



Department for
Communities and
Local Government

Proposal on using a Legislative Reform Order to establish the social housing regulator as an independent body

Consultation



© Crown copyright, 2016

Copyright in the typographical arrangement rests with the Crown.

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, <http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/> or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

This document/publication is also available on our website at www.gov.uk/dclg

If you have any enquiries regarding this document/publication, complete the form at <http://forms.communities.gov.uk/> or write to us at:

Department for Communities and Local Government
Fry Building
2 Marsham Street
London
SW1P 4DF
Telephone: 030 3444 0000

For all our latest news and updates follow us on Twitter: <https://twitter.com/CommunitiesUK>

November 2016

ISBN: 978-1-4098-4927-8

Contents

Scope of the consultation	4
Introduction	6
Background and Scope	6
The Legislative Reform Order process	9
Questions	12
About this consultation	14

Scope of the consultation

<p>Topic of this consultation:</p>	<p>This consultation paper is issued on behalf of the Secretary of State for Communities and Local Government (DCLG) and sets out the proposal for amending the Housing and Regeneration Act 2008 so that responsibility for social housing regulation is transferred from the Homes and Communities Agency (HCA) to a new standalone public body. It proposes that the changes to legislation are made through a Legislative Reform Order under the Legislative and Regulatory Reform Act 2006.</p> <p>Under the Legislative and Regulatory Reform Act 2006, the Government must consult on the use of a Legislative Reform Order to make changes to primary legislation. Subject to the results of this consultation, the Government plans to make the order which makes these amendments as soon as is practicable.</p>
<p>Scope of this consultation:</p>	<p>The aim of this consultation is to set out the proposed legislative changes to the Housing and Regeneration Act 2008, to seek views on our proposal and whether it meets the criteria for using a Legislative Reform Order.</p> <p>The proposal has been formed as a result of the findings of the Government Review into the HCA, which recommended that the regulatory function should be removed from the HCA and established as a standalone body.</p>
<p>Geographical scope:</p>	<p>The social housing regulator operates in England only, so the impact of this measure will be limited to England.</p>
<p>Impact Assessment:</p>	<p>This measure will have no impact on business or the voluntary sector because it will not change the powers, duties or operations of the Regulator.</p>

Basic Information

<p>To:</p>	<p>The Government is seeking views from the social housing sector, as well as other interested parties, in response to the questions set out in this paper.</p>
<p>Body/bodies responsible for the consultation:</p>	<p>DCLG</p>
<p>Duration:</p>	<p>This consultation will last for 8 weeks, from 30 November 2016 to 27 January 2017.</p>
<p>Enquiries:</p>	<p>For any enquiries about the consultation please contact</p>

	LRO.consultation@communities.gsi.gov.uk
How to respond:	<p>Responding to this consultation document is your first and main opportunity to make your views known to the relevant department as part of the consultation process. You should respond by completing this survey on Survey Monkey.</p> <p>When you reply it would be very useful if you confirm whether you are replying as an individual or submitting an official response on behalf of an organisation and include:</p> <ul style="list-style-type: none">- your name,- your position (if applicable),- the name of organisation (if applicable),- an address (including post-code),- an email address

Introduction

1. On 10th February, the Minister for Housing and Planning launched the Tailored Review of the HCA. The HCA is the national housing, land and regeneration agency in England (excluding London) and the Regulator of social housing providers in England.
2. In respect of regulation, the HCA Review focused on the structure and delivery of the regulatory function. Regulatory policy and statutory powers were not examined by this Review. Published on 30 November 2016, the Review recommends the separation of the social housing regulator into a new standalone NDPB, to address the potential conflict of interest that arises from the Agency's current configuration.
3. This consultation paper sets out proposals for reforming the legislation governing the regulatory function of the Homes and Communities Agency (HCA), in order to implement the recommendation made in the HCA Review.
4. Views are invited on all aspects of the consultation paper, with a specific focus on eligibility against criteria for using a Legislative Reform Order.

Background and Scope

Background to the Social Housing Regulator

4. Under the 2011 Localism Act responsibility for social housing regulation was conferred on the HCA, a non-Departmental public body (NDPB) of the Department for Communities and Local Government. Recognising the importance of economic regulation, and to safeguard its independence, statute required for regulatory functions to be exercised through an Independent Regulation Committee. Responsibility for strategic and operational decision making of the regulatory function resides with the Regulation Committee.
5. Registered providers built approximately 40% of all new housing in England last year and rely upon private finance to enable development. In addition to approximately £67 billion private debt, there is a further £15 billion of undrawn loan facilities in the sector. Their exposure to the capital markets (and therefore to economic cycles) alongside diversification in the operations of housing associations (for example into building for home ownership), demonstrates the continued, and increasing, need for a robust regulatory framework delivered by a regulator that has the confidence of the sector and lenders.

6. The Regulation Executive Team is the senior executive decision making body within the HCA's Regulation Directorate and has a dual line of accountability – through the Executive Director of Regulation – to the Regulation Committee and to the HCA Chief Executive. The regulatory function therefore currently has a quasi-independent status within the Agency.

The need for reform

7. Our proposal reflects the findings of the HCA Review, which was explicitly focused on the structure and effectiveness of the regulatory function, and therefore did not look at the Regulator's statutory powers. The Review's recommendation on the Regulator was shaped by consultation with stakeholders, through a formal call for evidence and interviews.
8. The HCA Review found there was a compelling case for change of the Regulator's structure, given the way the HCA has evolved since it assumed responsibility for social housing regulation. Since the establishment of HCA's investments arm (HCA-I) in 2014, the Agency has expanded into commercial investments. This has made the HCA, in some cases, both a secured creditor and regulator of registered providers. This potential conflict of interest did not exist when the decision was made to incorporate social housing regulation within the HCA, as at that time the Agency's funding predominantly focused on grant-making.
9. The HCA's governance arrangements and an operational 'ethical wall' have ensured that information is not inappropriately exchanged between the Regulator and Investment function. However, as the financial landscape of the sector evolves and becomes more complex, it becomes ever more important that the HCA and the Regulator are best positioned to adapt to such changes, and that commercially sensitive information is sufficiently safeguarded. Moreover, it is crucial that the Regulator is perceived to be adept at handling such complexities, to uphold lender confidence. The HCA Review therefore made the recommendation that the function of regulation should be removed from the HCA and established as an independent body.
10. Whilst the Regulator remains part of the HCA it will continue to be part of the body corporate and therefore share the same Board and Accounting Officer as the wider Agency. Separation will reaffirm the independence of the Regulator, increasing its autonomy and allowing it to better control its own budget and recruitment.

How we propose to change current arrangements

11. We propose to establish the Regulator as a standalone non-departmental public body (NDPB), therefore removing this function from the HCA. **This measure will not change how registered providers are regulated; the regulatory framework and regulatory powers will not alter as a result of the Review.** This will be a change to the constitutional set-up of the Regulator only.

12. The Regulation Committee; its functions and powers set out in legislation, and regulatory staff will transfer to the new body. We anticipate there will need to be three new staff to provide for legal and corporate services resource (which is currently shared with the Agency), and further Board appointments made to support the Regulation Committee's transition to a Board of non-executives.
13. The new NDPB will retain close working links with the HCA to allow for constructive information sharing on agreed joint areas of interest, whilst safeguarding protected, commercially sensitive information. We expect the relationship with the HCA to operate in a similar way to the current relationship between the Regulator and Greater London Assembly (GLA).

Who is affected by the current arrangements

14. Housing policy is a devolved matter and devolved authorities have their own social housing regulatory system. The HCA's regulatory powers therefore apply to England only. The Regulator's key stakeholders are registered providers of social housing, lenders and investors, social housing tenants and residents and local authorities.

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?

Question 2

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

How regulatory functions will be made more consistent with better regulation principles

15. The principles of good regulation are that regulatory activities should be carried out in a way which is:
 - Transparent
 - Accountable
 - Proportionate
 - Consistent; and
 - Targeted only at cases where action is needed.
16. As explained above, the Regulator's powers and functions will not be affected by this measure. The Regulator has a statutory duty to regulate in a manner which is proportionate, consistent, transparent and accountable, which it will continue to fulfil as an independent NDPB.

17. By transferring the HCA's regulatory function to a new independent NDPB, this measure will ensure that social housing regulation will be made more consistent with better regulation principles, providing for clean, clear and straightforward governance of the Regulator.
18. Currently the HCA Board is legally accountable for regulatory decisions, since it is the legal personality for the body corporate. However, as set out in statute, operational decision making for the regulatory function resides exclusively with the Regulation Committee. Our proposal will therefore improve regulatory accountability by making the Regulation Committee both legally accountable and responsible for making regulatory decisions.
19. In addition, being a standalone body will provide the Regulator with clarity of purpose and a strategic corporate focus on regulatory outcomes and statutory objectives. The Regulator will have its own clear governance arrangements, which will address the risk presented by the HCA's current configuration, in being a single organisation that is both a secured creditor and regulator of housing associations.

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?

The Legislative Reform Order process

20. We propose to set up the new body by means of a Legislative Reform Order (LRO) under section 2 of the Legislative and Regulatory Reform Act 2006 (LRRRA).
21. An LRO is a statutory instrument which can be used to amend primary legislation to remove or reduce a burden to which any person is subject as a result of any legislation and/or ensure regulatory functions comply with better regulation principles.
22. This consultation is being conducted in accordance with the provisions of section 13 of the LRRRA. Information on LROs can be found at:
www.parliament.uk/business/committees/committees-archive/regulatory-reform-committee/regulatory-reform-orders.
23. Further information on the Cabinet Office consultation principles can be found at:
www.gov.uk/government/publications/consultation-principles-guidance.

Parliamentary scrutiny

24. Both Houses of Parliament scrutinise draft LROs. This is conducted by the Regulatory Reform Committee in the House of Commons and the Delegated Powers and Regulatory Reform Committee in the House of Lords.
25. Each Committee might take oral or written evidence to help it decide these matters, and each Committee would then be expected to report.
26. Copies of Committees' reports are available on the Parliament website at [Regulatory Reform Committee in the Commons](#); and [Delegated Powers and Regulatory Reform Committee in the Lords](#).

How the proposed legislative changes meet the preconditions for use of a Legislative Reform Order

27. This chapter describes how the proposal to establish the social housing regulator as an independent body meets the preconditions required to use a Legislative Reform Order to enact the change.

Precondition 1: There are no non-legislative solutions that will achieve the intended outcome of the provision

28. Separation of the social housing regulator from the HCA's Investments function can only be achieved through legislation. It is not possible to delegate HCA's social housing function to a new entity as HCA can only exercise its functions by statute, and that statute prohibits sub-delegation. It is also not possible to establish separate governance structures for the regulatory function through appointing a separate Accounting Officer to the rest of the Agency, as a legal entity can only have one Accounting Officer.

Precondition 2: The effect of the provision is proportionate to the policy objective

29. The provision will set up a new NDPB and transfer social housing regulatory functions from the HCA to the new body. There will not be any change to the Regulator's powers or the way it operates as a result of this transfer.

Precondition 3: The provision strikes a fair balance between the public interest and the interests of the persons adversely affected by the provisions

30. No one will be adversely affected by this provision, since it will not change the way the social housing regulator regulates registered providers. The measure will also increase accountability for regulatory decisions, which is in the public interest.

Precondition 4: The provision does not remove any necessary protection

31. The functions and powers of the Regulator will remain the same as they are now, so no protections will be removed. This is a constitutional change that will increase the direct accountability of the Regulator.

Precondition 5: The provision will not prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise

32. The functions and powers of the Regulator will remain the same, so there will be no impact on any person's rights or freedoms. This is a constitutional change that will increase the direct accountability of the Regulator.

Precondition 6: The provision is not constitutionally significant

33. This provision will not change the functions or powers of the Regulator. We do not consider the change to be constitutionally significant as it will only formalise separation of the Regulator from the HCA, by giving it independent legal status. The level of independence from Government will remain the same as it is now.

Provision 7: Where a provision will restate an enactment, it makes the law more accessible or more easily understood

34. This provision will not restate an enactment.

The LRO will not:

- Impose, abolish or vary taxation
- Create a new criminal offence or increase the penalty for an existing offence so that it is punishable above certain limits
- Authorise forcible entry, search or seizure, or compel the giving of evidence
- Amend or repeal any provision of Part 1 of the Legislative and Regulatory Reform Act
- Amend or repeal any provision of the Human Rights Act 1998

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?

Questions

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?
2. Is there any empirical evidence that you are aware of that supports the need for these reforms? Please provide details.
3. Do you think that the proposed measure will make the function of social housing regulation more consistent with the following better regulation principles (as explained in paragraphs 15-19)?
 - Transparency
 - Accountability
 - Proportionality
 - Consistency
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? In particular:
 - i. Are there any non-legislative means that would satisfactorily remedy the difficulty which the proposals intend to address?
 - ii. Are the proposals put proportionate to the policy objective?
 - iii. Do the proposals taken as a whole strike a fair balance between the public interest and any person adversely affected by it?
 - iv. Do the proposals remove any necessary protection?
 - v. Do the proposals prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise? If so, please provide details.

How to make your views known beyond this Consultation

When the Minister lays proposals before Parliament you are welcome to put your views before either or both of the Scrutiny Committees.

In the first instance, this should be in writing. The Committees will normally decide on the basis of written submissions whether to take oral evidence.

Your submission should be as concise as possible, and should focus on one or more of the criteria listed below that a Legislative Reform Order needs to meet, as set out in section 3 of the Legislative Regulatory Reform Act 2006:

- There are no non-legislative alternatives that will achieve the intended outcome of the provision;
- The effect of the provision is proportionate to the policy objective;
- The provision strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- The provision does not remove any necessary protection;
- The provision does not prevent anyone from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise;
- The provision is not constitutionally significant and;
- Where a provision will restate an enactment, it makes the law more accessible or more easily understood.

Contact details for the Scrutiny Committees who scrutinise Legislative Reform Orders can be found at:

[Regulatory Reform Committee](#)

[Delegated Powers and Regulatory Reform Committee](#)

About this consultation

This consultation document and consultation process have been planned to adhere to the Consultation Principles issued by the Cabinet Office.

Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.

Processing personal data

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

The Department for Communities and Local Government will process your personal data in accordance with DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Individual responses will not be acknowledged unless specifically requested.

Non-disclosure of responses

Section 14(3) of the LRA provides what should happen when someone responding to the consultation exercise on a proposed LRO requests that their response should not be disclosed.

The name of the person who has made representations will always be disclosed to Parliament. If you ask for your representation not to be disclosed, the Minister should not disclose the content of that representation without your express consent and, if the representation relates to a third party, their consent too. Alternatively, the Minister may disclose the content of the representation in such a way as to preserve your anonymity and that of any third party involved.

I do not wish for my response to be disclosed

Information about Third Parties

If you give information about a third party which the Minister believes may be damaging to the interests of that third party, the Minister does not have to pass on such information to Parliament if he does not believe it is true or he is unable to obtain the consent of the third party to disclose. This applies whether or not you ask for your representation not to be disclosed.

The Scrutiny Committees may, however, be given access on request to all representations as originally submitted, as a safeguard against improper influence being brought to bear on Ministers in their formulation of legislative reform orders.

Your opinions are valuable to us. Thank you for taking the time to read this document and respond.

Are you satisfied that this consultation has followed the Consultation Principles? If not or you have any other observations about how we can improve the process please contact DCLG Consultation Co-ordinator.

Department for Communities and Local Government
2 Marsham Street
London
SW1P 4DF
or by e-mail to: consultationcoordinator@communities.gsi.gov.uk