator is currently empowered to take enforcement action wherever a landlord breaches a standard, and can proactively monitor for such breaches. Breaches against the regulatory standards can potentially cover a wide range of problems – ranging from minor, isolated issues to fundamental service failure.

4.3 The complaints process for social housing already provides a clear and trusted route for tenants to seek redress for individual service failings. Typically the complaints process comprises the landlord's own complaints process and (if necessary) determination by an Ombudsman. Often problems can be resolved between landlords and tenants themselves. There are currently clear precedents for tenant involvement in the complaints process by, for example, groups of tenants being involved in the landlord's internal complaints procedures. The role of tenant panels is discussed in more detail below.

4.4 In light of the trusted role of the ombudsmen in dealing with individual service failings, the starting point for the review was that there should be no automatic role for the regulator in dealing with these matters. In the small number of cases where complaints cannot be satisfactorily resolved locally we propose **an enhanced role for the ombudsmen**. In determining individual complaints, they should have regard to the national and locally negotiated standards. Where there is evidence that a landlord has not complied with these standards, the Ombudsmen could recommend that a landlord takes action to address the problem.

4.5 The review considered whether there was scope for increased involvement by Councillors and MPs in resolving complaints locally. We concluded that there was scope to increase democratic involvement in complaints and that this

would have a benefit, over time, of councillors and MPs becoming more expert at using their influence to stop complaints arising and resolve those that do at an earlier stage. Tenant panels could carry out a similar function. We therefore propose that **tenants should contact MPs, Councillors, or a tenant panel** once the landlord's complaint procedure has been exhausted, and that **MPs/Councillors/tenant panels should intervene in order to attempt to resolve the problem and only then refer the complaint on to the Ombudsmen if the matter cannot be resolved.** We anticipate that the majority of tenant complaints will be resolved at the local level.

- 4.6 We propose that the Ombudsmen should be the sole government bodies dealing with individual complaints, and that **the provision in the 2008 Act which requires TSA to consider complaints should be repealed.** This would help bring clarity to tenants as to the next steps and avoid duplication between the respective roles of the regulator and the ombudsmen.
- 4.7 In light of the above we have considered the residual role that needs to be carried out by the regulator. The current standard set by the TSA for tenant involvement requires that landlords 'have an approach to complaints that is clear, simple and accessible that ensures that complaints are resolved promptly, politely and fairly'. We propose that the **regulator should continue to set a standard on complaints but that a revised standard would specify the role of tenant panels, councillors and MPs in the complaints process.** Beyond standard setting we would want to retain the ability of the regulator to consider intervention where those involved in the complaints process believe an individual complaint is indicative of a more serious failure. We would also want to ensure that tenants retain the ability to alert the regulator where they wish to bring forward evidence of serious failures in service delivery, in cases where access to the powers of the regulator will be a more effective tool to remedy problems than the individual redress of the complaints system. This is discussed in more detail later in the report.

Scrutiny of landlord performance

- 4.8 This element of consumer protection is concerned with how pressure is exerted upon landlords to improve services and remain responsive to tenant needs. The existing regulatory framework encourages this to a degree. The starting point for the review was that effective scrutiny by tenants would be the most desirable means of delivering consumer protection as this reinforces the relationship between landlord and tenant.
- 4.9 The existing requirement in the regulatory framework that landlords develop local offers presents a useful focus around which tenant scrutiny could be built. Currently tenants are involved in negotiating local offers with a flexible definition of what 'local' means. As tenant groups should, by the time the review recommendations are implemented, have a degree of ownership of local offers it would make sense that tenants also provide ongoing scrutiny of the delivery of those offers.

- 4.10 In contrast to the potential role of tenant scrutiny, the regulator has at its disposal in law blunt monitoring tools to compare performance by way of performance indicators and intervention where it feels necessary. The review concluded that this role does not add substantially to what can be achieved by tenant led scrutiny and is not an appropriate role for regulation.
- 4.11 However, the review considered that **there is a role for the regulator in setting clear expectations about what scrutiny should achieve.** To ensure that effective scrutiny is established we propose that the Secretary of State's direction on tenant involvement would include a clear expectation that tenants would be able to scrutinise landlord performance. The review considered that there was also a role for the regulator in addressing serious failures to implement effective scrutiny. The threshold for regulatory intervention is considered below.
- 4.12 **A potential vehicle for delivering effective tenant scrutiny is tenant panels,** these are considered in more detail below as they may serve several useful functions in consumer protection. The review also considered the role of local authority scrutiny panels in supporting effective tenant scrutiny. **We concluded that, there were good reasons not to make local authority scrutiny committees a formal part of tenant scrutiny** as this would increase the control of the state over private sector housing associations and would introduce a degree of prescription into tenant scrutiny that could override what can be achieved by tenants and landlords working together in the manner that best suits them.
- 4.13 Rather than requiring any form of prescription the review proposes to continue to **rely on the requirement to co-operate locally in the existing standards framework and the capacity of landlords and tenants to develop flexible scrutiny structures.**

Performance information

- 4.14 Effective tenant scrutiny depends on the availability of timely, good quality information about landlord performance. The review considered how this should be achieved.
- 4.15 One approach is to seek to provide comparative data, allowing tenants to gauge the performance of their landlord against that of others. The regulator currently goes some way towards providing this. It uses available information to provide a searchable portal of basic information relevant to tenants, supplemented by more detailed information in landlords' annual reports. Tenants have also been able to refer to the starred inspection ratings of the Audit Commission, fuller sets of performance information made available by the regulator and any information voluntarily made available by landlords.
- 4.16 However these sources of information are not necessarily produced in a timely manner and, in order to drive service improvement, tenants need access to information that is better tailored to them. We consider that data provision needs to reflect the reality that it will be used by tenants in negotiating service

improvement – not to inform a decision of whether to choose one landlord over another.

- 4.17 **We recommend that there should be a clear regulatory obligation on landlords to provide timely, useful performance information to tenants in order to support effective scrutiny.** This could be included in the proposed government direction to the regulator on tenant involvement. We propose that government should avoid being prescriptive about the precise form that performance information should take; instead this should be agreed between landlords and tenants as part of local offers. It should be noted that landlords adopting accepted best practices and those innovating in this area will already make a large amount of relevant information available to tenants in a variety of formats and seek assurance from outside bodies of the quality of their data.
- 4.18 This option reflects the central relationship between landlord and tenant and does not involve an expensive, centrally-mandated bureaucratic process. We recognise that without comparability of data there is no automatic quality assurance, however we consider this option has the greatest potential to allow tenants to act as informed consumers, ensuring that information is useful to recipients.
- 4.19 **We recommend the regulator’s power to require landlords to send it an annual report of their performance (failure to comply with which is a criminal offence) should be repealed.** This power is fundamentally inconsistent with the model of regulation that we have set out. Instead, we anticipate that – through the Direction – landlords will be obliged to publish an annual report to their tenants, not to the regulator, as part of the routine provision of performance information to tenants.

Tenant panels: a role in both complaints and scrutiny

- 4.20 The current standard set by the TSA for Tenant Empowerment and Involvement requires landlords to provide tenants with a range of opportunities to influence how landlords meet the TSA's standards and to scrutinise their performance against the standards. The existing standard does not stipulate that a landlord should encourage tenants to adopt any particular approach to delivering these outcomes. However, tenant panels, where they currently exist, deliver many of the desirable outcomes and are a useful benchmark.
- 4.21 We considered whether there was a case for prescribing the form of tenant panels or introducing a requirement for a panel to be established locally. We do not propose to introduce a binding requirement that panels be established (either through legislation or the regulatory framework) nor seek to closely define how panels should be constituted. There are already a diverse range of approaches to securing tenant influence as the TSA local standards pilots have demonstrated. Many tenants will already be organised in a manner which, if not already carrying out the functions on which we would envisage a panel would lead, could easily be adapted to the role. Ultimately, should tenants not wish to form panels then this should be their choice.

- 4.22 As well as its role in scrutiny, a tenant panel could play a role in the complaints process. The number of stages involved in handling a complaint differs between landlords but the first stage invariably involves the initial complaint (which can generally be made in a variety of formal and informal ways). A panel would be unlikely to add value to this first stage but could act as a critical friend to the landlord to help ensure its complaint process is accessible, timely and credible to tenants.
- 4.23 Where a complainant remains dissatisfied with their landlord's response they are generally offered an opportunity for review. The complaint would then normally be made subject to reinvestigation by an officer / team not involved in handling the original complaint. A tenant panel could play an important role in forming part of the review or indeed conducting the review without officer involvement (as currently happens in some landlords).
- 4.24 Panels could also assist in helping landlords ensure that lessons are learnt from complaints or, indeed, act as advocates for tenants. The precise nature of tenant panel involvement would vary from place to place and would, in part, be dependent on the broader coverage and scope of the panel. Where panels or equivalent bodies do exist and are recognised by the landlord we propose (alongside MPs and councillors) that they can serve a role in referring complaints to the ombudsmen (see above).
- 4.25 **We propose that the existing tenant involvement and empowerment standard should be strengthened through a direction to the regulator to make clear an expectation that landlords should welcome scrutiny via a tenant panel (or equivalent body) as well as encourage their role in handling complaints.**

Serious failures

- 4.26 As outlined above, the review recommends that the role of regulation on consumer protection matters should be focused on setting clear standards and dealing with cases of serious failure against those standards. An explanation of how this would work in practice is set out below.

Definition

- 4.27 We recommend the regulator should only be able to exercise its monitoring and enforcement powers with respect to its consumer protection standards if, in its opinion, there are reasonable grounds to suspect there has been – or that there is a risk of – a breach of a standard(s) resulting in a serious detriment to tenants. In reaching this opinion, we envisage the regulator would have regard to the severity and the extent of the impact. Thus failures resulting in a severe impact on a large number of tenants would represent strong grounds for intervention.

Detection

- 4.28 As outlined earlier, we consider that the main information flow about landlords' performance should be in a mutually agreed format from landlords to tenants. But the emphasis on the flow of information from landlords to tenants raises a fundamental question: how will serious failures be detected?
- 4.29 We envisage a number of potential sources of evidence including – but not necessarily limited to:
- **Nature and volume of complaints**
Existing practice is for the Ombudsmen to refer evidence of serious failures to the regulator, informed by the pattern received. In future, tenant panels, MPs and Councillors could be an additional source of evidence about patterns of complaints
 - **Performance information**
Routine performance information supplied by landlords to tenants could reveal evidence of serious failure
 - **Local intelligence**
Local authorities (and their elected representatives) may become aware of evidence of serious failures by social housing landlords
 - **Evidence from other expert bodies**
This could include auditors or health and safety enforcing authorities
 - **Whistle blowing**
Employees of social housing landlords – or bodies that work closely with them – have in the past provided valuable evidence to the regulator about serious problems

Escalation

- 4.30 We propose that any person or organisation should be able to submit evidence of possible serious failures to the regulator. The legislation would provide that the regulator **may** have regard to such evidence. However we also want to provide clear escalation routes for tenants, locally elected representatives and others. We therefore recommend that, when considering whether or not to intervene, the regulator **must** have regard to any evidence it has received from certain specific bodies: the Housing Ombudsman, the Local Government Ombudsman, local housing authorities, MPs and councillors, bodies representing tenants (such as tenant panels); health and safety enforcing authorities; and the Secretary of State.
- 4.31 The specific reference to these bodies as sources of evidence will give them a clear route to the regulator in order to raise serious concerns about landlord performance. This could involve:
- an Ombudsman, noticing an unusually large volume of complaints about the performance of a landlord, could alert the regulator to the possibility of a serious failure

- a tenant panel, in exercising its scrutiny and complaint handling role, could approach the regulator with concerns about serious service failure
- a local authority scrutiny committee becomes aware of a landlord's chronic failure to provide decent services and submits its evidence to the regulator
- a councillor or MP, in discharging their role in the complaints process notice a pattern of complaints in a particular area which causes them concern
- a health and safety enforcement body compiling evidence of 'repeat offending.'

Intervention decision

- 4.32 Although we want to see clear channels of referral to the regulator, **we recommend the decision on whether to intervene in a particular case should rest with the regulator.** This decision would be based on the regulator's judgement of whether the 'serious failure' test had been satisfied, based on the evidence received. The regulator will need to make an informed judgement about whether the 'serious failure' threshold has been reached. **We therefore recommend that, when considering whether intervention is justified, the regulator should be able to request relevant information from the landlord concerned.**

Formal intervention

- 4.33 If the regulator is satisfied that the legal threshold for intervention has been met, it would then be able to deploy its formal intervention powers in order to inform remedial action. These include inspection, survey, statutory inquiry and extraordinary audit. The regulator's use of these powers would need to be consistent with its statutory duty to minimise interference and regulate proportionately. Where specific intervention powers have higher thresholds (such as statutory inquiry), these would also have to be satisfied.
- 4.34 This represents a significant change to the existing framework. In future, the use of the regulator's intervention powers (including inspection) on consumer matters will be focused purely on investigating specific issues of concern, rather than on proactive scanning for failure. This reform has significant implications for the current arrangements for commissioning inspections, as does the decision to disband the Audit Commission. These implications are discussed later in the report.

Enforcement

- 4.35 Where the regulator concludes there has been a serious failure against one or more of its consumer protection standards, it would be able to exercise its enforcement powers. We do not propose any changes to the existing range of

enforcement powers, which provide the regulator with a range of tools that it can deploy depending on the nature and severity of the failure. Again, the use of these powers would need to be consistent with the statutory duty to minimise interference (and where specific enforcement powers have higher thresholds, these would also need to be satisfied).

- 4.36 **We propose to retain the opportunity available to landlords to give the regulator a voluntary undertaking** as an alternative to formal enforcement and the requirement on the regulator to take such undertakings into account when considering whether to exercise its enforcement powers.

Feedback

- 4.37 Where the regulator – having decided to intervene – finds that there has not been a serious failure, it would take no further action in relation to the landlord concerned. However, it would be useful for the regulator to provide information to the landlord and its tenants about the reasons for its decision. For example, the regulator may wish to make non-binding recommendations that tenant panels could pursue. **We recommend that a statutory duty is placed on the regulator to develop a policy on how it will provide this feedback.**

Health and safety issues

- 4.38 Some partners have argued that ‘reactive’ regulation is not an appropriate model for regulating health and safety in social housing. The existing standards framework requires landlords to comply with applicable health and safety legislation, breach of which would also be a breach of a standard (particularly the homes standard). The review considered the following options: (i) a proactive approach to monitoring the health and safety compliance of landlords by the regulator; and (ii) a ‘backstop’ role for the regulator in which no proactive action is taken.
- 4.39 A proactive approach would require the regulator to gather compliance data from landlords and challenge those who did not appear to be complying with applicable laws (e.g. carrying out gas safety checks). The advantage of this approach is that it would remind regulated bodies that the health and safety of tenants is an important matter to which they must have regard and would be in line with the expectations of some partners. This would be a very different approach to that being proposed in respect of other consumer matters in the review.
- 4.40 There are, however, fundamental difficulties with this approach. In pure terms, it should not be for the *social housing* regulator to say whether or not an approach to compliance on health and safety matters is good enough. Landlords have health and safety obligations and discharge of those obligations is a matter for landlord boards and councillors subject to their own advice. Ultimately it is for the specialist health and safety enforcing authorities to investigate and take action against breaches. There is a risk that the regulator taking a proactive approach would give boards and councillors undue

comfort to the detriment of tenants. For these reasons a proactive approach is not recommended.

- 4.41 Instead **we recommend that the regulator should take a reactive approach** – in common with its approach to other consumer protection matters. This recognises that the regulator has access to powers that allow it to deal with the organisational causes of health and safety failings; these powers are complementary to the powers of other enforcing bodies.
- 4.42 Although we recommend a reactive approach, we acknowledge the seriousness of health and safety breaches and the need for co-ordinated working between enforcing authorities to protect tenants. **The review therefore recommends the regulator must have regard to evidence received from the health and safety enforcing authorities when deciding whether to exercise its powers.** Outside of the legislative requirements, clear public statements about the respective roles of different enforcing authorities and the importance of whistleblowing can be used to support effective protection.

Inspection

- 4.43 We believe the **regulator's power to commission inspections** should be retained. If this power was abolished outright, the regulator may be forced to make greater use of relatively invasive and expensive processes (such as statutory inquiry) to investigate suspected serious failures.
- 4.44 The move to a 'reactive' model of consumer regulation will accelerate the current trend towards having only a small number of targeted inspections. This, along with the recent decision to disband the Audit Commission, creates a clear need for reform to the current commissioning system. The current system gives the Audit Commission a 'right of first refusal' on carrying out all consumer-related inspections commissioned by the regulator.
- 4.45 We propose to repeal this right of first refusal, in order to allow the regulator to procure inspections from the open market. This approach should maximise efficiency and flexibility. The regulator would be responsible for setting a consistent methodology for inspection, linked to its standards, in order to avoid unnecessary compliance costs for landlords.

Section 5

Economic regulation

Role of regulation

- 5.1 Our starting point, given the objectives in the review's terms of reference, is that the following activities that the regulator currently undertakes with respect to **economic regulation of housing associations should continue and should be subject to minimal legislative change:**
- regulation to ensure that associations are financially viable and well governed
 - regulation to ensure taxpayers' funds are not misused (through controls over the disposals of properties) and to ensure there are no unreasonable burdens imposed on the taxpayer (through the regulation of rents).
- 5.2 There is a clear rationale for the continuation of the regulator's proactive stance in relation to these activities to prevent organisational failure and defaults on loans. These activities also help support the confidence of private lenders to provide funds at competitive rates.
- 5.3 The framework of statutory powers available to the regulator to monitor and secure compliance should therefore remain unchanged. However the new overall duty to minimise interference will apply and we would expect the regulator's activities to be targeted, proportionate and risk-based. The regulator should have sufficient resources to deliver these objectives, although we would expect it to continually strive to maximise efficiency.
- 5.4 In addition to the two principal activities set out above, **we expect in future the regulator to be more proactive than is currently the case on ensuring value for money in the sector** in order to achieve better returns for the taxpayer and support new affordable housing supply. With less public investment likely than in the past it is important to consider how regulatory levers can support the Government's wider policies in relation to affordable housing. This also helps to support the confidence of private lenders in a situation where the availability of grant for new build is likely to be reduced. This includes focussing on the efficiency of landlords, their capacity and incentives for new affordable housing supply.
- 5.5 In practice, we want the regulator to base its approach on a combination of the following activities, though this is not designed to be an exclusive list:
- Requiring greater transparency and consistency in the provision of cost information to allow landlords, their tenants and other interested parties to benchmark performance and drive value for money improvements.
 - Using the consents regime to support the provision of new affordable housing within a framework supported by Government. For example,

certain types of consents to dispose affordable housing properties for alternative uses could be given in return for undertakings around the release of funds for future development of affordable housing and commitments on efficiency improvements.

- Reviewing structural barriers to efficiency and looking to remove these where possible. This is likely to involve the regulator looking at a number of issues including incentives around governance structures, stock optimisation and rationalisation, the merits of group structures, and the regulatory system of consents and approvals for mergers and takeovers.
- Encouraging a wider range of social housing providers to increase competition for future public investment. Working alongside partner agencies, we expect the regulator to promote the development of more diverse markets of affordable housing provision and management. We do not propose to amend the registration powers and functions of the regulator as these were designed to encourage more diverse entry; and
- Encouraging innovative private sector funding arrangements to deliver new affordable housing. The housing association sector has been very successful in encouraging private investment to build affordable housing and we are keen to see this continue and develop further.

5.6 Inspection will not be a routine tool of proactive regulation on value for money, but may be used sparingly in cases giving cause for concern.

5.7 In undertaking these activities, we expect the regulator to continue to regulate in a manner that observes the independent status of housing associations. We also expect the regulator to keep under review the content and application of regulation to ensure that it does not act as a barrier to new entrants or new models of service delivery in housing management.

5.8 **The application of economic regulation to local authorities will be addressed in the context of the Housing Revenue Account reform and not specifically as part of this review.**

Section 6

Other functions of the regulator

6.1 The revised model of regulation set out above, and in particular the refocusing of the regulator's consumer protection role, has implications for certain functions that are currently carried out by the regulator. Our recommendations are as follows:

- **Best practice work currently done by the TSA should cease.** Wherever regulators have a role in setting best practice there is a risk that this will be construed as additional regulatory requirements by landlords, potentially increasing compliance costs and hindering innovation. There are already plenty of trusted sources of guidance for the sector.
- **TSA's work to actively promote tenant empowerment should be scaled back, pending the outcomes of the Tenant Empowerment Programme Review.** The regulator's principal role will be to set a clear standard on empowerment and involvement, against which tenants would be able to seek redress through the complaint system. A suggested new direction to the TSA on tenant involvement and empowerment is included at Annex 1.
- **TSA's data collection activity should be significantly reduced and streamlined** to focus more clearly on its needs as a regulator.
- **The regulator's power to issue Codes of Practice relating to its consumer protection standards should be repealed.** This power has not yet been deployed, but it allows for a level of prescription that is not consistent with reactive consumer regulation.

Section 7

Funding of regulation

- 7.1 The TSA currently has a power to charge landlords an annual fee for continued registration with it.
- 7.2 **We believe that there is a strong ‘in principle’ case for regulation being largely or wholly funded through fees on regulated landlords in future.** This model is common among economic regulators. A fees regime would relieve the taxpayer of some or all of the burden of funding regulation and it would expose the regulator to stronger pressure from landlords to minimise costs. We do not propose, however, that fees should be an alternative to the cost-reduction measures set out above or the ongoing need to maximise efficiency. The detail of a fees regime would need to be worked up separately, beyond the review’s immediate timeframe and a consultation on the introduction of fees will take place in due course.

Section 8

Institutional arrangements

Location

- 8.1 In order to meet the objective of the review to reduce the number of quangos, we explored a range of potential locations for the remaining regulatory functions following abolition of the TSA. We focused on existing regulators/inspectorates and bodies with a specialist knowledge of social housing. Many options were ruled out at an early stage as clearly unfeasible and/or undesirable. **The clearly preferred option was to locate regulation within the reformed Homes and Communities Agency (HCA).**

Advantages

- 8.2 The model of investment and regulation under one roof has been used before, with regulation and investment co-located in the TSA’s predecessor body, the Housing Corporation. Co-locating investment and regulation is advantageous in terms of operational efficiency and synergy between functions (e.g. around driving efficiency and social housing supply).

Issues

- 8.3 It is important that regulation should be demonstrably independent, not be over-shadowed by investment and that Government should not exercise undue

control over the HCA ('policy passporting') which could give rise to classification issues. This could be managed through governance arrangements which enshrine the independence of regulation, and through legislation providing Government with differing powers of direction over investment and regulatory issues, as currently exist.

8.4 Given:

- (a) the restrictions imposed on the Secretary of State's powers of intervention in respect of the exercise of the regulatory function and the assumption that such restriction would continue;
- (b) the current commitment of government to reducing the number of State agencies; and
- (c) the ability through the legislative process to preserve the independence of regulatory decision-making and thereby reduce potential conflicts,

the disadvantages identified in the Cave Review for locating the regulatory and investment functions seem largely to have been addressed.

8.5 **The HCA option was favoured by the majority of external partners, subject to there being sufficiently robust independent governance arrangements in place.**

Governance

8.6 This section of the report sets out a proposal for the future governance of social housing regulation. It assumes that (with effect from April 2012) the remaining regulatory functions of the TSA will be transferred to the HCA.

Objectives

8.7 Taking account of the terms of reference, we consider that any proposal for the future governance of regulation within the HCA must:

- Ensure the **independence of regulation**. The Secretary of State's formal powers in relation to regulation should continue to be carefully circumscribed. But independence should exist in practice as well as in theory, so it is also important that informal 'command' powers should be limited and that a culture of independence is maintained.
- Be capable of delivering **robust, transparent economic regulation** that maintains lender confidence and protects the taxpayer, and **reactive consumer regulation** that protects tenants.

Analysis

- 8.8 Formal independence from Ministers can be achieved by retaining the existing statutory framework for regulation. The HCA would inherit the TSA's regulatory powers in Part 2 of the Housing and Regeneration Act 2008, which include carefully limited Secretary of State powers over the content of regulatory standards, registration, disposals and enforcement.
- 8.9 We consider however that the formal governance structure of the reformed HCA will need to reflect the functional independence of regulation. The approach most likely to retain lender confidence and mitigate the reclassification risk is for this clear separation to be clarified in statute.

Proposal: A Regulation Committee

- 8.10 Our proposed response to this challenge is to establish **a statutory Regulation Committee as part of the HCA**. Under this proposal, the Regulation Committee – not the HCA board will take on what remains of TSA's regulatory powers.
- 8.11 We propose that all regulation committee members are appointed by the Secretary of State (whether directly or by virtue of their membership of the HCA board) and that the Secretary of State will be placed under a statutory duty to ensure that a majority of committee members are not also members of the HCA board. The HCA would be placed under a duty to have regard to any issue which the regulation committee formally raises with it and the Chairman of the regulation committee will have an explicit right to draw the Secretary of State's attention to any concerns about his regulatory decisions.
- 8.12 We consider that the Regulation Committee should be supported by the staff of the HCA. The Committee would not issue its own annual report, nor would it receive its own ring-fenced budget – it would be up to HCA to determine the level of resourcing for regulation with the proviso that regulation is sufficiently resourced to deliver its role effectively. We therefore suggest that HCA may need a new statutory objective along the lines of *“supporting the effective discharge of regulatory functions by the Regulation Committee.”*

Section 9 Implementation

- 8.13 The structural recommendations set out within the review will need to be enacted through legislation, mainly through amendments to the Housing and Regeneration Act 2008. The Localism Bill provides the opportunity to do this.

Annex 1

Suggested revised direction on tenant involvement and empowerment standard

Note this draft direction is for indicative purposes only, the final draft direction will be consulted upon at the appropriate time

1. The Regulator shall set a standard relating to the involvement by tenants in the management by registered providers of accommodation
 - (1) The Regulator shall set a Tenant Involvement standard with a view to achieving the following so far as possible-
 - a) that tenants are given a wide range of opportunities at a local level to influence and participate in
 - (i) the formulation of their landlord's housing related policies and priorities, and
 - (ii) decisions about how housing related services are delivered including offers on service standards, and
 - (iii) the scrutiny of landlord performance and making recommendations to landlords about how performance might be improved, and
 - (iv) the resolution of complaints, and
 - b) that tenants are supported to develop and implement this empowerment, including through
 - (i) registered providers supporting and recognising the formation of tenant panels or equivalent groups by tenants, and
 - (ii) the provision of timely and relevant performance information, in a form which registered providers should seek to agree with their tenants
 - c) that registered providers co-operate with locally elected representatives (for example Councillors, directly elected Mayors, Members of Parliament) in the resolution of complaints.

Annex 2

Visual representation of review proposals

