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Housing and Regeneration Bill

Bill 8 of 2007-08

One of the Government's main priorities is the provision of "available and affordable housing." A key aim of Part 1 of this Bill is to secure an increased supply of housing within sustainable communities by merging the housing investment and regeneration expertise of the Housing Corporation and English Partnerships in a new Homes and Communities Agency.

Part 2 of the Bill will create a new regulator of social housing, the Office for Tenants and Social Landlords. This body will be tasked with developing a more 'risk-based' regulatory regime for social housing. Initially at least, this regime will not apply to local authority owned housing.

Part 3 includes various measures including changes to the Right to Buy, tenant empowerment provisions, the introduction of sustainability certificates and provisions relating to local authorities' Housing Revenue Accounts.

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Summary of main points

In July 2007 the Housing Green Paper, *Homes for the Future: more affordable, more sustainable,* set a goal of increasing the supply of housing so that three million new homes are provided by 2020. This goal was set in response to the fact that housing supply is failing to keep up with rising demand from an ageing, growing population. Baroness Andrews, Parliamentary Under-Secretary of State at Communities and Local Government (CLG), has said that the *Housing and Regeneration Bill* will "enable us to realise those ambitions to build more and better homes and communities."

Part 1 of the Bill will create a new Homes and Communities Agency (HCA) which will bring together the land acquisition and regeneration expertise of English Partnerships with the skill and experience of the Housing Corporation in investment in public housing. The agency is also expected to take over some of the CLG's key delivery functions in respect of achieving decent homes, housing market renewal, the housing PFI, housing growth and urban regeneration. The agency's role has been described as a "one-stop delivery partner for local authorities, supporting them to plan and shape cohesive communities alongside unified and lasting plans for economic development and infrastructure." Another key role of the HCA will be empowering communities by "funding community empowerment and providing employment and training opportunities, support and information."

There is general support in the housing industry for the creation of the new agency to drive the Government's programme of increased housing supply and to take a more strategic approach to regeneration. Concerns expressed have tended to centre on the detail of the agency's operation and, in particular, how it will interact with existing organisations in this field. There is also a desire that the HCA should not focus on new supply at the expense of improving the standard of existing housing stock.

Some of the debate around Part 1 of the Bill has focused on whether or not the Government will achieve its target of building 3 million new homes by 2020. There is general consensus amongst the political parties on the need for more housing; debate has tended to focus on where this housing should be built and whether sufficient infrastructure is in place to support the additional housing. The HCA will have a role to play in meeting this target and ensuring that infrastructure is provided but commentators also regard the content of the forthcoming *Planning Reform Bill* as key.

Part 2 of the Bill will create the Office for Tenants and Social Landlords. The Cave report, *Every Tenant Matters – a review of social housing regulation* (June 2007) identified certain drawbacks with the existing system of regulation. The Review proposed a new system of social housing regulation based on the following objectives: a) to ensure continued provision of high quality social housing; b) to empower and protect tenants; and c) to expand the availability of choice at all levels in the provision of social housing. Cave concluded that these objectives should be achieved with a minimum of intervention and with the same regulatory approach applied, where possible, to all social housing providers.

The new Office will take over the Housing Corporation's role of regulating social landlords and will introduce a more 'risk-based' approach to regulation. Initially at least,

this new regime will not apply to local authority landlords. The new regulator will be tasked with improving the level of service that social tenants receive and ensuring that they have more choice and influence in matters central to their everyday lives. There is general recognition amongst providers of social and affordable housing of the need to change the foundation and spirit of regulation. Local authority respondents believe there are substantial hurdles to overcome before a single regulatory regime for all social housing providers can be established while profit-making providers of social housing have referred to the "enormous challenge" of developing regulations that will be acceptable to both not-for-profit and for-profit providers.

There is no overall theme to the measures contained in **Part 3** of the Bill.

Regulatory powers created under the Bill will facilitate the mandatory rating of sustainability for new homes in England and Wales.

It will be easier for tenants of local authorities to exercise their Right to Manage, i.e. take over management of local authority stock or request a transfer of management to an alternative landlord; the requirement to hold a ballot prior to a large scale transfer of an authority's stock will become mandatory.

The Bill will make it possible for social landlords to offer tenancies to families who have exhibited serious anti-social behaviour for the purpose of placing them in a Family Intervention Project without giving these families long-term security of tenure.

Some relatively minor changes will be made to the Right to Buy, the most significant of which will give authorities the power to offer loans to leaseholders in flats (bought under the Right to Buy) on terms other than an interest bearing loan.

Amendments will allow some local housing authorities to opt out of the Housing Revenue Account system. Initially at least, this will allow the six HRA pilot authorities to carry out further work to establish the affordability of self-financing schemes both to the councils and to Government.

Amendments to the *Housing Act 1996* will tackle disadvantage that members of the Armed Forces experience in accessing social housing on discharge because of their lack of a "local connection" in the area in which they are based as service personnel. This will fulfil a commitment made by the Minister for Housing and Planning in June 2007.

Finally, the Bill will extend the *Mobile Homes Act 1983* to cover local authority gypsy and traveller sites. This will give residents on these sites the same rights and responsibilities as gypsies and travellers on private sites, and occupants of other types of residential caravan sites such as park home sites. This amendment is being made in response to a judgement of the European Court of Human Rights in the case of *Connors v UK* (2004).

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I Introduction

The Government's draft legislative programme, published in July 2007, announced a forthcoming *Housing and Regeneration Bill.*[1] This was preceded by an independent review of the role of the social housing sector (John Hills, *Ends and Means: The Future Roles of Social Housing in England,* February 2007) and a review of the regulation of this sector (Martin Cave, *Every Tenant Matters – a review of social housing regulation,* June 2007). Consultation documents concerning the creation of a new housing and regeneration agency and proposals to reform the regulation of social housing were also published in June 2007 (*Delivering Housing and Regeneration: Communities England and the future of social housing regulation),* alongside a further consultation paper entitled *Tenant Empowerment.* The Housing Green Paper, *Homes for the Future: more affordable, more sustainable,* was published in July 2007. The current Bill will take forward a number of the proposals contained in the Green Paper and associated consultation documents.

The *Housing and Regeneration Bill* was introduced in the House of Commons on 15 November 2007 as Bill 8 of 2007-08 and was published the following day. The Explanatory Notes to the Bill provide a detailed explanation of the purpose of each of the Bill's clauses.[2]

The Bill extends only to England and Wales save for some consequential matters which may extend to Scotland and Northern Ireland. Parts 1 and 2 of the Bill generally apply only to England. Part 3 of the Bill applies to England and Wales.

II Part 1: The Homes and Communities Agency

Part 1 of the Bill will create a new Homes and Communities Agency (HCA).

In July 2007 the Housing Green Paper, *Homes for the Future: more affordable, more sustainable,*[3] set a goal of increasing the supply of housing so that three million new homes are provided by 2020. This goal was set in response to the fact that housing supply is failing to keep up with rising demand from an ageing, growing population.[4] The housing stock in England is currently growing by 185,000 new homes per year. The Government's target is to increase this to 240,000 per year by 2016 and to continue at this level up to 2020. The 2007 Comprehensive Spending Review (CSR07) underlined the importance being placed on housing supply through the announcement of a new cross governmental Public Service Agreement (PSA) target to "increase long-term housing supply and to build more cohesive, empowered and active communities." CSR07 also committed the Government to deliver 45,000 new social homes per year by

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1 Office of the Leader of the House of Commons, *The Governance of Britain – the Government's draft legislative programme,* July 2007, Cm 7175

2 Bill 8 Explanatory Notes: www.publications.parliament.uk/pa/cm200708/cmbills/008/08008.i-v.html

3 CLG, *Homes for the future: more affordable, more sustainable,* July 2007, (Cm 7191): www.communities.gov.uk/documents/housing/pdf/439986

4 CLG, *Projections of Households in England and the Regions to 2029,* 16 March 2007: www.communities.gov.uk/news/corporate/new-projection-households

2010/11 with investment of £6.5 billion, representing a 50% increase compared with 2007/08.[5]

Thus the key driver behind the creation of the HCA is the need for a "modern and streamlined delivery chain" which makes the best use of private investment, public subsidy, land, assets and skills to deliver more houses and mixed communities.[6]

A. Background

Ruth Kelly, then Secretary of State for Communities and Local Government (CLG), announced the Government's intention to create a new national housing and regeneration agency on 17 January 2007.[7] This decision came out of the department's Housing and Regeneration Review which was launched in April 2006 and which was extended to take in the CLG's own delivery functions in July 2006. The HCA will combine the affordable housing investment functions of the Housing Corporation and the regeneration roles of English Partnerships. It will also take over some key housing and regeneration delivery functions from CLG. The Housing Corporation is the Government's non-departmental public body (NDPB) that funds new affordable housing and regulates housing associations in England. New arrangements for the Corporation's regulatory powers are covered in Part III of this paper. The Commission for New Towns and the Urban Regeneration Agency are two separate NDPBs which have operated in partnership under the trading name of English Partnerships since 1999. English Partnerships is the national regeneration agency helping the Government to support high quality sustainable communities in England.

The Housing and Regeneration Review found "strong evidence" of the added value that could be created by having one agency focusing on the delivery of national housing and regeneration programmes. The CLG consultation paper, *Delivering Housing and Regeneration: Communities England and the future of social housing regulation* (June 2007) lists the following "significant" benefits that are expected to arise from the creation of the HCA:

- The agency acting as a one-stop delivery partner for local government and other partners.
- More effective investment through a "holistic" approach to project appraisal.
- Increased private sector leverage through the adoption of a project based approach to maximising the use and value of public sector assets.
- More effective marshalling of scarce skills.
- Sharing best practice.
- Economies of scale.
- Increased negotiating power.

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5 HM Treasury, *Comprehensive Spending Review 2007*, Annex D.5: www.hm-treasury.gov.uk/media/7/A/pbr_csr07_annexd5_147.pdf

6 CLG, *Delivering Housing and Regeneration: Communities England and the future of social housing regulation,* June 2007, annex B

7 HC Deb 17 January 2007 c35-6WS – at the time of this announcement it was envisaged that the new agency would be called Communities England, hence the title of the subsequent consultation paper of June 2007 (see footnote 3).

- Increased innovation.
- More timely interventions – harmonising the timing and sequence of existing activity by the Housing Corporation, English Partnerships and CLG, e.g. in relation to bidding rounds and the development of corporate plans.
- Increased environmental benefits – HCA will pioneer the low and zero carbon standards in the *Code for Sustainable Homes*.
- A stronger more strategic department – by removing delivery functions for certain programmes from the CLG it is envisaged that the department's focus on strategic policy will be sharpened.[8]

The consultation paper states that the net effect of these improvements "will be more thriving communities, more sustainable regeneration, more and better homes, and healthier outcomes for places".[9]

The core outcomes which the new agency is expected to deliver include:

- An increased supply of housing including affordable housing for rent, shared ownership and other low cost home ownership schemes.
- Regeneration of underperforming urban centres and neighbourhoods.
- Transformation of disadvantaged estates by promoting mixed communities.
- Sustaining strong and stable existing communities.
- Better use of public sector assets (particularly land).
- Improved efficiency, outcomes, leverage, spreading best practice, building capacity in partners and developing skills and knowledge needed to make better places.
- Levering in additional private sector finance from new and existing lenders.
- Driving the adoption of high and rising environmental standards across the whole market.

Delivering Housing and Regeneration states that the agency will develop a 'toolbox' of support for partners which will range from the provision of advice and capacity building, through to the development of partnerships and commercial vehicles, to direct investment and undertake development in its own right. Thus "the agency will be able to adopt the investment model best suited to particular local challenges and partners."[10]

It is envisaged that the new agency will be fully operational by April 2009.

B. The Bill

Part 1 of the Bill (**clauses 1- 60**) creates the HCA and sets out its objects and powers. Schedule 1 to the Bill sets out the constitution of the HCA, including provisions about its status, membership, procedure, delegation, appointment of its chief executive and other employees, pay and pensions, accounts and annual reports.

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8 CLG, *Delivering Housing and Regeneration: Communities England and the future of social housing regulation,* June 2007, pp12-14: www.communities.gov.uk/documents/housing/pdf/322429

9 *ibid*

10 *ibid* paragraph 4.2

The Bill provides for the abolition of the HCA's predecessor organisations, the Urban Regeneration Agency and the Commission for New Towns, which operate under the joint name of English Partnerships. The HCA's powers are modelled largely on those of the Urban Regeneration Agency. It will also take on the Housing Corporation's investment functions.

The objects, principal powers and general powers of the HCA (**clauses 2-4**) are drawn broadly to reflect to the wide range of activities that the HCA will undertake. The Explanatory Notes to the Bill state that the HCA will:

> Work to improve housing supply, including tackling housing shortages, and to improve the quality of housing including the condition of housing. It will also undertake the regeneration and development of any type of land or infrastructure; and will have a more general role supporting the well being of communities, in relation to which it will be able to establish new communities or work to regenerate or develop existing communities. The HCA will also act as the residuary body for the development corporations for new towns established under the New Towns Act 1981 and for urban development corporations (which is currently a function of the Commission for New Towns), as set out in clause 54. [11]

The HCA will be able to do anything it considers appropriate for the purposes of its objects or for purposes incidental to them. Its specific powers are set out in Chapters 2 to 4 of Part 1 of the Bill. As noted above, many of these powers are modelled on the existing powers of the Urban Regeneration Agency, the Commission for New Towns and the Housing Corporation.

The draft legislative programme of July 2007 included amongst the functions of the proposed Bill:

> The Bill will also provide an opportunity to modernise powers on establishing new settlements like eco-towns, and simplify the ways in which the new agency would be able to facilitate delivery of these projects.[12]

There is no mention of eco towns in the Bill and only one passing reference to urban development corporations (UDCs). However, the objects of the HCA in **clause 2** would include:

> (b) to secure the regeneration or development of land or infrastructure in England, and
> (c) to support in other ways the creation, regeneration or development of communities in England or their continued well-being.

That would cover action to support eco towns.

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11 Bill 8 Explanatory Notes: www.publications.parliament.uk/pa/cm200708/cmbills/008/08008.i-v.html

12 Office of the Leader of the House of Commons, *The Governance of Britain – the Government's draft legislative programme,* July 2007, Cm 7175

The rest of this section provides a general overview of the powers that the HCA will acquire under the Bill. The Explanatory Notes to the Bill provide a more detailed explanation of the purpose of each of the Bill's clauses.[13]

a. Land and infrastructure (Chapter 2)

The HCA will have the power to provide or facilitate the provision of housing or other land and will be able to regenerate or develop land and bring it into effective use. In this context 'provide' means: "provide by way of acquisition, construction, conversion, improvement or repair" (**clause 7(3)**). The HCA will also be able to provide or facilitate the provision of infrastructure.

The HCA will be able to acquire, hold, improve, manage, reclaim, repair or dispose of housing or other land or property, or facilitate these activities. It will be able to purchase land by agreement or may, with the consent of the Secretary of State, acquire land and rights using compulsory purchase powers. Restrictions will operate over the disposal of land by the HCA for less than the best market price.

Schedule 3 to the Bill sets out the HCA's main powers in relation to acquired land; Schedule 4 sets out its powers in relation to, and for, statutory undertakers.[14]

The Bill makes provision for the HCA to enter land, subject to certain conditions, for valuation purposes where it wishes to acquire land or determine compensation payments. Obstruction of the HCA in carrying out this function will be a criminal offence.

The HCA would not have the power to establish an urban development corporation (UDC). Only the Secretary of State could do that. However, **clause 13** would allow the Secretary of State to make designation orders and **clause 14** would allow the designation order to make the HCA the local planning authority. A similar power was granted to English Partnerships by the *Leasehold Reform, Housing and Urban Development Act 1993* (sections 170 and 171). However, the new Bill would allow much more of the *Town and Country Planning Act 1990* to be transferred. The 1993 Act listed the sections of the Act with powers that could be transferred. The core functions that can be transferred cover: enforcement; tree preservation orders; advertisements; the ability of the Secretary of State to require the development of land; local inquiries; miscellaneous provisions covering rights of entry and so on. In addition, the order may transfer some of Part VI (rights of owners etc to require purchase of interests and extinguishing rights of way). Some parts of the *Planning (Listed Buildings and Conservation Areas) Act 1990* and the *Planning (Hazardous Substances) Act 1990* were also included.

The new Bill would allow much broader planning powers to be transferred. The explanatory note states:

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13 *ibid*

14 Examples of statutory undertakers are persons authorised to carry on any railway, light railway, road or water transport by any enactment.

> In particular the designation order may provide that the HCA is to be the local planning authority in relation to development control under part 3 of the Town and Country Planning Act 1990, it may be given responsibilities in relation to the preparation and maintenance of Local Development Frameworks under part 2 of the Planning and Compulsory Purchase Act 2004, it may be the local planning authority in relation to applications for listed building and conservation area consent and it may be the hazardous substances authority for the designated area.

Whether that amounts to an important removal of powers from local authorities probably depends upon the extent to which this power will be used. The Secretary of State can already set up a UDC and make it the local planning authority but that is unusual and there are currently only three UDCs in operation.[15] However, the Government might want the HCA to take over planning powers more often than it would establish UDCs. On the other hand, there is no particular reason why an eco town should necessarily require the HCA as planning authority.[16]

b. Financial provision (Chapter 3)

The Bill provides for the HCA to have wide powers to give financial assistance "to any person" in pursuit of its objectives, subject to the consent of the Secretary of State. This assistance may take any form and may include provision for repayment.

The HCA will have the power to borrow; long-term borrowing will only be through the Secretary of State or European Investment Bank. It follows from this that the Secretary of State will be able to lend money to the HCA. A limit of £2,300 million will be placed on the HCA's total borrowing unless the Secretary of State provides for an increase, by order, up to a limit of £3,000 million. These are the current limits that the Housing Corporation is subject to.

The HCA will be able to charge a reasonable amount for the provision of certain services, such as training and information services.

The Secretary of State will, after consultation, be able to direct the HCA to pay surplus funds to the Consolidated Fund.

The HCA may be appointed to act as an agent for the Secretary of State for the purpose of issuing financial assistance in relation to regeneration and development activities[17] and in connection with specified derelict land functions.

c. Other functions (Chapter 4)

The HCA will have the power to trade, and to establish or acquire an interest in a company with the consent of the Secretary of State.

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15 Thurrock Thames Gateway UDC, West Northamptonshire UDC, East London UDC. There is also an Urban Development Area in Milton Keynes

16 See Standard Note SN/SC/4406, *Eco Towns,* November 2007

There will be a power to act in a supportive capacity to provide or facilitate the continued well-being of communities; this will include the prevention of anti-social behaviour and provision of community services.

The HCA will have to ensure that properties it acquires, converts or constructs etc, when made available for rent, are let by a landlord who is "a relevant provider of social housing."[18]

The Bill contains powers to enable the HCA to operate a system similar to that of the Housing Corporation's Recycled Capital Grant Fund (section 27 of the *Housing Act 1996).* This enables the Corporation to require, as a condition of grant, that, for example, when a property grant-funded by the Corporation is disposed of, a sum is repaid to the Corporation or applied by the recipient to a purpose specified by the Corporation, such as the provision of new social housing.

The Secretary of State will be able to make an order requiring the HCA to provide information about its provision of social housing. The intention is that where the HCA funds housing provision, it will be required to tell the regulator of social housing which housing will be low cost rental accommodation. If the recipient of the funding is not a registered provider of social housing this accommodation will have to be transferred to such a provider in order to ensure that management of the property is covered by the regulatory regime.

The HCA will be under a duty to co-operate and consult with the regulator of social housing on matters of general interest. The regulator, in turn, will be under a corresponding duty.

The HCA will have general powers to publish, provide, disseminate or facilitate ideas or information. It will also be able to undertake research and provide education and training services. A reasonable charge may be levied for these services. The Bill provides for the HCA to provide guidance or vary existing guidance about matters relating to its work after appropriate consultation.

With the consent of the Secretary of State, the HCA will be able to appoint a UDC to carry out functions on its behalf, other than its financial functions. The HCA will be able to form partnerships or enter into working arrangements in conjunction with others.

d. Supplementary (Chapter 5)

The Secretary of State will have the power to issue guidance to the HCA, following consultation. The HCA will be required to have regard to this guidance. The Secretary of State will also be able to issue general or specific directions to the HCA on the conduct of its functions; the HCA will be required to comply with these.

This Chapter provides for the abolition of the predecessor bodies to the HCA and the associated transfer of property, rights and/or liabilities.

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17 Under sections 126 to 128 of the *Housing Grants, Construction and Regeneration Act 1996.*

18 A relevant provider will be a registered provider of social housing as defined by clause 79(2) or an English housing authority or county council in England.

C. Comment

Aside from section ***b*** (below), the following sections summarise responses received to the CLG consultation paper, *Delivering Housing and Regeneration: Communities England and the future of social housing regulation* (June 2007). While the Bill provides for the formal creation of the HCA and its powers, the consultation paper provides information on the role envisaged for the agency and how it might interact in practice with local authorities and other agencies.

Some of the debate around Part 1 of the Bill has focused on whether or not the Government will achieve its target of building 3 million new homes by 2020. There is general consensus amongst the political parties on the need for more housing; debate has tended to focus on where this housing should be built and whether sufficient infrastructure is in place to support the additional housing. The HCA will have a role to play in meeting this target and ensuring that infrastructure is provided but commentators also regard the content of the forthcoming *Planning Reform Bill* as key.

a. The creation and role of the HCA

There is general support in the housing industry for the creation of the new agency to drive the Government's programme of increased housing supply and to take a more strategic approach to regeneration. There is acceptance that there is a significant degree of overlap between the Corporation, English Partnerships and CLG. Bringing the various funding streams together should result in better links across these streams, better outcomes for communities, and improved processes for stakeholders who will liaise with one organisation with one set of objectives.

Concerns expressed have tended to centre on the detail of the agency's operation and, in particular, how it will interact with existing organisations in this field. For example, the Chartered Institute of Housing (CIH) is keen to see the agency provide flexible, tailored support to the organisations it works with, as opposed to providing direction and imposing standard solutions to local problems.[19] Several respondents to *Delivering Housing and Regeneration* acknowledge the importance of increasing the supply of new homes but do not want this to "overshadow" the wider regeneration and communities agenda. The National Federation of Arm's Length Management Organisations (NFA) provides some perspective on this point:

> In 2050 70% of the social housing stock will be properties that exist now. Ensuring that this publicly owned asset is maintained to high standards and continues to meet the needs of new and current households in the future is imperative.[20]

A key area for clarification is how the agency will work with local authorities. London Councils, which represents the 33 London councils, and the Local Government

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19 CIH response to *Delivering Housing and Regeneration*, September 2007: www.cih.org/policy/Delivering-Housing-and-Regeneration-Response.pdf

20 NFA response to *Delivering Housing and Regeneration*, September 2007: www.almos.org.uk/documents/87/76/1189789491661.pdf

Association (LGA), clearly see the starting point of new agency as working closely with local authorities and supporting them in the delivery of *their* locally determined priorities.[21] There appears to be no desire amongst local authorities to cede power to the new agency. London Councils has specifically asked for clarification on how the respective roles of the agency and the Mayor will interface.[22]

Respondents suggested that the new agency should be a "partner authority" as defined in section 104 of the *Local Government and Public Involvement in Health Act 2007*. Part 5 of this Act requires local authorities and their defined public sector partners to co-operate in agreeing targets within their Local Area Agreements (LAAs), and to have regard to those targets when carrying out their functions. The Secretary of State may, by order, add to the list of partner authorities defined in section 104 of the 2007 Act. LAAs are agreements between the Government, the local authority and its major 'delivery partners' in a particular area. They are designed to simplify the additional funding streams from central government going into that area and help join up public services more effectively and allow greater flexibility for local solutions to local circumstances.

London Councils sees a positive role for the agency as a "highly placed advocate and sponsor" within Government "to secure cross-departmental sponsorship to unlock the necessary investment in physical and social infrastructure to enable major estate regeneration projects to proceed successfully."[23]

The Royal Institute of Chartered Surveyors' (RICS) response to *Delivering Housing and Regeneration* identifies a need for the new agency to establish a strong partnership with the Regional Development Agencies (RDAs) and sets out the case for having these bodies report to the same Government department.[24]

The logic behind splitting responsibility for policy formulation and delivery is widely accepted but the British Property Federation (BPF), which represents companies that own, manage and invest in property, makes the point that the boundaries between these areas are often blurred and that there will be a need for the agency to feed in policy suggestions:

> Successful delivery of policy depends in large part on the ability of policy makers to get the policy right in the first place. A crucial element in that is the quality of the feedback they receive from those whose implementation of policy at the sharp end inevitably reveals flaws or gaps that need to be remedied. The danger in a stark split between policy and delivery is that those implementing policies and gaining practical, on the ground experience, will become divorced from policy

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21 LGA response to *Delivering Housing and Regeneration, September 2007*: www.lga.gov.uk/Documents/LGA%20%20Submission%20Sep%2007.pdf

22 London Councils and LGA responses to *Delivering Housing and Regeneration*, September 2007: www.londoncouncils.gov.uk/upload/public/attachments/1204/Delivering_Housing_Regeneration_LondonCouncilsResponse.pdf

23 London Councils' response to *Delivering Housing and Regeneration*, September 2007

24 RICS' response to *Delivering Housing and Regeneration*, September 2007

> makers. As a result information about practical flaws in the policies handed down could be slow to filter back and policy might become less 'experience-driven'.[25]

The National Housing Federation (NHF), the trade body representing 1,300 housing associations across England, amongst others, has emphasised the need to resource the agency appropriately.[26]

b. Implications of the merger for regeneration

On 9 November 2007, *Regeneration & Renewal,* the weekly housing and regeneration magazine, carried an interview with Baroness Ford, chair of English Partnerships (EP), who has produced a draft business plan for the new HCA.

> [S]he is keen to counter common fears about the HCA: that it will only be involved in housebuilding in areas that already have reasonably high land values, for example, or that it will make property investments rather than give grants in the most deprived areas. The HCA will continue to give grants for the construction of social housing, she says, and to gap fund regeneration schemes where the land values mean private investment doesn't stack up…There is, however, likely to be radical change in the agency's relationship with the private sector. Where the HCA can make investments and recoup costs, she says, it will do so – for example in big estate redevelopment schemes. And the ways in which developers work with EP is likely to change: rather than making separate bids to develop each site that EP owns – a process that, Ford says, has been incredibly wasteful – the new agency may package up portfolios of sites and seek to develop long-term relationships with developers…[27]

Regeneration & Renewal welcomed the proposed merger, noting a genuine opportunity to simplify and focus Government regeneration and housing activity by creating a single body. Distancing controversial programmes such as housing market renewal might even make them less vulnerable to political interference. However, it wondered whether the potential benefits outweighed the uncertainties and cost in the period before the new agency started to operate in 2009.[28]

Lord Sandy Bruce-Lockhart, chair of the LGA, stressed the key role of councils in regeneration:

> Only councils are able to make the necessary links between housing needs, employment opportunities, transport provision, education, health and community facilities to make sure the right kind of homes are provided in locations where people want to live, work and raise their families.[29]

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25 BPF response to *Delivering Housing and Regeneration*, September 2007: www.bpf.org.uk/topics/document/23209/bpf-response-to-delivering-housing-and-regeneration-communities-england-and-the-future-of-social-housing-regulation

26 NHF response to *Delivering Housing and Regeneration*, September 2007 www.housing.org.uk/Uploads/File/Responses/070907%20NHF%20response%20to%20Communities%20England%20and%20the%20future%20of%20social%20housing%20regulation.pdf

27 "The matchmaker", *Regeneration & Renewal*, 9 November 2007

28 "Time will tell if merger gains outweigh costs", *Regeneration & Renewal*, 19 January 2007

29 LGA Press Release, *New housing and regeneration agency must let local people decide on local priorities – LGA*, 17 January 2007

The British Urban Regeneration Association (BURA) welcomed the proposed merger. Regeneration should benefit through the creation of a long-term policy culture, because regeneration and funding programmes have changed too often. It was important to maintain the momentum of regeneration policies and both organisations had to be transformed. Control over funding streams was crucial to delivering regeneration projects. Without access to funding, the new agency would be unable to push forward its agenda. It was essential that HCA and the regeneration sector did not become transfixed by housing delivery. BURA welcomed the focus upon sustainable communities and schemes such as the regeneration of the coalfields and the National Brownfield Strategy.[30]

In June 2007, *Regeneration & Renewal* reported that Lord Heseltine would restore to local government powers that had been taken by quangos.

> Heseltine describes the development corporations as a response to the different political climate of the 1980s, when "we were dealing with a hardline left-wing Labour movement that was in charge in many areas." He argues that, later in his time as a minister, he returned powers to councils through the City Challenge programme…Now he dismisses many of the traditional arguments for national or regional regeneration agencies. English Partnerships has in the past argued that its existence allows profits made from successful regeneration in yesterday's problem areas to be directed towards the next generation of priority places. Heseltine is not impressed. "What is the argument for allowing unelected quangos to do the prioritisation that is the job of democratically elected government?" he asks.[31]

c. Transfer of responsibilities from the CLG

Delivering Housing and Regeneration asked for views on proposals to transfer the following delivery functions from CLG to the new agency:

Mixed communities and achieving the decent homes standard in the social housing sector: It is envisaged that the HCA will take over the mixed communities policy which is aimed at tackling disadvantage and reducing deprivation by adopting long term, transformational and targeted interventions from all sectors to address weak economies, poor housing and public services.

The Government adopted a Public Service Agreement target in 2000 (PSA 7) to bring all social housing up to a decent standard by 2010. All local authorities have now determined the route by which they will deliver decent homes. The options now being pursued include delivery within their existing resources or, where additional resources are required, via one or a combination of:

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30 BURA Press Release, *BURA Response to Announcement of the New Agency Communities England*, 17 January 2007

31 "Heseltine: this report is no change of heart", *Regeneration & Renewal*, 22 June 2007

1. An Arm's Length Management Organisation (ALMO) – a company with resident representation at board level which is set up by local authorities to manage their stock and carry out improvement work. The stock remains council owned.
2. A large Scale Voluntary Transfer (LSVT) – the transfer of council owned stock to a Registered Social Landlord (RSL) to secure investment to improve social housing and contribute to wider regeneration work.
3. A Housing Private Finance Initiative scheme (PFI) – housing PFI contracts offer council and RSL residents the certainty of knowing their homes will be maintained and services provided for the period of the contract which is generally 30 years.

The consultation paper suggests that HCA will inherit existing decent homes delivery commitments but local authorities will be able to engage with the agency in relation to variations to their original plans. HCA will complete any remaining assessments of proposals to meet the standard; manage any new bidding rounds; advise ministers which of these proposals should be supported; manage the subsequent programmes; and support mixed community programmes where authorities seek to undertake estate transformation work.

PFI for the supply of new housing: this will create synergies with the provision of new housing using social housing grant.

Housing Market Renewal (HMR): this programme aims to restore sustainable communities to those parts of the North and Midlands where demand for housing has been relatively weak and where there has been a significant population decline. These areas are characterised by dereliction, poor services and poor living conditions. Nine HMR pathfinders are currently in operation.

It is envisaged that HCA will take over management of the HMR programme. It will have a remit to advise and challenge sub-regional strategies, assess funding proposals and advise the Secretary of State on resource allocation and delivery arrangements. Actual delivery will remain with the pathfinders/local authorities.

Housing Growth: HCA will take over responsibility for programme delivery in three of the four Growth Areas: Milton Keynes & South Midlands, London-Stansted-Cambridge-Peterborough, and Ashford, as well as the New Growth Points Initiative announced in 2006. Together with London these areas have been identified as having potential to deliver 300,000 new homes above previously planned levels. Responsibility for the fourth Growth Area, Thames Gateway, will remain with the CLG as there is a desire not to disrupt the recently established delivery mechanisms in this area; this decision may be reviewed over time.

Capital investment on homelessness, hostels and specialist supported housing: HCA will take over administration of the Government's Hostels Capital Improvement programme, the Extra Homes Pilot and other homelessness and related capital improvement programmes.

National Land-Use Database of Previously Developed Land (NLUD-PDL): This database provides estimates of the extent and location of brownfield land in England, the data is provided by local authorities. Currently CLG and English Partnerships co-operate to produce the NLUD-PDL. The database provides information on the stock and flow of

brownfield land and its suitability for housing and as such can help to identify potential development sites. The work currently carried out by CLG will transfer to Homes and Communities.

Academy for Sustainable Communities (ASC): The ASC was established in 2005 to help influence the delivery of the skills and knowledge needed to make better, more sustainable places. The ASC was a response to the key recommendation of the Egan Review of Skills for Sustainable Communities, which highlighted the need for a national centre to address issues, both of capacity and generic skills, in the professions and bodies involved in delivering more sustainable places. The objective of the ASC is to build capacity and capability around the country in these core sectors by a number of different means. These include providing access to practical information and examples of best practice, developing training, and other programmes of skills and knowledge development.

It is not envisaged that HCA will have a policy role; it will support the department and feed in advice on policy development where appropriate, CLG will continue to allocate resources to the agency. After the transfer the consultation paper states that CLG will mainly focus on strategy and policy development work. The delivery roles retained by the CLG are expected to include:

- Provision of core funds to manage, maintain and improve existing council housing.
- Delivery of the decent homes standard in the private sector.
- Monitoring progress in delivering decent homes, through Government Offices.
- Scrutinising the business case for new Urban Regeneration Companies (URCs).

The Government Offices, which have a key role in delivering the Government's commitment to sustainable communities, are expected to retain their core role but some of their housing related activities, which cover the delivery of some of CLG's functions described above, will move to the HCA.

There is widespread support for the transfer of CLG roles listed in *Delivering Housing and Regeneration* (and described above) to the new agency, with the proviso that the transfer does not compromise the effectiveness of any of the programmes. In fact the National Audit Office (NAO) recently published a report that is critical of the HMR programme's progress[32] while the Public Accounts Committee has criticised progress in the Thames Gateway.[33] The CIH has said that having three major national agencies playing separate roles in implementing these programmes "creates burdensome requirements for harmonisation and co-ordination of approaches and priorities across the agencies."[34] This view is echoed in a number of responses.

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32 HC 20 Session 2007-08, *Housing Market Renewal*, 9 November 2007: www.nao.org.uk/publications/nao_reports/07-08/070820.pdf

33 HC 693 Session 2006-07, The Thames Gateway: Laying the Foundations, 10 October 2007: www.publications.parliament.uk/pa/cm200607/cmselect/cmpubacc/693/693.pdf

34 CIH response to *Delivering Housing and Regeneration*, September 2007

Various respondents suggested additional roles that could be transferred to the HCA. The CIH argues that the rationale for separating the public and private decent home programmes "is not clear" and sees a role for the integration of approaches to public and private sector decent homes within the new agency to ensure the best use of resources and to support 'place-shaping.' The apparent lack of a role for the agency in relation to private sector renewal is mentioned by several respondents; the NFA has strong views on this issue:

> It seems highly illogical to have housing market renewal and decent homes in the social sector under one agency but private sector renewal and decent homes for vulnerable households in the private sector under another. While these functions are part of the local authority strategic housing role so are homelessness and supporting people yet capital projects in these areas are also proposed to be included within the new agency.
>
> Private sector renewal, especially elderly households with limited income in the home ownership sector, is a time bomb for the future. Compared to the decent homes programme in the social sector progress has been relatively limited so far but it is an area that will need significant investment at some point. Arm's Length Management Organisations, due to their experience in managing major decent homes programme, are well placed to carry out works in this sector on behalf of local authorities.[35]

The LGA would, however, prefer to see responsibility for the delivery of private sector decent homes and the monitoring of this programme remain with CLG and would like all programmes and functions assessed to see whether they might be better undertaken in the sphere of local government before being transferred to the new agency. [36]

RICS argues that the Neighbourhood Renewal Unit should also transfer to the HCA:

> This part of the department is extremely important to the overall urban regeneration delivery particularly through the New Deal for Communities and other Neighbourhood related budget heads. In particular, housing associations have the potential to play the most significant regeneration delivery role in neighbourhoods and therefore Communities England is the obvious place to bring these skills and budgets together. [37]

Questions have been raised about the implications of splitting up responsibility for capital and revenue funding between CLG and the HCA:

> The NFA has real concerns that, with subsidy and the major repairs allowance retained in the CLG, the use of revenue steams to complement capital funding could become even more difficult and complex than it is now. Mechanisms for close liaison and co-ordination will be essential to ensure both organisations pursue policies and integrate timetables to allow maximum flexibility for innovative housing and regeneration projects.[38]

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35 NFA response to *Delivering Housing and Regeneration*, September 2007
36 LGA response to *Delivering Housing and Regeneration, September 2007*
37 RICS's response to *Delivering Housing and Regeneration*, September 2007
38 NFA response to *Delivering Housing and Regeneration*, September 2007

Both London Councils and the NFA used the *Delivering Housing and Regeneration* consultation process to call for reform of the current Housing Revenue Account subsidy system (see section **IV.C** of this paper).

d. Planning functions and institutional arrangements

There is some disagreement as to which body should be the local planning authority in an area where major regeneration or growth is taking place. Local authorities are normally local planning authorities but the planning powers have occasionally been taken over by another body, such as an urban development corporation. The housing policy consultation paper stated that it was considering whether to amend or rationalise existing planning powers.

London Councils stressed the need for the HCA to work closely with local authorities and consider local authority input before making any decisions around investment, release of land or use of compulsory purchase orders (CPOs). They argued that planning functions should be retained at the local authority level wherever possible:

> UDCs [urban development corporations] should only be set up in very specific circumstances, as they do add another layer and tend to lead to role duplication. In London, our view is that the best model is local authorities acting in concert at sub-regional level to make the best use of their land assembly powers to deliver a shared vision. A good practice model in this respect is the North London Strategic Alliance and the delivery vehicle that is likely to emerge through this. An added advantage of this model is its efficiency (it does not require a new bureaucracy to be set up). The New Homes Agency can support this by:
>
> • Targeting national resources to support the areas with strategic local needs;
> • Assisting with timely land assembly;
> • Assisting arrangements which encourage and enable pooling of skills between LAs, particularly in relation to major infrastructure projects; and,
> • Assisting with regeneration schemes where there are conservation issues.[39]

The LGA replied to the consultation:

> Q8: Local planning should sit with local authorities. However, Urban Development Corporations, Urban Regeneration Agencies and New Towns Development Corporations could be replaced with a new Designated Areas Planning Body (DAPB) within Communities England that would cover designated Growth Areas/New Towns/Major developments (New Airports/Ports) only.[40]

New Towns provide a possible example of problems caused by the removal of planning powers from the local planning authority. The Transport, Local Government and the Regions Select Committee report in 2002 on new towns made several criticisms of the way that they had been handled. One criticism related to planning:

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[39] London Councils, *"Delivering Housing and Regeneration: Communities England and the future of social housing regulation" Response by London Councils*, 13 September 2007

[40] LGA, *Delivering Housing and Regeneration: Communities England and the Future of Social Housing Regulation*, September 2007

> Councils said that because the Commission for New Towns (CNT) and subsequently EP had planning powers, they had lost the opportunity to negotiate planning obligations including affordable housing. They did not receive the application fees but were required to enforce the planning approvals.[41]

e. Compulsory Purchase Orders

London Councils had concerns about the compulsory purchase (CPO) proposals:

> The proposal to lift the restrictions on English Partnerships' CPOs of brownfield land, in line with the Housing Corporation's existing powers, appears to give the new organisation a great deal of power to secure land. London Councils wants, as a safeguard, to see a clear and transparent process for the New Homes Agency CPOs, including consultation and working alongside local authorities at the earliest stage in the process. We would not welcome the New Homes Agency being able to exercise these powers without due consultation with local authorities and communities.[42]

The LGA, however, was more positive about the proposal:

> Extended CPO powers for the new homes agency (that is, the removal of its current restriction to brownfield land) seem sensible given its wide ranging remit.[43]

f. Sub-national Review of Economic Development and Regeneration

In July 2007, the Treasury published the sub-national economic development and regeneration review, which provides some context to the proposed merger.[44]

The review notes that the HCA "is expected to play a key role in supporting local government to deliver housing and regeneration."[45] It stresses the role that housing could have in delivering regeneration in under-performing areas with a potential for growth, partly through attracting private investment.[46] The review emphasises the importance of the relationship between the HCA and the regional development agencies.[47]

However, this review has little immediate impact upon the current Bill and any changes will come in later legislation. Only **clause 18** is directly related to it. This clause would require that the regional planning body must ask advice from the HCA, where the HCA is the local planning authority for a designated area.

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41 Transport, Local Government and the Regions Committee, *The New Towns; their problems and future*, July 2002, HC 603, 2001-2

42 London Councils , *Delivering Housing and Regeneration: Communities England and the future of social housing regulation" Response by London Councils*, 13 September 2007

43 LGA, *Delivering Housing and Regeneration: Communities England and the Future of Social Housing Regulation*, September 2007

44 HM Treasury DBERR and CLG, *Review of sub-national economic development and regeneration*, 16 July 2007

45 *ibid* para 2.41

46 *ibid* para 4.25

47 *ibid* para 4.33

g. Empowering communities

Baroness Andrews, Parliamentary Under-Secretary of State at Communities and Local Government, speaking in the Lords Debate on the Queen's Speech, described empowering communities as the second and "more expansive role" of the HCA after building more and better homes:

> It will fund community empowerment and provide employment and training opportunities, support and information. In so doing it will help to address the problems caused by high rates of worklessness, poor mobility and high levels of tenant dissatisfaction.[48]

Issues around worklessness and the lack of mobility experienced by tenants in social housing were highlighted by Professor Hills in *Ends and Means: The Future Roles of Social Housing in England.*[49]

Delivering Housing and Regeneration contains little information on how the new agency will approach this role. The NFA's response called for a "greater onus on the agency to work with residents" and pointed out that its only duty in relation to resident involvement appears to lie with the proposed new regulator of social housing providers.

h. Accountability

Respondents to *Delivering Housing and Regeneration* were broadly supportive of the proposed arrangements for securing the accountability of the HCA. London Councils and the LGA believe that there should be local government representation on the Board of the agency "to ensure both political and officer experience of working with and delivering in neighbourhoods and communities is brought to bear."[50] The NHF argues that making customer focused delivery a reality will require an input from tenants and residents to the policy and regulatory environment that their landlords operate in. Thus the NHF proposes that the HCA should have a formally constituted customer reference panel "with a responsibility to audit the work of the new agency from a customer perspective."[51]

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48 HL Deb 13 November 2007 c365

49 Professor John Hills was commissioned by the CLG to carry out research into the role of social housing in the 21st Century – his report, *Ends and Means: The Future Roles of Social Housing in England,* was published in February 2007

50 LGA response to *Delivering Housing and Regeneration*, September 2007

51 NHF response to *Delivering Housing and Regeneration*, September 2007

III Part 2: Regulating social housing

The Hills review of social housing concluded that this sector provides security and stability for around four million households in England who would otherwise experience difficulty in securing decent affordable housing in the private sector.[52] There is no statutory definition of social housing but it is generally taken to refer to housing let at sub-market rents and owned by local authorities or registered social landlords. The term can also cover housing sold under low-cost home ownership schemes.[53]

Regulation of social housing providers is viewed as necessary because tenants of sub-market rented housing have limited choice over the provider of their housing, with the effect that social landlords have little incentive to provide good management. The process of regulation involves setting the standards required of these landlords and monitoring their performance. There is also a need, as the provision of social housing requires public investment, to protect the legacy of this investment. Finally, it is accepted that housing plays a key role in determining individuals' quality of life; thus there is a public interest in ensuring high standards in the provision of social housing.

A. The current regulatory system

In addition to its investment functions the Housing Corporation (established in 1974) is the statutory regulator of housing associations in England. Once registered with the Corporation associations become registered social landlords (RSLs) and are subject to the Corporation's regulatory guidance and statutory powers. The regulatory process is concerned to ensure that RSLs remain viable organisations with suitable governance arrangements. Inspection of RSLs was transferred to the Audit Commission in 2003. Following the Elton Review in 2006[54] the Corporation implemented reforms to deliver a more risk-based regulation system in order to minimise the regulatory burden on good performers.

Local authority landlords who have retained management responsibility for their own stock are subject to the local authority performance management system under Best Value legislation; this includes a duty to deliver best value. Monitoring takes place by undertaking reviews, reporting on Best Value Performance Indicators and inspection/assessment by the Audit Commission. Plans to develop a new performance framework for local authorities were set out in the 2006 Local Government White Paper, *Strong and Prosperous Communities;*[55] this framework is currently under development.

Arm's Length Management Organisations (ALMOs), who manage local authority stock on the landlord's behalf, are subject to regular inspection by the Audit Commission.

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52 *Ends and Means: The Future Roles of Social Housing in England,* February 2007

53 See page 28

54 CLG, *The Elton Review of Regulatory and Compliance Requirements for Registered Social Landlords,* April 2006

55 CLG, October 2006

B. The Cave Review and Government response

In December 2006 the Government invited Professor Martin Cave, Director of the Centre for Management under Regulation at Warwick University, to lead an independent review of social housing regulation. His remit included consideration of options for the reform of the current system. He was asked to carry out the review in the light of the decision to create a new national housing and regeneration agency and the Hills review of social housing.[56]

The Cave report, *Every Tenant Matters – a review of social housing regulation,*[57] was published in June 2007. Certain drawbacks with the existing system of regulation were identified, including:

- inadequate concern for tenant interests;
- over-regulation of some social housing providers;
- poor efficiency incentives;
- unacknowledged implementation of policy through regulation; and
- a failure to fully use available capacity to expand the provision of new social housing.

The Review proposed a new system of social housing regulation based on the following objectives:

- to ensure continued provision of high quality social housing;
- to empower and protect tenants; and
- to expand the availability of choice at all levels in the provision of social housing.

These objectives, the Review concluded, should be achieved with a minimum of intervention and with the same regulatory approach applied, where possible, to all social housing providers. It follows from this that Cave recommended the creation of a single regulator with a single system of regulation for all social housing providers. Such a system would allow comparisons of services and standards of provision across the social housing domain.

The Review argued for a statutorily independent regulator with objectives enshrined in legislation. The regulator would have power to collect information from social housing providers and take enforcement action where necessary. Cave recommended that the regulator's powers of intervention should be wider than those currently held by the Housing Corporation; specifically, he advocated new intermediate powers such as enforcement notices and administrative penalties. The sort of data to be supplied for monitoring purposes by providers would include:

- level of tenant satisfaction, tenant involvement and choice;
- the standard of housing and service provided;

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56 Professor John Hills, *Ends and Means: The Future Roles of Social Housing in England,* February 2007

57 Martin Cave, *Every Tenant Matters – a review of social housing regulation*, *June 2007:* www.communities.gov.uk/documents/housing/pdf/320365

- financial projections (for housing associations only);
- average operating costs;
- rents.

Cave envisaged that tenants' power would be enhanced by giving tenant organisations access to information supplied to the regulator by their provider. He recommended that tenants should have the ability to trigger investigations and, where appropriate, enforcement action by the regulator.

The regulator's overall strategy for rent setting and the standards applied to the 'core housing function'[58] would be set by the Government using statutory powers.

On the identity of the new regulator, Cave rejected the option of making local authorities the key or joint regulator of social housing providers in their areas. It was felt that this would cause confusion and regulatory uncertainty. Three alternatives were considered:

- Making the new national housing and regeneration agency the regulator;
- Making the Audit Commission the regulator; or
- Creating a separate social housing regulator.

The first option was rejected on the ground that combining the investment and regulatory function could result in a conflict of interests. It was accepted that the Audit Commission option was viable but Cave preferred the establishment of a new and separate regulator:

> On balance, the review…favours the creation by statute of an independent social housing regulator, consisting of a small number of executive and non-executive board members, with a non-executive chair and majority, to which regulation should be entrusted. Such a newly-created body would be able to make a fresh start at implementing a new approach. It would also be wholly focused on social housing regulation. [59]

Cave also recommended that all providers of social housing should have a new statutory duty to engage constructively with local authorities in respect of their strategic and place-shaping function. Providers failing to engage could become subject to regulatory enforcement action.

On publication of the Cave Review in June 2007 the Government announced its support for the development and implementation of a new regulatory regime for social housing. The second part of the consultation paper *Delivering Housing and Regeneration: Communities England and the future of social housing regulation* (June 2007), which announced the intention to create a new Homes and Communities Agency, also set out how the Government intended to take Cave's recommendations forward. The consultation paper sets out the objectives behind the establishment of the new regulatory regime:

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[58] This includes management and maintenance of the housing stock.

[59] *Every Tenant Matters,* June 2007, p23

> To improve the regulation of social housing (social rented and low cost home ownership) in England, focusing on empowering and protecting tenants, ensuring continued provision of high quality social housing, and expanding the availability of choice between suppliers. The intention is to reduce the level of unnecessary regulation and bureaucracy.[60]

In the consultation paper the Government announced that a new independent social housing regulator would be established by statute with much of the scope and many of the powers envisaged by the Cave Review. However, while accepting the case for applying common standards and principles across the whole social housing domain, the Government decided, at least initially,[61] to apply the new regulatory regime only to RSLs and for-profit providers:

> The Government is clear that tenants should be able to expect the same minimum standards of service and have similar opportunities for empowerment, to influence delivery and to seek redress regardless of their social housing provider. However, it recognises that the funding, governance and accountability arrangements vary significantly between providers. The Government is also mindful of its commitments in the Local Government White Paper to implement a new, single performance framework for outcomes secured by local authorities working alone or in partnership. Therefore, the Government immediately accepts the case for the new regulatory regime to apply to RSLs and for-profit providers.[62]

The need to separate investment and regulatory functions was accepted by the Government but in *Delivering Housing and Regeneration* it did not settle on a preferred regulator. The relative merits of having the Audit Commission take on the role and establishing a new standalone regulator were set out and the views of stakeholders sought. Three possible scenarios were considered:

- Locating the regulatory functions in the Audit Commission would build on its existing strengths and consumer focus. It could be implemented quickly, and it should be possible to develop governance arrangements which enabled it to be focussed and independent while still being located within the Commission. It would also help minimise the number of inspectors or regulators, as is Government policy following the Hampton Review.

- Establishing a stand alone housing regulator would avoid having housing regulation led from an organisation primarily focused on the public sector. As such, it may be better at commanding the confidence of those who provide private finance.

- Building on the Housing Corporation's regulatory functions would be a quick way of establishing a stand alone regulator and would enable the smooth transition from the existing regulatory functions, which would

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60 CLG, *Delivering Housing and Regeneration: Communities England and the future of social housing regulation,* June 2007, p55

61 see p36

62 *Ibid,* paras 7.28-9

> need to continue to be in place until the new system was up and running.[63]

On 15 October the Minister for Housing and Planning, Yvette Cooper, announced that, following consultation, an Office for Tenants and Social Landlords would be established as a new standalone body which would take on the regulatory functions of the Housing Corporation:

> Unlike under the current regulatory framework, the new regulator will have the power to reduce red tape and regulation for Registered Social Landlords that are performing well, and will also have stronger and more wide ranging powers to take action where tenants are not getting a good service. The new regulator will therefore put a much greater emphasis on service to tenants, with tenants groups able to trigger inspections and interventions when problems arise.[64]

C. The Bill

Part 2 of the Bill will create the Office of Tenants and Social Landlords ('Oftenant') as a standalone regulator of "registered providers" of social housing. Oftenant will take on the regulatory functions of the Housing Corporation; the Bill provides for the abolition of the Housing Corporation by order (**clause 66)**.

The sections below provide a very general overview of the Bill's provisions relating to the creation and powers of Oftenant. The Explanatory Notes to the Bill provide a detailed explanation of the purpose of each of the Bill's clauses.

a. Introduction (Chapter 1)

This Chapter provides for the replacement of the current system of regulation set out in Part 1 of the *Housing Act 1996.* Part 1 of the 1996 Act will continue to apply to Welsh RSLs.

The new regulator will regulate social housing in England provided by registered providers (this will include current RSLs and other bodies that choose to register). Registered providers will not be regulated in respect of any of their other activities, such as developing housing for sale on the open market. Social housing is defined in the Bill by **clause 67** as:

- Low cost rental accommodation – this is rented accommodation let at below market rents and made available in accordance with rules for eligibility designed to ensure that it is occupied by people who cannot afford to buy or rent at market rates (**clause 68**); and
- Low cost home ownership accommodation – this is accommodation occupied or made available in accordance with: a) shared ownership arrangements; b) equity percentage arrangements; or c) shared ownership trusts. The definition also

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63 *Ibid,* para 7.30
64 HC Deb 15 October 2007 47-8WS

requires that the accommodation is made available in line with the eligibility requirements described above (**clause 69**).

Properties owned by an RSL immediately before clause 67 comes into force are also defined as social housing in order to ensure continued regulation, even if they do not satisfy the definitions in clauses 68 or 69.

The Secretary of State will have regulatory making powers to amend the definition of social housing and exclude or include specified types of accommodation. This will ensure that all homes funded through public investment can be designated as social housing and made subject to the regulatory regime. The Bill provides for dwellings to cease being social housing in certain circumstances, e.g. sale to the tenant or on expiry of the lease (**clauses 72-75)**.

Registered providers are defined in **clause 79** as persons listed on the register under Chapter 3 of the Bill or referred to in other primary or secondary legislation as "registered providers of social housing."

b. The Social Housing Regulator (Chapter 2)

Clauses 80-85 provide for the establishment of the regulator and set out its constitutional basis. The objectives of the regulator are set out in **clause 86** as:

- Encouraging and supporting a supply of well-managed social housing of appropriate quality and sufficient to meet reasonable needs;
- Providing an appropriate degree of choice and protection for current and potential future tenants of social housing in relation to their homes;
- Ensuring tenants have the opportunity to be involved in the management of their social housing;
- Ensuring that registered providers are financially viable and properly managed;
- Encouraging registered providers to contribute to the environmental, social and economic well being of the areas in which their property is situated;
- Encouraging investment in social housing – i.e. investment in new housing and continuing investment in existing social housing;
- To avoid creating an unreasonable burden on public funds;
- To guard against the misuse of public funds;
- To regulate in such a way as to minimise administrative burdens.

The regulator will have the power to do anything it thinks necessary or expedient for the purpose of, or in connection with, the performance of its functions (**clause 92**). It will be able to give financial assistance to another person for the purpose of advancing its fundamental objectives and it will be able to fund research, guidance, best practice and tenant involvement. The regulator will be able to consider evidence from any source when deciding whether to exercise one of its powers (**clause 95**).

The regulator will be able to charge for giving advice, conducting research or providing other services (**clause 97**).

The regulator will be under duty to co-operate with the HCA and consult the HCA on matters likely to interest it (**clause 102**). The regulator will be able to direct the HCA not to give financial assistance to a specified registered provider (**clause 103**). The purpose

of this provision is to prevent a registered provider from receiving public funding where there are serious concerns about mismanagement or viability.

The Bill provides for the regulator to have power to require documents or information "from any person" about the affairs or activities of registered providers or a person who has applied to become a registered provider (**clause 104**). Routine data will be required by the regulator in order for it to ascertain when intervention is necessary. For-profit registered providers will only be required to provide information in relation to their affairs and activities concerning the provision of social housing (**clause 104(2)**). It will be an offence to fail to comply with a request for information without reasonable excuse (**clause 104(5)**) or alter/suppress/destroy documents to which a request for information from the regulator relates (**clause 104(5)** and **(6)**).

Clause 106 provides for the way in which information may be disclosed to, and by, the regulator.

c. Registration (Chapter 3)

This Chapter of the Bill provides for the regulator to keep a public register of providers of social housing. Only registered bodies will be subject to regulation.

Clause 109 sets out which bodies are eligible for registration. It will not be compulsory for providers of social housing to register. Bodies seeking registration must satisfy relevant criteria set by the regulator in respect of their financial viability, constitution and management arrangements. The regulator must consult the HCA, representative bodies of registered providers and representative bodies of tenants in developing eligibility criteria.

The Bill excludes local housing authorities, county councils and bodies controlled by such an authority (e.g. an ALMO) from being eligible for registration. However, the Secretary of State will have power to make regulations prescribing bodies that may or may not be registered providers who are eligible for registration (**clause 110**).

The register will identify whether a provider is a non-profit or profit-making organisation. The provision in the 1996 Act (section 2(2)) that an RSL must be a non-profit making organisation is not replicated. **Clause 111** defines non-profit and profit making organisations.

Clauses 112-117 provide for the procedures associated with registration including entry, the regulator's power to charge fees for registration (and annual fees),[65] de-registration, and appeals against a refusal to register, a decision to deregister and a refusal to deregister on request.

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[65] Fees may vary according to the number of properties owned.

d. Registered Providers (Chapter 4)

This Chapter (**clauses 118-159**) make general provisions in relation to registered providers.

All registered providers will be required to be members of an approved ombudsman scheme (**clause 120**). The existing ombudsman schemes established under section 51 and Schedule 2 to the *Housing Act 1996* will continue to have effect.

Registered providers will be required to co-operate with local authorities if invited to participate in the preparation or modification of a sustainable community strategy under section 4 of the *Local Government Act 2000* (**clause 122**).

Clauses 123-134 broadly replicate the powers of the Housing Corporation in Part III of Schedule 1 to the *Housing Act 1996* (as amended). These powers relate to the accounting requirements for non-profit providers of social housing and are conferred on the regulator.

Clauses 135-149 replace the provisions in sections 39-45 of the 1996 Act; these clauses provide for situations where non-profit providers face insolvency.

Clauses 150-156 re-enact the Housing Corporation powers in paragraphs 12-14 of Schedule 1 to the 1996 Act as powers of the regulator. These powers relate to restructuring and dissolution of non-profit registered providers of social housing.

e. Disposal of Property (Chapter 5)

Chapter 5 of the Bill makes provision about the disposal of property by registered providers. Registered providers will be able to dispose of land subject to certain conditions being met.

Non-profit providers will be required to seek the consent of the regulator to dispose of land unless it falls within an exception listed in **clause 163**. Profit-making providers will also be required to seek consent for the disposal of social housing. Exceptions include disposal by way of the creation of an assured or secure tenancy or under the Right to Buy. The procedure for obtaining consent is set out in **clause 164**. There are provisions setting out how proceeds from disposals must be accounted for (**clause 165**).

f. Regulatory Powers (Chapter 6)

This important Chapter sets out the regulator's powers to set the standards that registered providers will be expected to adhere to. **Clause 173** provides that the regulator will have power to set standards in respect of the social housing owned by these providers. These standards may relate to "the nature and extent of the social housing provided and to the nature, extent and quality of accommodation, facilities and services provided by them in connection with social housing." In addition, **subsection 2 of clause 173** provides that the standards set may incorporate rules relating to the following matters:

a) the nature of the housing demands to be addressed,
b) the extent to which demand is to be supplied,
c) criteria for allocating accommodation,
d) terms of tenancies,
e) levels of rent (and the rules may, in particular, include provision for minimum or maximum levels of rent or of increase or decrease of rent),
f) maintenance and repair,
g) procedures for addressing complaints by tenants against landlords,
h) methods for consulting and informing tenants,
i) methods of enabling tenants to influence or control the management of their accommodation and environment,
j) anti-social behaviour,
k) landlords' contribution to the environmental, social and economic well-being of the areas in which their property is situated, and
l) estate management.

The regulator will also have the power to set standards relating to the financial viability and management of the organisation and to its governance arrangements (**clause 174**). Before setting these standards the regulator will be required to consult representative bodies of registered providers, tenants, the HCA and Secretary of State (**clause 176**). The Secretary of State will have the power to direct the regulator in the setting of standards subject to consultation. This is a narrower provision than that in section 76 of the *Housing Association Act 1985* under which the Secretary of State "may give directions to the Housing Corporation as to the exercise of its functions." Under the new system the direction making power will be limited to the setting of standards.

Clause 175 gives the regulator power to produce a code of guidance relating to the standards required. Failure to meet the standards required will be grounds for exercising the powers of the regulator to intervene and enforce (**clause 178**).

Clause 179 gives the regulator the power to have a property surveyed where a registered provider is suspected of failing to maintain it. **Clause 181** provides for the regulator's powers of inspection in relation to registered providers. Providers will be required to produce annual reports containing an assessment of performance in relation to the attainment of standards set by the regulator (**clause 182**). The regulator will be able to hold an inquiry in cases of suspected mismanagement by a registered provider in relation to its social housing functions (**clauses 183-186**).

Clauses 187-190 re-enact the powers of the Housing Corporation in paragraphs 9 to 11 of Schedule 1 to the 1996 Act as powers of the regulator. These powers relate to changes in the constitutions of non-profit providers of social housing.

The regulator will be under a duty to produce guidance (after consultation) on how it will use its powers under Chapters 6 and 7 of the Bill (**clause 192**).

The regulator will be able to operate a scheme to accredit persons providing services in accordance with the management of social housing (**clause 194**). Providers may be required to ensure that a body providing services in connection with its management role is accredited.

g. Enforcement Powers (Chapter 7)

This Chapter of the Bill provides for the regulator's enforcement powers. These are more extensive than those currently held by the Housing Corporation but the aim of Oftenant will be to cut 'red tape' where tenant satisfaction is high; in these cases there will be no routine inspections and RSLs' paperwork will be kept "to the absolute minimum."[66]

Before exercising any of the powers described below, the regulator will have to be satisfied that there are grounds for taking action and that the action proposed is appropriate. A warning notice will have to be served before proceeding with enforcement action in order to permit the provider to enter into a voluntary undertaking to avoid full enforcement action; providers will have the right to make representations to the regulator. The grounds for action in respect of an enforcement notice or imposition of a fine will include:

- that a registered provider has failed to meet a standard of social housing established by the regulator under clauses 173 or 174;
- that the affairs of a registered provider have been mismanaged;
- that it is required to protect the interests of tenants;
- that it is necessary to protect the assets of a registered provider;
- that a registered provider has failed to comply with an undertaking that it has given to the regulator as provided for in clause 121;
- that an offence under Part 2 has been committed by a registered provider.

In certain circumstances the regulator will be able to take action against an individual rather than the registered provider.

The regulator's suite of enforcement powers will include:

Enforcement notice: this will require a registered provider to do or stop doing certain things to resolve specified failures.

Imposition of fines: in addition to the grounds set out above, fines may be imposed where a provider has failed to comply with an enforcement notice (**clause 203**). Where the regulator is seeking to impose a fine in the event of a registered provider committing an offence, it must be satisfied "beyond reasonable doubt" that the offence has been committed, i.e. the criminal standard of proof. **Clause 206** sets out factors that the regulator must take into account before taking this type of enforcement action, such as the impact a fine might have on the provider's ability to provide services. The aim is to seek to avoid jeopardising a registered provider's financial viability. **Clause 210** specifies that money collected in fines must be applied to the regulator's costs in administering the penalty procedure; any balance must be paid to the HCA for investment in social housing.

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[66] CLG Press Release, *New legislation for greener, more affordable housing*, 16 November 2007

Compensation: the regulator will be able to require a registered provider to pay compensation to certain classes of people. This can be used where a registered provider has failed to meet a standard of social housing established by the regulator under clauses 173 or 174 or where the provider has failed to comply with an undertaking given to the regulator (**clause 214**). Compensation may be awarded to a person or persons who have suffered as a result of the provider's failure (**clause 215**). Those eligible for compensation must be tenants or occupiers of social housing. Payment of compensation must be co-ordinated with the arrangements for approved ombudsman schemes (**clause 216**).

The following enforcement powers relate to how providers manage their affairs or how they are constituted:

Management tender: where the regulator is satisfied that a registered provider has failed to meet a standard of social housing established by the regulator under clauses 173 or 174, or that its affairs in relation to social housing have been mismanaged (as defined in **clause 238**), it may require the provider to tender out the management of its social housing in whole or in part (**clause 223**).

Management transfer: this action may be taken following an inquiry under **clause 184** or an audit under **clause 186**. The regulator may require a registered provider to transfer the management of some or all of its management functions to another specified person where: a) a registered provider has failed to meet a standard of social housing established by the regulator under clauses 173 or 174; b) that the affairs of a registered provider have been mismanaged in respect of social housing; or c) some or all of the provider's management of its social housing is likely to be improved by a transfer of management functions (**clause 225**).

Appointment of a manager: the regulator will have the power either to appoint a manager of the registered provider or require the provider to appoint a manager if satisfied that a registered provider has failed to meet a standard of social housing established by the regulator under clauses 173 or 174 or that its affairs have been mismanaged (**clause 227**).

Transfer of land: this sanction will only apply to non-profit registered providers. It will apply: a) where a registered provider has failed to meet a standard of social housing established by the regulator under clauses 173 or 174; b) that the affairs of a registered provider have been mismanaged in respect of social housing; and c) the transfer of land would be likely to improve the management of that land (**clause 229**).

Removal of officers: **clause 231** replicates the provisions of paragraphs 4 and 5 of Schedule 1 to the 1996 Act. The regulator will have the power to remove officers from the governing bodies of designated non-profit registered providers where:

- where the officer has been adjudged to be bankrupt;
- where the officer has made an arrangement with creditors;
- where the officer has been subject to a disqualification order or a disqualification undertaking under the Company Directors Disqualification Act 1986 (or the equivalent statutory provision for Northern Ireland);

- where the officer has been subject to an order under section 429(2) of the Insolvency Act 1986 (which occurs where a person fails to make a payment under a county court administration order under the County Courts Act 1984);
- where the officer is disqualified under section 72 of the Charities Act 1993 from being a charity trustee (whether this is in relation to their position as an officer of a registered provider that is a charity or as officer of a different charity);
- where the officer is incapable of acting by reason of mental disorder;
- where the officer is impeding the proper management of the registered provider by reason of absence or failure to act.

Appointment of new officers: **clause 233** replicates the effect of paragraphs 6, 7 and 8 of Schedule 1 to the 1996 Act. The regulator will have the power to appoint a person as an officer of a non-profit registered provider to: a) replace an officer removed under clause 231; or b) the provider has no officers on its governing body; or c) the regulator thinks that an additional officer is necessary for proper management purposes.

In respect of all the powers outlined above, the registered provider subject to such action will have rights of appeal. In certain cases, such as the appointment of a manager or a management tender, the regulator must notify the HCA of the action being taken.

D. Comment

There is general recognition amongst providers of social and affordable housing of the need to change the foundation and spirit of regulation. The CIH has said:

> The policy context and the way we think about providers of affordable housing and their customers have changed significantly and regulation has evolved as approaches to housing provision have changed. It is certainly the right time to redefine the purpose, scope and philosophy of housing regulation.[67]

The Housing Corporation, the existing regulator, also acknowledges the need for change:

> Existing regulatory arrangements for housing associations have delivered a stable sector, encouraged massive private investment at low cost and - most importantly - have successfully protected tenants.
>
> But social housing provision will increasingly be delivered by a mixed economy of providers – local authorities, voluntary not-for-profit housing associations and private sector providers.
>
> These landlords will be responsible for over 4 million social homes in England – and their tenants deserve a regulator who puts their interests first and foremost. That's why the Corporation is clear that the new regulator needs to be truly independent and 100% focused on social housing. It is critically important that it

[67] CIH response to *Delivering Housing and Regeneration*, September 2007

> should not be open to criticism as a result of competing objectives, conflicts of interest or a confused mandate.
>
> Success will be measured by the new regulator's ability to encourage new entrants into the market, provide stability and assurance to the lending community and champion tenants' rights.[68]

a. Domain-based regulation

Respondents to *Delivering Housing and Regeneration* (June 2007), which set out the Government's plans on the future regulation of social housing, expressed general support for a regulator that that is independent from Government; there is 'in principle' support for all social landlords to be subject to the same standards of management and tenant engagement. Initially at least, Oftenant will not deliver the domain-based regulation of social housing providers envisaged by Cave. It is the Government's intention that cross domain regulation should be in place within two years of the regulator coming into existence (i.e. by 2011).[69] Further detailed work is to be carried out with stakeholders before local authorities are brought within the remit of Oftenant.[70]

Professor Cave is reportedly disappointed about this 'step-back' from his recommendation:

> I would have preferred to see all tenants coming within the ambit of the regulator as soon as the regulator was established. I would be disappointed if the delay for local authority and ALMO tenants was for more than two years.[71]

From the local authority point of view, the LGA and London Councils see an overriding need to integrate the regulation of social housing with proposals for Comprehensive Area Assessments (CAAs) and Local Area Agreements (LAAs).[72] The London Councils' response said: "It would be most unhelpful if social housing regulation did not support the CAA approach." Both organisations supported the Audit Commission's bid to take over the role of the single regulator because of its existing expertise and proposed role in CAAs. The London Councils' response refers to differences in funding, governance and accountability between providers which mean that there are "significant issues" to resolve before local authorities and ALMOs can be brought within the same regulatory regime as that for RSLs and for-profit providers.[73] The LGA argues that if council landlords are to be subject to the same responsibilities and scrutiny as other providers, there should also be a level playing field in terms of access to funds for investment in existing stock and new build.[74]

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68 Housing Corporation Press Release 84/07, 10 September 2007

69 HC Deb 15 October 2007 47-8WS

70 It appears that local authorities and ALMOs could be brought within the regulatory regime by regulations made under clause 110 of the Bill.

71 "All eyes on the birth of a new regulatory beast," *Inside Housing,* 26 October 2007

72 London Councils and LGA responses to *Delivering Housing and Regeneration*, September 2007;

73 *ibid*

74 *ibid*

The BPF said, in its response to *Delivering Housing and Regeneration,* that it understands the drive to create a regulatory level playing field but for the private sector to be supportive of this policy and continue investing in and managing affordable housing, the current social housing regulatory system would have to be "drastically changed". The BPF calls for a less bureaucratic and more risk-based approach to regulation:

> We would urge the Government to face up to the admittedly enormous challenge of developing regulations that would be acceptable to both not-for-profit and for-profit providers, as well as meeting the principles of tenant empowerment outlined in the Cave Review.[75]

The Cave Review argues for a more risk-based approach to regulation and the Government has acknowledged that different providers with varying funding, governance and accountability arrangements may require some tailored regulations.

b. A new standalone body

When announcing the decision to create a new standalone body the Minister made it clear that retaining the confidence of lenders who provide private finance to RSLs was a key consideration:

> Our consultation document recognised that locating the regulatory functions in the Audit Commission would build on its existing strengths and consumer focus, and it could be implemented quickly. However we also recognised that a standalone regulator may be better at this stage at commanding the confidence of those who provide private finance for social housing. We consulted openly on this issue.
>
> In responding to the consultation document, Registered Social Landlords, tenant representative bodies and lenders all favoured a standalone regulator because of the greater clarity of purpose of an independent regulator, and because of the importance of the regulator maintaining expertise in private finance issues. As it is vital that the new regulatory arrangements command the confidence of lenders in order to support increasing new social housing, I therefore propose to establish the new regulator as a standalone body.[76]

The Council of Mortgage Lenders' (CML), the representative trade body for the residential mortgage lending industry, response to *Delivering Housing and Regeneration* argued forcefully for a new independent regulator:

> The CML and its members believe that there should be a new independent domain-wide regulator for the social housing sector. This provides the best hope for an orderly transition, which is vital in the light of current capital market and housing market uncertainty and increased development risks facing housing associations (HAs). They do believe that an independent regulator drawing on Housing Corporation expertise could have more experience than the Audit Commission (AC) of regulating the private sector and of regulation of

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[75] BPF response to *Delivering Housing and Regeneration*, September 2007
[76] HC Deb 15 October 2007 47-8WS

> finance/governance issues rather than service outputs. Lenders must be closely involved with the HC and the new regulator during the transition period. [77]

c. Objectives

Cave identified the key objectives of the new system of social housing regulation as:

- to ensure continued provision of high quality social housing;
- to empower and protect tenants; and
- to expand the availability of choice at all levels in the provision of social housing.

The CIH response calls for additional objectives for the new regulator, specifically:

- to ensure that there is a recognisable affordable housing sector that is capable of delivering affordable housing and wider community services associated with it;
- to ensure that local authorities' strategic approaches to housing are competent; [78]
- to promote a sector that is capable of greater self-management.

In addition the CIH suggests that consideration be given to "whether the regulator should have an objective to protect the long-term use of taxpayers' money."[79]

The CML suggested a further objective:

> To provide a framework for the sound management of existing public and private investment within social housing and for the effective promotion of new public and private investment in pursuit of objectives 1-3. [80]

In support of this the CML argues that adequate investment is an essential pre-condition for the achievement of the other regulatory objectives. The point is made that a regulator charged with securing investment will be in a stronger position should Government policy cut across this objective; the prospect of future reforms affecting Housing Benefit in the social rented sector is cited.[81]

The fundamental objectives of the regulator are set out in **clause 86** of the Bill.[82] The objectives have been drawn quite widely and certainly go further than those envisaged by Cave. An objective to ensure the financial viability of registered providers has been included, as has encouraging investment in social housing.

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77 CML response to *Delivering Housing and Regeneration,* September 2007: www.cml.org.uk/cml/filegrab/DeliveringhousingandregenerationSept07.pdf?ref=5513

78 This would involve, the CIH suggests, having market assessments and local housing strategies signed off to check that they will contribute to the delivery of national housing agendas at the local level.

79 CIH response to *Delivering Housing and Regeneration,* September 2007

80 CML response to *Delivering Housing and Regeneration,* September 2007

81 A majority of social housing tenants are in receipt of Housing Benefit to meet their rent commitments. This is a key income stream for social landlords and, for RSLs, provides the cash flow on which private finance is predicated.

82 See page 28

d. Core housing functions

In *Delivering Housing and Regeneration* the Government proposed that core housing functions, including housing management and maintenance, would be subject to regulation and proposed that regulation might cover broader activities, such as estate management for appropriate providers.

Respondents' views were mixed on the question of whether additional functions should come within the remit of the regulator. For example, London Councils and the CIH support the restriction of regulation to these core functions while the NFA argues that "housing plus" functions should also be subject to regulation:

> We accept that, across the whole social housing sector, there are a wide variety of sizes and types of organisations and of services offered. We also acknowledge that some wider functions delivered by a relatively small number of providers relate to specialist expertise that may be more effectively regulated under other banners. Nevertheless, we consider that the majority of housing providers now perceive core housing functions as only one part of their role and that delivering housing related community and neighbourhood functions is increasingly prevalent within the sector as a whole.[83]

The aspects of social housing that the regulator will cover in terms of setting standards are listed in **clause 173** of the Bill.[84] The standards appear to go wider that the traditional core functions of management and maintenance and include "landlords' contribution to the environmental, social and economic well-being of the areas in which their property is situated." Thus registered providers can expect a new focus by the regulator on their 'place-shaping' role.

Delivering Housing and Regeneration consulted on the regulator's potential role in relation to rent setting. This issue was focused on by several respondents. London Councils called for clear parameters for rent setting by the regulator, taking into account affordability and local market conditions. London Councils' response highlights the importance of rent levels on tenants' ability to work (i.e. high rent levels can make it harder for tenants to take-up low paid employment because of the rate at which Housing Benefit is withdrawn). There is also concern about how the regulator's role in this area will impact on local authority rents, which are set in relation to Housing Revenue Account subsidy and the rent restructuring regime, if local authorities are to be brought under the Oftenant by 2011.[85]

The Bill includes in **clause 173** provision for the regulator to set standards in terms of rent levels, including minimum or maximum levels and levels of increases/decreases.

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83 NFA response to *Delivering Housing and Regeneration,* September 2007

84 See pages 30-31

85 London Councils' response to *Delivering Housing and Regeneration,* September 2007

e. Intervention & enforcement

The Bill will give the regulator a suite of flexible intervention and enforcement powers, as envisaged by Cave.[86]

Responding to *Delivering Housing and Regeneration*, the CML welcomed the possibility of "graded intervention" powers to tackle performance failures but was concerned about Cave's "ambivalence" on the extent to which the regulator will be required to escalate upwards from information requests to more drastic action. In the CML's view there will be instances where high-level intervention is required immediately.[87]

In contrast, the NHF expressed reservations about "more flexible" regulatory sanctions proposed by Cave and called for the use of formal regulatory powers to be contingent on the test of "misconduct or mismanagement," as set out in the *1996 Housing Act,* to guard against inappropriate regulatory intervention. The NHF has specific concerns over whether the type of interventions proposed by Cave might 'tip' associations into "public body" status:

> Fundamental to our concerns is the issue of the non-public status of housing associations. This is much more than the abstract issue it may at first appear to be. Housing associations' non-public status means that their loans do not count as Government borrowing. This means that they can greatly enhance the value of Government grants they receive by raising additional money from commercial lenders, virtually on a pound-for-pound basis. In this way, the resources available for investment are effectively doubled compared with what would have been possible with Treasury grants alone.
>
> If associations were ever found to be public bodies, the effects would be gravely damaging. They would no longer be able to borrow independently, which would effectively deprive the Government of its preferred – and highly effective – vehicle for the provision of affordable housing.
>
> Indeed, the effect of such a finding would be even worse, because it would also mean that the Government would have to assume responsibility for the existing borrowings of associations, which amount to up to £35 billion.
>
> In short, it is of paramount importance that associations' relationship with Government, particularly the way they are regulated, should leave no doubt about their nonpublic nature.
>
> Unfortunately, existing regulatory arrangements have not been entirely satisfactory in this respect. Although the court rulings have, so far, generally tended to confirm associations' nonpublic status, there have been occasional decisions to the opposite effect, for instance when it was decided that Poplar HARCA was carrying out a function of a public nature in certain of its activities. Although it can be argued that the Poplar HARCA case applied only in relatively

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86 For more information on HRA subsidy and the Government's rent restructuring policy see Standard Notes SN/SP/4341, *Housing Revenue Account Subsidy,* August 2007 and SN/SP/1090, *Social Housing: Rent Reform,* November 2005

87 CML response to *Delivering Housing and Regeneration,* September 2007

> limited circumstances, there have been repeated attempts, often funded by legal aid, to secure a ruling that would deem associations to be carrying out functions of a public nature in their more general activities.
>
> This threat is very real. The Corporation's existing power to intervene has already convinced the European Commission that associations are sufficiently 'public' in nature to be subject to European procurement rules. This was a very unhelpful decision that has done nothing to improve associations' procurement, and we suggest it should be taken as the clearest possible warning that any further encroachment on associations' independence could have very serious consequences.
>
> …We therefore have serious reservations about the suite of 'more flexible' regulatory sanctions set out in the Cave Report. The risk is that this approach will facilitate the type of intervention that could be construed as effective management control, thus potentially tipping associations into 'public body' status. However, we are optimistic that it would be possible to reform the regulator's powers in ways that will not jeopardise non-public status.
>
> We think that the suggestion that the regulator should be able to appoint a special temporary manager to administer the business of a troubled association undermines the independent nature of associations. We should however, be sympathetic to a proposal that the regulator should ask the board to do this, while a long-term solution is found.[88]

There is wide agreement amongst respondents to *Delivering Housing and Regeneration* that the regulator should not be able to fine landlords for poor performance, as suggested by Cave:

> We do not support proposals for fining associations, which can only have the effect of reducing the resources available to meet the needs of tenants (there are no shareholders to take the hit and exert pressure as a result), which is especially inequitable given their income profile.[89]

The Bill *does* include imposition of fines as a sanction for poor performance (**clause 203**) however; there will be a requirement to consider the impact of this on the registered provider before this sanction is used:

> These matters are the financial condition of the registered provider and the impact that any fine may have on the provider's ability to provide services. The regulator's considerations of these matters will particularly seek to avoid jeopardising a registered provider's financial viability or its ability to honour financial commitments it has made, or pre-empting the financial resources it requires to remedy the failures which are the grounds on which the penalty is being considered.[90]

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88 NHF response to *Delivering Housing and Regeneration,* September 2007

89 *ibid*

90 Bill 8 Explanatory Notes: www.publications.parliament.uk/pa/cm200708/cmbills/008/08008.i-v.html

Respondents referred to a lack of incentives in the proposed regulatory framework: "Sanctions will tackle the worst problems but do little to drive providers from average to excellent."[91]

f. Tenant empowerment

As noted above, a key objective behind the new regulatory regime envisaged by Cave is to empower and protect tenants. The joint response of the Tenants & Residents Organisations of England (TAROE), the National Federation of Tenant Management Organisations (NFTMOs) and the Confederation of Co-operative Housing (CCH) to *Delivering Housing and Regeneration* argues that current regulatory regimes focus too heavily on financial, governance and development issues "and rarely on delivering good quality housing and neighbourhood services."[92] They call for tenants to be "at the heart" of the new regulatory arrangements and for the regulator to ensure effective tenant representation.[93]

Tenant organisations will be given a right to collectively trigger intervention by the regulator.[94] Local authorities would also like this power and are supported in this by the CIH, who would also like "other stakeholders" to be given the power.[95]

The NHF, supports the creation of a "national tenants' voice" with the statutory right to be consulted by Government, the new HCA and the new regulator on all matters relating to the interests of tenants.[96]

The CML, while in agreement with the proposition that tenants should be fully consulted about service outputs, sounds a note of caution in relation to tenant engagement in governance and management:

> Housing associations (HAs) are private sector organisations undertaking a range of activities in an increasingly commercial environment that is becoming subject to increased risks. The assets of larger HAs are comparable to a substantial PLC. Given the trend towards increased gearing of lending to the sector lenders are concerned that high standards of management and governance are maintained. While lenders are comfortable with a degree of tenant representation on HA boards (including the 1/3 of board tenant representation common amongst Large Scale Voluntary Transfers) excessive reserved representation within governance structures has caused concern while excursions into tenant management have been scrutinised carefully. There are several reasons for this:
>
> - While individual tenants may in fact make valuable contributions to the governance or management of an HA, being a tenant does not of itself presuppose an interest or skills in those areas. While most tenants will

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91 CIH response to *Delivering Housing and Regeneration,* September 2007
92 TAROE, NFTMOs and CCH joint response to *Delivering Housing and Regeneration,* September 2007: www.cch.coop/docs/cch-clg-consultation-communities-england.doc
93 *ibid*
94 CLG Press Release, *New Legislation for greener, more affordable housing,* 16 November 2007
95 CIH response to *Delivering Housing and Regeneration,* September 2007
96 NHF response to *Delivering Housing and Regeneration,* September 2007

> expect to buy quality services from their landlord, few will wish to be involved in running it and fewer will have relevant skills. By analogy, the average mortgage borrower expects a good service but does not wish to run the bank or building society providing it. Arguably, an activist rather than consumerist paradigm for empowerment is fundamentally inappropriate.

- Reserving places on a board for any group can make it more difficult for that board to achieve an appropriate matrix of skills and experience without the board becoming too large.

- Tenants have potential conflicts of interest in relation to their landlord over such issues as rent levels and repair schedules. This should place a natural limit on the overall level of tenant representation.
- Imposition of tenant management, particularly if devolved to more than one organisation, can increase the overall cost base of an HA and should not be undertaken outside the context of a thorough prior appraisal of the financial implications.

- It will be most important that the new regulator does not come with a built in mandate to increase tenant representation in governance and management across the board. Proposals by interested tenants should be judged in the context of an objective consideration of the likely impact on the financial performance and risk profile of the HA involved.[97]

g. Paying for regulation

The Partial Regulatory Impact Assessment on the Government proposal to establish a new regulatory body for social housing advised that regulated bodies would be expected to meet the costs of ongoing regulation; they would be charged in proportion to the level of stock they own. It is estimated that this could reduce Government costs by around £15 million per year, representing an annual cost to RSLs of around £7.50 per home owned.[98]

The NHF expressed "dismay" at this proposal:

> This would in effect reduce the resources associations have to meet the needs of current and future tenants, many of whom are on low incomes. This is tantamount to an inequitable double tax on some of the poorest people in the country. We are also concerned that if the regulator can recoup its costs from the organisations it regulates, it will have no incentive to run itself economically and efficiently. We therefore recommend that the costs of the regulator, which as Cave says ought to be modest, are met by Government.[99]

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97 CML response to *Delivering Housing and Regeneration,* September 2007

98 CLG, *Delivering Housing and Regeneration: Communities England and the future of social housing regulation,* June 2007, Annex C

99 NHF response to *Delivering Housing and Regeneration,* September 2007

In contrast, the CML said that the principle that regulation should be paid for by a fee levied on those regulated "has been accepted". The CML emphasises the need to fund the regulator sufficiently well to undertake its role effectively.[100]

The *Housing and Regeneration Bill – Impact Assessment*, which was published alongside the Bill states:

> Costs to regulated bodies will comprise two elements: staff and other costs within the body, and a payment to meet the ongoing costs of the regulator. If the level of regulation is lower, staff costs on complying with the regulator may also be lower, though better management may carry costs.[101]

IV Part 3: Other provisions

A. Sustainability certificates

a. Overview

The Code for Sustainable Homes (CSH, otherwise "the Code") is an assessment mechanism developed by the Government for rating the sustainability credentials of new homes. It is based on the Building Research Establishment's (BRE) *EcoHomes* standard. Since April 2007 the developer of any new home in England can choose to be assessed against the Code. Making assessment against the Code mandatory was first proposed in the *Building a Greener Future: Towards Zero Carbon Development* consultation document. Whilst a number of environmental benchmark schemes exist, the Government hopes that customer demand and industry support will lead to the CSH becoming the single national benchmark for sustainable construction across the built environment.

To this end, the Government has consulted on the matter with a view to bringing in a mandatory rating for all marketed new homes in England and Wales from April 2008 (but without the need to meet any particular level). Although building to or assessment against the Code will remain voluntary for homebuilders, the proposals in the Bill will provide a mechanism for sustainability certificates to be issued when a property is sold, which will declare if a new house's performance rating has been determined against the Code, or not. Certificates will be presented in Home Information Packs, alongside mandatory Energy Performance Certificates. The Government hopes the Code will provide a stepping-stone towards all new housing developments being zero carbon by 2016.

b. Sustainable Homes

The Housing Green Paper, *Homes for the future: more affordable, more sustainable* (Cm 7191), sets the mandatory rating of new homes against the CSH across England and Wales in the context of the wider sustainable housing agenda.

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[100] CML response to *Delivering Housing and Regeneration,* September 2007

[101] CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007: www.communities.gov.uk/documents/housing/pdf/HousingandRegBill

> **Greener homes:** New housing needs to be much more sustainable for the future. We need a revolution in the way we build, design and power our homes. A quarter of the UK's current carbon emissions (around 150 million tonnes of carbon dioxide each year) arise from how we heat, light and run our homes. We want to increase protection of the environment by cutting carbon emissions and we want all new homes to be zero carbon from 2016. We will strengthen building regulations by 25% in 2010 and by 44% in 2013 to set the standards we need to help achieve this. We will also set new minimum standards for water use in new homes cutting average water use by almost 20%. And we are consulting on how best to rate new homes against our Code for Sustainable Homes to inform consumers and help drive up standards. We have set up a task group to look at research and work across the supply chain to deliver the improvements we need.
> (…)
> 14. In December 2006, we published our Code for Sustainable Homes. This is a voluntary Code, which measures the sustainability of a new home, covering energy and other aspects of sustainability too.
>
> 15. We want home buyers to be clear about how a new home rates against the Code. We now believe it should be made mandatory for new homes to be rated against the Code standards. We are launching a consultation alongside this Green Paper on how this policy will work in practice and how it will build on Energy Performance Certificates.
> (…)
> Building regulations cover England and Wales but not Scotland or Northern Ireland. So, our policies on zero-carbon homes implemented through building regulations, though not those implemented through planning, will apply to both England and Wales, as will the Building Regulations Part L Forward Look. As long as assessment against the Code for Sustainable Homes remains voluntary, it applies only in England, but proposals on making rating against the Code mandatory through building regulations would apply in both England and Wales.[102]

c. The Code for Sustainable Homes

The Code for Sustainable Homes is based on the BRE *EcoHomes* Standard,[103] which it replaced for the assessment of new housing in England in April 2007. The *EcoHomes* Standard is already used as a benchmark, particularly for social housing developments[104] and BRE will continue to maintain *EcoHomes* during the transition to the proposed mandatory adoption of CSH. *EcoHomes* 2006 will continue to be used for refurbished housing in England and for all housing in Scotland and Wales.

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[102] The Housing Green Paper *Homes for the future: more affordable, more sustainable* (Cm 7191) CLG July 2007

[103] See: BRE bream:ecohomes webpage visited 18 November 2007

[104] From 1 April 2006 all new homes funded by English Partnerships and the Housing Corporation were required to meet *EcoHomes* Very Good 2006 standards, which are broadly equivalent to the Code level three. English Partnerships required Code Level 3 as a minimum standard from April 2007. The Housing Corporation will require Code Level 3 as a minimum standard from April 2008 for housing receiving grants from the 2008-10 National Affordable Housing Programme. From 2008, 40,000 homes are to be built annually to a minimum Code Level 3 standard through both organisations as Communities England

The CSH has undergone a number of changes since it was originally proposed in December 2005.[105] In March 2006 the Government announced that the CSH would be strengthened, with the possibility of mandatory assessments, alongside enhanced energy efficiency requirements under Part L of the Building Regulations, which came into force in April 2006.[106] Level one of the Code requires thermal efficiency just above Part L 2006; level three being just above *EcoHomes* 'Very Good', and level six being 'zero carbon.' It is intended that the Code will be the basis of progressively higher improvement levels in Part L with respect to carbon emissions from, and energy use in homes, achieving Code Level 3 by 2010, Code Level 4 by 2013, and Code Level 6 by 2016.

Information on the development of the Code and other environmental benchmarks can be found in Standard Notes SNSC-03873 *Sustainable buildings and environmental standards: background,* and SNSC-04214 *Sustainable buildings and environmental standards: Towards zero carbon housing development*.

The final Code was launched in December 2006 and went live on 10 April 2007. It uses a star rating system (1 to 6) to indicate the overall sustainability performance of a home. One star indicates entry level, with standards set above the level of the Building Regulations, the minimum statutory building standards. Six stars is the highest level, deemed to be exemplar level at current standards.

The Code assessments are carried out in two phases, an initial Design Stage Review, based on design drawings, specifications and other commitments, for which an interim certificate of compliance is issued for each home type on a development, and a mandatory Post Construction Review. The latter is a final assessment and certification carried out after construction on a sample of completed homes, based on the design stage review. Confirmation of compliance includes inspection of site records and a visual inspection.

A booklet explaining how the CSH is intended to work in detail is accessible via the Planning Portal website.[107] An updated Technical Guide was issued in October 2007.[108]

From April 2008 it is proposed that a home builder would either:

- Employ a qualified Code Assessor to make the relevant inspections and provide a Sustainability Certificate; or
- Provide a zero-rating certificate or standard letter stating that the house has not been assessed against the relevant standards. The Certificate will need to state if the house has been built to the standards in the Code.

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105 Proposals for Introducing a Code for Sustainable Homes - A Consultation Paper, ODPM (now CLG) December 2005 and Summary of Responses to the consultation for The Code for Sustainable Homes (CSH), CLG December 2006

106 ODPM News Release, *Stronger Code for sustainable homes* 9 March 2006

107 Code for Sustainable Homes – a step-change in sustainable home building practice, CLG December 2006

108 Code for Sustainable Homes: Technical Guide, CLG October 2007

The CLG consultation document provided baseline assumptions for the likely costs of these two options. For a full assessment, the average fee is estimated to be around £217 with a further cost of approximately £280 incurred by developers in providing information for the assessment. A zero star certificate/statement of non-assessment is assumed to be free to obtain, with administrative costs to obtain and provide the certificate in the range of £20.[109]

The BRE FAQ webpage notes the two-stage assessment procedure means that costs may initially be higher than the *EcoHomes* assessment. [110]

d. Towards a mandatory rating

On the basis of responses to its consultation document, *The Future of the Code for Sustainable Homes - Making a rating mandatory* issued on 23 July 2007, [111] CLG has decided to proceed with a mandatory rating system, with this Bill providing the legislative framework. The summary of responses to the consultation, issued on 16 November, can be accessed on the CLG website.[112]

This consultation round followed on from a positive response received to *Building a Greener Future:Towards Zero Carbon Development*, where it was asked if rating against the Code should be mandatory. The Government fears that if the Code were to remain voluntary it might mean that it is not implemented on a wide enough scale for a discernible impact to be seen. Of the 218 responses received, 61 per cent of respondents agreed. Of the 8 per cent that did not, the concerns centred on additional confusion for consumers and the overlap with assessment for Energy Performance Certificates (EPCs).

A partial Regulatory Impact Assessment on making the rating mandatory is contained within the consultation document.

e. Responses to the Consultation

Many organisations have taken the opportunity to respond to the consultation on making the rating mandatory. Whilst many are supportive of the CSH, some express concerns about implementation along the lines proposed.

The National Housing Federation's letter of 22 October 2007 endorses the Code and notes that many of its developers already achieve standards at or above Level 3 of the Code.

> Current estimates identify that 92% of housing association developments in the 2006/08 National Affordable Housing Programme will achieve 'very good' or better using the eco homes assessment criteria. Housing associations are achieving significantly more than the odd exemplar scheme – our members are

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109 The Future of the Code for Sustainable Homes - Making a rating mandatory, CLG 23 July 2007 p34
110 BRE FAQs on the Code for Sustainable Homes
111 The Future of the Code for Sustainable Homes - Making a rating mandatory, CLG 23 July 2007
112 The Future of the Code for Sustainable Homes - Making a rating mandatory: Summary of Responses, CLG November 2007

> geared up to move across to level three of the Code for Sustainable Homes (CSH). In fact the Housing Corporation estimates that 39% of development partners already expect to achieve Code level 4. [113]

NHF encourages the Government to make the CSH mandatory for all housebuilders, otherwise, it believes, there may be little market incentive for private developers to adopt the standard. It cautions against the "npd" (no performance determined) zero rating, fearing this may be confusing to buyers.

> We believe that a zero rating against the Code is unnecessary and would be confusing. A customer would infer there had been an assessment against the Code. Code level 1 is not onerous and can be introduced with minimal cost, indeed it is proposed that water usage is introduced at level 1 for all homes from April 2008 through revisions to building regulations. [114]

The Home Builders Federation (HBF), the principal representative of private sector house-builders in England and Wales, on the other hand considers it illogical to pursue a mandatory rating against a voluntary Code. It notes that:

> Given that the Code is to be integrated into Building Regulations and that the energy efficiency rating required at Level 3 will become the Building Regulation in 2010 there seems little point in trying to assign Levels 0-2 in the intervening two years. It would also be desirable for the Code to be enforced through the national Building Regulations rather than to allow a repeat of the current confusion over renewable energy targets. [115]

HBF sees any attempt to change the Code to reflect changes in the Building Regulations, as opposed to driving progressive improvements in the Regulations, as potentially harmful, if meaningful comparisons are to be made throughout the lifespan of the Code.

HBF dismisses any need for documentation confirming the no performance rating but sees the Home Information Pack as the most logical option for rating certificates. However, HBF is concerned that there is scope for duplication between EPCs, Sustainability Certificates and Building Regulation final certification, and urges that, "It is imperative that the provision of any rating does not result in delays."

The Royal Institute of British Architects (RIBA) believes that, whilst making compulsory assessments (not just ratings) against the Code mandatory by April 2008 for new homes may not be realistic, due to assessor capacity and industry resistance, "assessment leading to a rating should become compulsory as soon as practically possible." It signals concern that the lower standards permitted under the Code for homes in the private sector "will lead to homes being built to the lowest common denominator." It argues for a level playing field between public and private sector assessment under the scheme:

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[113] National Housing Federation response letter 20 October 2007

[114] *ibid*

[115] The Future of the Code for Sustainable Homes: making a rating mandatory HBF response 18 October 2007. Received as personal communication 16 November 2007

> We are concerned that the Government's proposals set out in the consultation would mean that hundreds of thousands of new homebuyers by 2010 will be buying properties that do not even reach Code Level 1, far behind the standards being set by the public sector. If the public sector, which works at much tighter margins, must be assessed then we believe that the private sector should be subjected to the same requirements.
> …
> The RIBA would like to see developers aim for at least Code Level 3 in new developments immediately. However, we strongly encourage the Government to insist as soon as possible that all new homes are assessed at the post-construction stage and given a mandatory rating against the Code, and that this information is clearly provided to consumers. [116]

It goes further, recommending that:

> We suggest that zero-ratings should not be an easy option for developers to simply purchase – they should be clearly labelled as a "fail" against the Code to potential buyers.[117]

The Environment Agency in its response supports the use of the Code but expresses concerns about the duration of validity of the rating, especially at the time of re-selling a rated property.

> The Government needs to urgently address the issue of whether homes should be rated against the Code when they come to be resold and under what scheme.
>
> We strongly believe that there is a case for extending the Code for Sustainable Homes to cover existing homes and complement the EPC. This needs to be developed as a matter of urgency. [118]

f. Energy Performance Certificates and Sustainability Certificates

From 6 April 2008, it will be mandatory to produce Energy Performance Certificates (EPCs) for all homes built and physically complete on or after this date.[119] EPCs express the energy efficiency of a home in terms of an A-G rating, similar to domestic white goods; the most efficient homes are in band A. The Certificate also rates, on a scale of A-G, the impact the home has on the environment. Better-rated homes should have less impact through carbon dioxide emissions.

The Government considers that requiring a mandatory Code rating of new homes will encourage take-up of higher environmental standards. The introduction of EPCs offers a

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116 Consultation paper on the Future of the Code for Sustainable Homes - making a rating mandatory. Response by the Royal Institute of British Architects

117 *ibid*

118 Response to Communities and Local Government consultation: The Future of the Code for Sustainable Homes - making a rating mandatory, Environment Agency October 2007

119 The requirements for EPCs are made under the Energy Performance in Buildings Directive, which is implemented in the UK in a phased programme under *The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007* (SI 2007/991)

timely opportunity to introduce a mandatory requirement for rating individual dwellings on the same timescale.

Sustainability Certificates will complement but not replace EPCs in the Home Information Pack. Although the energy assessment in the Code will use the same methodology (the SAP assessment rating)[120] the CSH is made up of a wider range of key indicators that make up the overall performance rating, expressed in numerical points for each category.

The National Housing Federation would like to see "the sensible integration of the EPC and the Code rating."[121] The Home Builders Federation feels it is not possible to require SAP assessors to carry out non-mandatory assessments against the Code. [122]

g. Code assessors

Independent assessors, who may be drawn from any relevant profession, so long as they are appropriately qualified and trained, will carry out code assessments. The Bill proposes regulatory powers (**clause 244**) to ensure that an appropriate, accredited scheme is set up, for which charges may be made. Provision is also made (**clause 250**) for grants towards the development and operation of such schemes.

The consultation document comments on the prospects of having sufficient assessors in place in time for the introduction of the proposed mandatory rating scheme from April 2008:

> Some respondents to *Building a Greener Future* were concerned about the numbers of Code assessors available to undertake assessments. The Building Research Establishment (BRE) has been re-training Ecohomes assessors in England to become Code assessors. Training commenced in March 2007 and by the end of June 2007 there were already approximately 432 accredited Code assessors with more training events planned. BRE's latest figures show that these assessors are appropriately spread across the country, taking account of levels of home building.
>
> We expect that there will be enough assessors to undertake Code assessments, if we proceed with making a rating against the Code mandatory from April 2008, for the following reasons:
>
> - Ecohomes/Code assessors currently undertake an average of four assessments a year. However actual levels of activity vary widely with some assessors undertaking less and others more. One assessor has completed 60 assessments in the past year and has registered a further 350 assessments. So there is capacity in the system at present.

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120 SAP is the Government's Standard Assessment Procedure for Energy Rating of Dwellings. SAP 2005 is adopted by government as part of the UK national methodology for calculation of the energy performance of buildings. See BRE SAP webpages :

121 National Housing Federation response letter 22 October 2007

122 The Future of the Code for Sustainable Homes - making a rating mandatory HBF response 18 October 2007. Received as personal communication 16 November 2007

- A significant proportion of new homes are built as part of housing developments rather than as single units. New homes in housing developments will, where they share a design, be assessed in common rather than home by home. Therefore, based on the current average number of types of properties in a typical development, we anticipate that approximately 1000 assessments will be needed for every 15,000 properties. In making this calculation we have discounted single unit sites, built typically by owner occupiers, as we think that it is less likely that they will seek an assessment against the Code, partly because the cost of assessment will be higher.

- If new home building were to be around 165,000 new homes (i.e. at about the current level) in 2008, then, based on the number of different types of properties, the different sizes of sites, and allowing for some uptake on single sites, we estimate that approximately 22,000 actual assessments would be needed. The 432 Code assessors already trained would have to do about 51 assessments each in a year to meet this demand.

- BRE advise us however, that in addition to the 432 current assessors approximately 50 Code assessors are currently being trained and accredited each month. It is therefore anticipated that by April 2008 there will be approximately 900 assessors available. At this point, each of these assessors would need to do about 25 assessments a year if all anticipated new homes built were assessed against the Code. However, whilst there is a guaranteed minimum number of assessments as large parts of the social sector are required to assess against the Code, it is unlikely that every new home built will be assessed against the Code, at least in 2008.[123]

CLG currently expect there to be about 890 trained assessors at the end of March 2008,[124] which it considers to be adequate to manage the expected assessment workload of around 40 per cent of the 163,000 new homes expected to be built in 2008.[125] Not all private sector homes will be built to the Code's standards. The consultation document uses a baseline rate of assessments for the private sector of approximately 3,000 per year, equivalent to only 2 per cent of private new build compared with around 24,000 per year in the public sector.[126]

The Home Builders Federation is more pessimistic about the sufficiency of assessors:

> Q6: Do you agree with our analysis of the likely demand for assessments and that there will be sufficient Code assessors available?
>
> No. The assessors are required to do the calculations twice (design and completion) so with 180,000 new completions envisaged there is no way that there is/will be a sufficient number of trained, competent assessors. We are also

[123] The Future of the Code for Sustainable Homes - making a rating mandatory, CLG July 2007
[124] Personal communication 16 November 2007
[125] Equating to approximately 73 assessments per inspector per annum at these figures.
[126] The Future of the Code for Sustainable Homes: making a rating mandatory CLG July 2007 p34

> concerned that if a private company is to enjoy a monopoly position in accrediting such assessors there should be a system for monitoring their performance. [127]

h. The clauses

In essence, the Bill gives regulatory powers to facilitate a mandatory rating of sustainability for new homes in England and Wales. The proposed scheme will place a duty on anyone selling a newly constructed residential property to give the purchaser of the property information about its sustainability before the sale is agreed, free of charge.

The information will take the form of Sustainability Certificates (an interim certificate will be issued if the property has not been completed) or a statement that there is no Sustainability Certificate for the property. The documentation will form part of the Home Information Pack. The detail on how the rating and certification scheme will work in practice will be contained in Regulations. Powers to make additional Regulations are also given (**clause 253**).

Clause 243 allows for Sustainability to be prescribed in Regulations for ensuring or furthering the purposes of:

> (a) ensuring the health, safety, welfare and convenience of persons in or about the property and of others who may be affected by the property or matters connected with it,
>
> (b) furthering the efficient management of the property and of its construction,
>
> (c) furthering energy efficiency,
>
> (d) furthering the efficient use of water and minimising flood risk,
>
> (e) furthering efficient waste management,
>
> (f) furthering the protection or enhancement of the environment, and
>
> (g) furthering the prevention or detection of crime. [128]

There are powers to set up a register of certificates (**clause 245**), and conditions about the disclosure of information are contained therein. Unlawful disclosure may result in a fine of £5,000.

Local trading standards departments will enforce the law (**clause 246**). These officers will have powers to ask for sustainability certificates or statements to be produced for inspection; although there will be a defence of reasonable excuse for non-compliance (**clause 247**). Penalty charges may be given for breach of the conditions set out under **clauses 242** and **247** (**clause 248**). Anyone obstructing an enforcement officer in their

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[127] The Future of the Code for Sustainable Homes: making a rating mandatory, HBF response, 18 October 2007. Received as personal communication 16 November 2007

[128] *ibid*

duties or acting under these powers without authority will be subject on summary conviction to a fine of £5,000 (**clause 249**).

The Bill contains provision to extend the provisions to conversions of existing buildings and non-residential properties; although the Explanatory Notes state that there are no present proposals to use these powers.

The Bill gives delegated powers to the Welsh Ministers to bring in a mandatory rating scheme. The Welsh Assembly Government will determine which assessment scheme the rating will be set against following enactment.

B. Landlord and tenant matters

1. Tenant empowerment

a. Ballots before disposals to certain landlords

Legislation enabling the voluntary transfer of council housing stock was enacted as part of the *1985 Housing Act* (sections 32-34 and 43); however, it was not until the *1988 Housing Act* that authorities began to consider large scale stock transfers (LSVT) as a means to avoid the potential break-up of their stock under the Tenants' Choice[129] and Housing Action Trust initiatives. More recently, LSVT has been used as a key vehicle for the achievement of the Government's commitment to bring all social housing up to a decent standard by 2010. Approximately 830,000 stock transfers have taken place since 1997.[130]

Before a stock transfer takes place a local authority must obtain the Secretary of State's permission. The Secretary of State will not give permission unless satisfied that a majority of affected tenants do not oppose the transfer (Schedule 3A to the *1985 Housing Act*). Although guidance issued by CLG in the form of the *Housing Transfer Manual* recommends that a ballot of tenants be carried out, there is no statutory duty on local authorities to conduct a ballot before seeking consent to a stock transfer. In practice a ballot is always carried out, but this has not prevented disputes over the consultation/ballot process from arising. The *Housing and Regeneration Bill - Impact Assessment* gives an example of one such dispute:

> In early 2007 a secure tenant of the London Borough of Tower Hamlets challenged the Secretary of State's decision to consent to a transfer of housing stock in Parkside Estates from the London Borough of Tower Hamlets to the Old Ford Housing Association. As part of the consultation process, the local authority balloted tenants on the proposal to transfer their stock: the result was a majority of seven tenants in favour of the transfer, on a low turnout (45.7% of those eligible to vote). Subsequently, through an organised campaign over a long period, tenants and leaseholders wrote individual letters to the Secretary of State and the local authority alleging ballot irregularities, and petitions were received

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[129] Under which council tenants could opt to have their estates transferred to an alternative landlord.

[130] Some councils have transferred all their stock to a new landlord while others have transferred only certain estates.

> from both tenants and leaseholders objecting to the transfer. By the time of the local authority's application for consent to the transfer, the number of signatures received making representations against the transfer (at least 44% of those eligible to vote) exceeded the number of those who had voted in the ballot in favour of the transfer.
>
> The Department was concerned that notwithstanding the endorsement of the transfer through a positive ballot result the large number of representations subsequently made against the transfer would put a decision to consent to the transfer at risk. Specifically, the Department was concerned to verify that a majority of tenants had not made representations opposing the transfer; as, in such circumstances, the Secretary of State would be prohibited by the legislation from consenting to the transfer. Even if a majority of tenants had not expressed their opposition, it was considered that a decision by the Secretary of State not to exercise her discretion to require further consultation might be vulnerable in circumstances in which the ballot result was so close, and had taken place a considerable time before the application for consent to the transfer.[131]

In order to avoid a reoccurrence of this type of dispute the Bill (**clause 257)** will make the requirement for a ballot mandatory and will set a fixed period within which tenants will be able to make representations regarding the transfer proposal. The Secretary of State will not be able to give consent to a transfer if a majority of those voting vote against the proposal.

The Government consulted over the question of amending the requirements in relation to LSVT consultation and ballots in *Tenant Empowerment,* which was published in June 2007.[132] The CIH's response to the consultation paper agrees that there is a need to bring greater clarity to this process. The possibility of tenants influencing the Secretary of State's decision post-transfer opens the process up, in the view of the CIH, to potential exploitation.[133]

The joint response of the three national tenant organisations, TAROE, NFTMOs and CCH to *Tenant Empowerment* describes the existing stock transfer consultation and ballot process as: "probably the most effective extensive and rigorous consultation process in existence in any sphere of public life." Although these bodies believe the process could be improved by changing the funding arrangements for the appointment of an Independent Tenant Advisor to ensure that the advisor is truly independent, and by building in tenant empowerment costs to the valuation process, they do not see a need to change other parts of the transfer process.[134]

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131 CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007

132 CLG, *Tenant Empowerment*, June 2007: www.communities.gov.uk/documents/housing/doc/323545.doc

133 CIH response to *Tenant Empowerment,* September 2007: www.cih.org/policy/Tenant-Empowerment-Response.pdf

134 TAROE, CCH, NFTMO joint response to *Tenant Empowerment,* September 2007: www.cch.coop/docs/cch-clg-consultation-tenant-empowerment.doc

b. Management agreements: extending the requirement to co-operate

It is Government policy that local authority tenants should be given greater say over how their homes are managed, including who their landlord should be. The Government particularly wants to encourage and support 'Tenant Led Stock Options' where local authority tenants take the lead in looking at options for the management and/or ownership of their homes and, if feasible, take forward a preferred option. Research commissioned by the department in 2002 found that tenant management organisations (TMOs):

> - often manage their housing more effectively than their landlord. Their performance matches the top 25% of local councils in England. This better performance by TMOs covers repairs, re-lets, rent collection, and tenant satisfaction;
> - tend to act sooner and more effectively when dealing with tenancy management problems because they are 'on the spot' and have local knowledge;
> - can work well in socially excluded communities;
> - are involved in wider community activities and play an important part in neighbourhood regeneration; and
> - help to increase community spirit and improve the quality of life.[135]

Section 27AB of the *Housing Act 1985* gives the Secretary of State wide powers to make regulations requiring local housing authorities to co-operate, and eventually enter into management agreements, with (TMOs). The regulations governing this process are *The Housing (Right to Manage) Regulations 1994* (SI 1994/627). The *Tenant Empowerment* consultation paper notes that there are currently around 230 TMOs operating in England but goes on to say:

> …it is generally accepted by tenants, local authority staff and Approved Agencies that the regulations and processes are too complicated, take too long and are often adversarial.[136]

Clause 258 of the Bill will amend section 27AB to extend the list of what the right to manage (RTM) regulations might include and to set time limits on carrying out requirements under the regulations.

Tenants' representative organisations welcome the streamlining of the RTM process, particularly the stated intention to reduce the number of ballots required from two to one, but regret that there is no provision for tenants of RSLs to have the RTM.[137] The CIH also supports changes to improve the RTM process but questions the consultation paper's emphasis on speeding up the process:

> Whilst we agree that the process should be as user friendly as possible, we do not necessarily agree that one of the objectives should be speed. The key to

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135 Office of the Deputy Prime Minister (now CLG), *Tenants Managing: an Evaluation of Tenant Management Organisations in England* – Housing Research Summary No. 174, 2002

136 CLG, *Tenant Empowerment*, June 2007, para 2.4

137 TAROE, CCH, NFTMO joint response to *Tenant Empowerment,* September 2007, paras 4.2-3

> building a sustainable Tenant Management Organisation is to build tenant capacity to take on responsibility. So although we would agree that any unnecessary obstacles to tenants taking on responsibility should be removed there are clear advantages in a process which takes a reasonable length of time so that it can be used to build tenant capacity. We do not want create a process that increases the risk of failure to meet the competency standard or early management failure of the TMO either of which is likely to result in long-term damage to tenant confidence. [138]

The London Councils' response to *Tenant Empowerment* also focuses on building tenant capacity and expresses concern over the proposal to remove the initial ballot as it "provides a useful means of raising awareness of the proposal to establish a TMO and helps focus tenants' minds on what it would entail."[139] London Councils' response also refers to the fact that there is no intention to give RSL tenants an equivalent RTM:

> We acknowledge the reasons that CLG have cited for not extending this right to RSL tenants, but we are of the view that this discrepancy undermines the 'Every Tenant Matters' concept; other efforts to align local authority and housing associations in a way that extends tenant offer and choice; and that as it does not affect the ownership but only the management, extending the statutory RTM process to RSL tenants should be re-considered. [140]

CLG set out its reasons for not extending the RTM to RSL tenants in section 7 of *Tenant Empowerment:*

> We considered the advantages and disadvantages of extending the right to manage to RSL tenants. This could create a more level playing field between the rights of RSL tenants and local authority tenants, and could allow tenants an opportunity to be directly involved in the management of their homes in situations where their landlord is unwilling to negotiate a voluntary arrangement. However, we came to the conclusion that extending this right would not be practical. It could:
>
> - put burdens on the RSL sector at a time when there is a commitment to reducing regulation;
> - lead to loss of lender confidence, prompting increases in lending rates across the board and jeopardising supply; and
> - threaten the private sector classification of RSLs, on which the scale of borrowing (and therefore development) relies.[141]

The Council of Mortgage Lenders' (CML) response to the consultation paper clearly spells out lenders' opposition to extending the RTM to RSL tenants:

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138 CIH response to *Tenant Empowerment,* September 2007

139 London Councils' response to *Tenant Empowerment,* September 2007: www.londoncouncils.gov.uk/upload/public/attachments/1204/London%20Councils%20Response%20to%20Tenant%20Empowerment%20Consultation%2011th%20Sept%202007.pdf

140 *ibid*

141 CLG, *Tenant Empowerment*, June 2007, para 7.2

> Unlike local authorities, which sit clearly within the public sector, RSLs are independent organisations accessing significant levels of long-term private finance at rates significantly below those available to the wider commercial sector. This reflects the existence of the regulator and their capacity to monitor and if necessary intervene to secure, adequate standards of financial management and overall governance. As government puts pressure on RSLs to utilise their financial capacity for a variety of developments the risk profile and gearing of those organisations increases. In these circumstances it is essential for the maintenance of lender confidence that standards of governance are not undermined by measures that could dilute the matrix of skills and experience at board level or constrain the ability of RSL boards to act quickly and decisively to secure financial viability. While Tenant Management Organisations (TMOs) may sit outside the strategic governance framework they may have the ability to influence organisational, and can certainly affect the cost base of an organisation through duplication of management or devolution of service provision. Plans for TMOs should be studied critically in the context of broader goals, priorities and financial considerations therefore.[142]

c. Requirements to co-operate in relation to certain disposals of land

In line with the Government's objectives set out in the previous section, **clause 259** of the Bill will add a new section 34A to the *Housing Act 1985* which will give the Secretary of State (and the Welsh Minister in Wales) regulatory making powers to set out the process to be followed when a local housing authority is served with a request that ownership of the stock should transfer to a registered private landlord (RSL) by a group of tenants. The sort of requirements that will be placed on local authorities under the regulations will include: providing assistance to tenants (financial, training or accommodation); providing information; and co-operating with tenants.

In *Tenant Empowerment* CLG notes that a number of successful tenant-led stock transfers have already taken place but in some cases tenants have found it difficult to obtain necessary information from councils in a timely manner. In some cases, where tenants have wanted to take a transfer forward, councils have refused to implement the outcome of feasibility studies; cases in Birmingham City Council (Bloomsbury Estate Management Board) and Wolverhampton City Council (Bushbury Hill Estate) are cited.[143]

The Bill's provisions to aid tenant-led stock transfers have been welcomed by the three national tenant organisations.[144] London Councils' response to *Tenant Empowerment* highlights the potential impact of transfers on local authority funding:

> We would, however, expect there to be recourse to government funding/an offer of compensation to be made at the outset, if the transfer of ownership or management is expected to have a negative financial impact on the HRA/General Fund. This will enable the local authority to focus its decision as to whether to go ahead with stock transfer on grounds relating to the council's strategic place-shaping role and vision for the area. London Councils believes that the local

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142 CML response to Tenant Empowerment, September 2007: www.cml.org.uk/cml/filegrab/TenantempowermentAug2007.pdf?ref=5515

143 CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007

144 TAROE, CCH, NFTMO joint response to *Tenant Empowerment,* September 2007, paras 6.1

> authority, having taken everything into account, should have the final say as to whether stock transfer should take place.[145]

A number of respondents also referred to the fact that RSL tenants will not enjoy an equivalent right to initiate a transfer ownership to an alternative landlord. The points made in section ***b*** (above) are also relevant to this issue.

2. Family intervention tenancies

The CLG website explains the purpose of Family Intervention Projects (FIPs):

> The primary objective of family intervention projects is to stop the anti-social behaviour (ASB) of a small number of highly problematic families and restore safety to their homes and to the wider community. Family Intervention Projects (FIPs) use a twin-track approach with help for the families to address the causes of their behaviour, alongside supervision and enforcement tools to provide them with the incentives to change. A key worker 'grips' the family, the causes of their poor behaviour and the agencies involved with them, to deliver a more coordinated, intensive response.[146]

Research by Sheffield Hallam University on behalf of CLG (published in 2006) into the effectiveness of intensive family support projects found:

> …clear evidence that intensive support and supervision to the most challenging and anti-social families alongside clear sanctions where necessary, can stop entrenched anti-social behaviour and improve life chances.[147]

FIPs have been operational in 53 local authorities since April 2007. Families who may be subject to an FIP are often at risk of eviction as a result of their anti-social behaviour. Dealing with them as part of a FIP generally involves moving the household into specialist accommodation. Currently there are difficulties around local authorities and RSLs offering tenancies that do not grant full security of tenure to these families. It is the department's understanding that some local authorities and RSLs are granting licence agreements in an attempt to provide less security of tenure. However, in law these licence agreements could be deemed to be tenancies as they involve granting exclusive possession.[148] Offering full security of tenure to a family in an FIP is felt to offer them little incentive to improve their behaviour and to be inappropriate for the relatively short duration of the support programmes.

Clause 260 of the Bill will provide for the creation of a form of tenancy in this specialist accommodation which, although the landlord may be a local authority or RSL, offers less security than either a secure or assured tenancy[149] thus "providing the families with more of an incentive to co-operate with their support programme."[150] These Family Intervention

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145 London Councils' response to *Tenant Empowerment,* September 2007
146 www.communities.gov.uk/communities/respect/familyinterventionprojects/
147 CLG, *Anti-social Behaviour Intensive Family Support Projects: An evaluation of six pioneering projects*
148 CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007
149 These are the usual tenancies offered by local authorities (secure) and RSLs (assured).
150 CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007

Tenancies (FITs) will be subject to the *Protection from Eviction Act 1997* which provides that landlords must give proper notice of their intention to seek possession. It will also be possible for a FIT to be offered without going through the normal social housing allocation processes.

Clause 261 makes provision for the termination of FITs.

It is envisaged that families who engage successfully with a FIP may go on to enjoy the benefits of secure tenure "without damaging the lives of others."[151] The Bill's Impact Assessment estimates that around 150-600 families could be assisted by FIPs.[152]

3. The Right to Buy

The statutory basis for the Right to Buy (RTB) scheme is Part 5 of the *Housing Act 1985* which applies to England and Wales. Under the RTB local authority and housing association secure tenants, and tenants of housing associations who have been transferred with their homes from local authorities, who have been public sector tenants for at least five years (two years if their current tenancies began before 18 January 2005), may buy their rented homes at a discount. Certain tenants and dwellings are excluded from the RTB.

CLG published a consultation paper, *Clarifying the Right to Buy rules,* in August 2007.[153] This paper sought views on proposals to make "minor changes to the way the Right to Buy scheme works." None of the provisions in the Bill affect the terms under which social tenants can exercise their RTB. The changes are: "designed to reduce regulation, widen the range of options that landlords can offer to assist their leaseholders, improve the administration of the scheme, and clarify interpretation of the RTB rules."[154] The Bill does not contain provisions to introduce all of the proposals in the CLG consultation paper; for example, it will not empower local authorities to buy back shares in properties bought under the RTB to assist owners who are finding it difficult to afford the cost of maintaining their homes.

a. Exception to the RTB: possession orders

Section 121(1) of the *Housing Act 1985* provides that the RTB cannot be exercised if the tenant is required, by an order of the court, to give up possession of their home, or will be so obliged at a date specified in the order. The aim of this section is to prevent tenants who are seriously in breach of the terms of their tenancy from being able to buy their homes.

The Bill's Impact Assessment explains a problem that has arisen in relation to this section:

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151 *ibid*
152 *ibid*
153 CLG, *Clarifying the Right to Buy rules,* August 2007: www.communities.gov.uk/documents/housing/pdf/righttobuyconsultation
154 *ibid*

> This may be undermined by a new 2-stage procedure for postponed possession orders on the grounds of rent arrears, required by a recent Court of Appeal decision. A wording for such an order was recommended by HM Courts Service, an executive agency of the Ministry of Justice (then the Department for Constitutional Affairs). The first stage of the new procedure (which was approved by the Civil Procedure Rules Committee) is that a possession order is granted which does not specify a date for the landlord to be entitled to possession. Arguably, because section 121(1) refers to a date, the exclusion from exercising the RTB does not apply where the tenant has received a postponed order which does not specify a date.
>
> The proposal is to rectify this unintended effect by clarifying that section 121 of the Housing Act 1985 applies where a possession order has been granted whether or not a date for possession is specified on the face of the order. [155]

Clause 262 of the Bill will clarify the circumstances where section 121(1) of the *Housing Act 1985* applies so that a tenant subject to a possession order cannot exercise the RTB.

There is general support for this proposed amendment. The CIH comment: "Tenants should not be rewarded for their poor behaviour by qualifying for a discount at public expense",[156] is echoed by numerous respondents to *Clarifying the Right to Buy rules*.

b. Review of determination of value

Section 125 of the *Housing Act 1985* provides that where a tenant has applied for the RTB and his/her right has been admitted by the landlord, the landlord must serve a notice providing specified information, including the value of the property. The notice must state the price at which, in the opinion of the landlord, the tenant is entitled to buy the property; and, for the purpose of showing how the price has been arrived at:

a) the value at the relevant time (i.e. the date on which the tenant applied for the RTB);
b) the improvements made by the tenant which are to be disregarded in determining the value;
c) the discount to which the tenant is entitled.

Section 127 of the Act provides that the value of the property at the relevant time shall be taken to be the price which at that time it would realise if sold on the open market by a willing vendor (disregarding the value of improvements made by the tenant). If the tenant is dissatisfied with the value placed on the property by his landlord, s/he may require that the value be determined[157] (or in limited circumstances re-determined) by the district valuer, an employee of the Valuation Office Agency. The tenant must apply for a determination not later than three months after receiving the landlord's section 125 notice. The district valuer's determination is binding on both tenant and landlord but is subject to judicial review.

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[155] CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007
[156] CIH response to *Clarifying the Right to Buy rules,* October 2007
[157] Under section 128 of the *Housing Act 1985.*

The Bill's Impact Assessment explains why the Government intends (under **clause 263**) to enable district valuers to withdraw a statutory determination of value and replace it with a correct determination where it is discovered that the original determination was based on faulty facts:

> The Valuation Office Agency is aware of a number of cases each year in which district valuers discover that their determinations of value are flawed because they are based on factually-incorrect information, but are unable to withdraw these because they have no power to do so. The only remedy available to tenants and landlords affected by such inaccuracies is judicial review, a time-consuming and costly process. It is proposed to provide a straightforward and low-cost means of rectifying demonstrable errors. Doing nothing will mean the continuation of a situation that can mean that incorrect determinations of value have to stand, to the detriment of tenants (who may have to pay too much) or landlords (which may receive less for properties than would be justified by the market).[158]

There is general agreement amongst respondents to *Clarifying the Right to Buy rules* that this change should be introduced. The CIH has called for improved procedures to reduce the risk of valuation error.[159]

c. Approved lending institutions

If a tenant buys their home under the RTB and resells it within five years the former landlord may require the repayment of some, or all, the discount received. This obligation is secured by a charge on the property. However, if the owner has a mortgage and is unable to keep up the payments on it, lenders specified in section 156 of the *Housing Act 1985,* or approved by the Secretary of State under that section, ("approved lending institutions") are entitled to recover what they are owed (by taking possession and selling the property) ahead of the landlord's entitlement, i.e. they have a 'first charge' on the property.

Clause 264 will remove the Secretary of State's powers under section 156 to specify bodies as approved lending institutions and to revoke that status. Instead, the clause adds to the list in section 156(4) of automatically approved lending institutions: (i) bodies which are authorised by the Financial Services Authority (FSA); and (ii) European lenders automatically entitled to operate in the United Kingdom. The clause will also make consequential amendments to the relevant definitions in section 622 of the *Housing Act 1985*. The overall effect is to combine the process of approving lenders for RTB purposes, currently carried out by the Secretary of State, with the process of authorising lenders carried out by the FSA.

The Government was recommended to explore this change by the Twelfth Report of the House of Commons Treasury Select Committee 2005-06, *Financial inclusion, credit, savings, advice and insurance.* [160]

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158 CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007
159 CIH response to *Clarifying the Right to Buy rules,* October 2007
160 HC 848-I of Session 2005-06: www.publications.parliament.uk/pa/cm200506/cmselect/cmtreasy/848/848i.pdf

There is general support for transferring approval of lenders for RTB purposes to the FSA. Some respondents used the consultation process as an opportunity to raise concerns about lenders who specialise in lending to "more risky customers" and, because RTB tenants represent some of the most marginal home-owners, suggest that the FSA should review its guidance to "take account of the unique needs of RTB purchasers."[161]

d. Former right to buy flats: service charge loans

The position of leaseholders of social landlords in blocks of flats who face large demands for works carried out by their landlords in order to achieve the decent homes standard has received a good deal of publicity in recent years. The Government announced the outcome of its review into the bills faced by these leaseholders on 29 March 2007; the Minister for Housing and Planning's full statement is reproduced over the next three pages:

> **The Minister for Housing and Planning (Yvette Cooper):** This statement reports progress on the Government's review of the complex issues raised by the high major works bills now faced by some owners of ex-council flats ('leaseholders'). It sets out progress and further steps that the Government will take to address these issues, while looking for other sustainable solutions in the longer term.
>
> *Background*
> Tenants who buy flats from local authorities, and people who buy flats formerly owned by local authorities, are responsible for contributing towards the cost of repairing, maintaining and improving the properties in which those flats are situated.
>
> Some current works of repair, maintenance and improvement to local authority properties are generating high major works bills, particularly in London. We have commissioned research into the impact on leaseholders, and have published the results on our website.
>
> *The Government's Review*
> We recognise that substantial major works bills may cause difficulties for some leaseholders and have consulted widely on the implications with all the stakeholders.
>
> Our review has mainly focused on the range of ways in which local authorities can help leaseholders to pay their bills. It has also considered how landlords currently communicate with leaseholders on scheduled major works and their costs.
>
> *Capping of Service Charges*
> Leaseholders do not always have to pay the full amount that their lease requires. Major works charges are capped to no more than £10,000 in any five-year period when the works are funded by specified Government grants.

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[161] CIH response to *Clarifying the Right to Buy rules,* October 2007

Ways of Helping Leaseholders Pay Their Bills
Local authorities can already help leaseholders to pay their bills in a number of ways.

They may reduce bills to no more than £10,000 in any five-year period if the leaseholder would not benefit from the works financially or would face exceptional hardship in paying it.

They must offer loans to leaseholders who have bought their flats under the right-to-buy scheme, if they apply within a specified time, and they may give loans to leaseholders under other circumstances.

They may allow leaseholders to pay their bills by monthly instalments and over an extended period, or defer payment until the property is sold.

They can buy back properties from owners who are in financial difficulties. When doing so, they receive financial assistance from the Government.

Some local authorities offer leaseholders the HouseProud equity release scheme managed by the Home Improvement Trust. A number of lenders also offer other equity release products that can be tailored to people's needs.

Taken together, these offer leaseholders a wide range of options. But we have found that these are not all available in all areas.

What the Government Will Do
We think more can be done in the short term to help leaseholders to deal with high major works bills by means of these existing options, with enhancements and additions in the longer term.

But the alternative of simply extending the existing scheme for capping bills would bring severe problems. Capping all major works bills to £10,000 while taking no account of ability to pay would be very expensive—in London, this could, on current figures, cost more than £40 million.

But we recognise that there may be people whose financial resources are so squeezed that more targeted action may be needed. So we will do the following:

We will make it clear to local authorities that they should:

i. inform and advise all leaseholders who face particularly high major works bills about the available payment options;

ii. offer the full range of available payment options to help leaseholders pay their bills, and share best practice to ensure that this happens everywhere;

iii. use existing resources, such as for private sector renewal which they are already expected to target towards those in need and on low incomes, to assist leaseholders in hardship;

we have in addition increased funding for LEASE so that social sector leaseholders can obtain authoritative advice and help at an early stage and LEASE can expand its alternative dispute resolution and mediation role in respect of social sector service charge disputes that arise;

> we will work urgently with lenders and independent financial advisers, landlords and leaseholder representatives to develop the use of existing equity release/equity loan schemes (including 'HouseProud');
>
> in the longer term, we intend to legislate to enable local authorities to offer equity loans to leaseholders, and to buy back shares in properties so that leaseholders in difficulties do not have to revert to being tenants.
>
> We are continuing to look further at ways to address this complex and sensitive issue. These actions represent work in progress. We will also actively monitor developments, to ensure that all concerned focus on the best ways of tackling these issues both now and in the future. [162]

Clause 265 of the Bill will implement the Government's commitment to enable local authorities to offer loans for service charge payments to leaseholders who have bought under the RTB on terms other than an interest bearing loan.

This change was recommended by London Councils' working group on major works bills. Not surprisingly London Councils supports the proposal but raises issues about the repayment of such loans:

> We feel that the opportunity cost of the loan must be repaid: within a ring fenced HRA it is not appropriate that rent/tax payers subsidise owner occupiers and a local authority would not want to bear the risk of falling house prices (or more realistically, prices not increasing at the same level as interest rates).
>
> This method of offering assistance to leaseholders poses more risk to the local authority as it is a loan on the property, whereas proposal 3 (buying back shares) allows a local authority to charge a rent on their share of the property. To ensure that councils are not placed in a position that presents them with undue risk, London Councils believes that local authorities should also be given the power to individually determine the terms of the scheme. [163]

The LGA does not agree with the proposal:

> There have been similar schemes introduced in the past with few take ups. The systems have been complicated and would require a form of lease with the resultant additional administration. It would be necessary to arrange the collection of payment of the mortgage repayments and resultant action for default.[164]

e. Corrections

Clause 266 will correct two errors in Schedules to the *Housing Act 1985* which were introduced when the RTB provisions were amended by the *Housing Act 2004.*

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[162] HC Deb 29 March 2007 c118-9WS

[163] London Councils' response to *Clarifying the Right to Buy rules,* October 2007*:* www.londoncouncils.gov.uk/upload/public/attachments/1266/RTB%20Consultation%20-%20Urgency%20v2.doc

[164] LGA response to *Clarifying the Right to Buy rules,* October 2007

One is a typographical error:

> Paragraph 5 of the new Schedule 5A to the Housing Act 1985 ('Initial Demolition Notices') inserted by Schedule 9 to the *Housing Act 2004* contains a typographical error. It states that: *Paragraph 16 of Schedule 13 (service of notices) applies in relation to notices under this Schedule…*
> This is incorrect – it should read: *Paragraph 16 of Schedule 5…* [165]

The clause will also correct an addition to the rules excluding from the RTB properties that are particularly suitable for occupation by elderly persons:

> The Government does not intend to depart from the policy that properties which are particularly suitable for occupation by the elderly (as defined in the legislation) should be excluded from the Right to Buy. Nor does it intend to change the right of tenants to appeal against their landlords' decision to deny the Right to Buy on these grounds.
>
> However, an error was made in the part of the Housing Act 2004 which transferred jurisdiction of these appeals from the Secretary of State to the Residential Property Tribunal Service (RPTS). The drafting of the Act inadvertently introduced a *further* right of appeal, to the High Court, against the decisions of the RPTS. No such appeals were possible against decisions of the Secretary of State, and there was no intention to permit them. The Government proposes to rectify this error. [166]

Age Concern used the consultation exercise on the RTB to request a full review of the RTB rules relating to properties suitable for occupation by elderly persons.[167] Shelter's response to *Clarifying the Right to Buy rules* argues for the replacement of the RTB with Social Homebuy; Shelter considers that this scheme offers "a much more sustainable way of helping tenants in social rented housing to move them into home ownership."[168]

4. Local authority disposals of dwellings

Clause 267 will introduce Schedule 9 to the Bill. Schedule 9 will amend the *Housing Act 1985* and the *Leasehold Reform, Housing and Urban Development Act 1993,* to remove the requirement on authorities to apply annually to the Secretary of State to be included in the large scale disposals programme in a particular financial year. The Secretary of State will still be required to consider the exchequer costs of such disposals before granting consent. Local authorities will also be expected to engage with the HCA at an early stage if considering a large scale disposal of stock.[169]

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165 CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007
166 CLG, *Clarifying the Right to Buy rules,* August 2007
167 Age Concern's response to *Clarifying the Right to Buy rules,* October 2007: www.ageconcern.org.uk/AgeConcern/Documents/Ref4107Clarifyingrighttobuyrules.pdf
168 Shelter's response to *Clarifying the Right to Buy rules,* October 2007: http://england.shelter.org.uk/files/docs/33487/11-07%20Clarifying%20RTB%20Rules.pdf
169 More information on large scale transfers of stock can be found in Standard Note SN/SP/1581, *Large Scale Voluntary Transfers.*

5. Financial assistance for information

Clause 268 will widen the existing power in section 94 of the *Housing Act 1996* for the Secretary of State in England and Welsh Ministers to provide financial assistance for giving general advice in relation to residential landlord and tenant law. It will be possible to provide assistance with training, giving information and running an alternative dispute resolution service.

C. Housing finance and other provisions

1. Housing Revenue Account Subsidy

Local authorities with housing stock are required to record all income and expenditure in relation to these dwellings in their Housing Revenue Account (HRA). Councils that transfer their entire housing stock[170] are not required to maintain an HRA.

The Housing Revenue Account Subsidy system is governed by the *1989 Local Government and Housing Act* (as amended by the *2003 Local Government Act*). The HRA is often referred to as a 'landlord account'; the main items of HRA income include rents and service charges paid by council tenants and HRA subsidy (if payable), while the main items of expenditure include management and maintenance costs and loan service charges. HRA subsidy is the sum paid by Government to local housing authorities to make up any shortfall between income and expenditure on their HRAs. HRA subsidy may be a negative amount. Local authorities with deemed surpluses on their HRAs must transfer these to CLG where they are pooled and paid to deficit authorities:

> This keeps resources within the housing budget where previously they would have been lost to the individual authorities' general funds.[171]

This system has proved to be highly controversial; a common charge of 'in surplus' authorities is that their tenants' rent payments are subsidising the management and maintenance of other authorities' stock.[172] There is currently a positive contribution from the Exchequer to local authorities' HRAs:

> For clarification, for England as a whole in 2005-06 total surpluses amounted to £549 million, set off against total deficits of £769 million. The remaining shortfall of £220 million was met by the Exchequer.[173]

However, a recent article in *Inside Housing* magazine reports that the HRA subsidy regime is likely to go "billions of pounds into surplus" relatively soon. The article suggests that this will enable the Treasury to use HRA surpluses (tenants' rents) to subsidise

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170 Transfers usually take place to an RSL.

171 Letter from Meg Munn, Parliamentary Under Secretary of State at DCLG to all Members of Parliament, March 2007, MGP 07/758

172 See Standard SN/SP/4341, *Housing Revenue Account Subsidy,* August 2007, for more information on HRA subsidy.

173 Letter from Meg Munn, Parliamentary Under Secretary of State at DCLG to all Members of Parliament, March 2007, MGP 07/758

Government spending on areas such as health and education. John Perry, policy advisor at the CIH, is reported as stating: "This underlines the fact that the HRA system is no longer fit for purpose and should be abolished."[174]

Evidence suggests that the current HRA subsidy system, based on annual determinations, may inhibit long term planning, active asset management and development of an optimally efficient cycle of repairs and maintenance by local authorities.[175] In summer 2006 the CLG approached Cambridge, Sheffield, Carrick, Warwick, Hounslow and Darlington councils (three of which have set up Arm's Length Management Organisations[176] and three of which have retained their housing stock). They were invited to participate in a study to see if there would be any advantage to the operation of the housing service if they were to opt out of the current HRA subsidy system. All six agreed to participate and Housing Quality Network, a private consultancy, was appointed to undertake some business plan modelling on their behalf.

In the Housing Green Paper, *Homes for the Future: more affordable, more sustainable,* (July 2007) CLG made reference to the pilot authorities' progress:

> We are currently examining the costs and benefits of 'self-financing' – allowing some councils to in effect leave the HRA subsidy system and retain their rental incomes. To ensure fairness to those who remained within the system, self-financing councils would have a one-off adjustment to their HRA based on the present value of anticipated future subsidies or surplus payments were they to remain within the HRA subsidy system.
>
> A group of councils has shown potentially significant benefits by modelling this approach. They believe it would assist long-term planning and improve asset management. It could also lever in more private sector investment to support estate transformation, mixed communities and an increase in supply.
>
> Further work is needed to establish the affordability of self-financing schemes both to the councils and to Government. This work should establish the viability of a self-financing business plan with a level of resources that reflects the transfer of risk, but also maintains fairness for those councils who remain within the HRA subsidy system. Subject to this being demonstrated, we see the next stage as a pilot of the self financing approach.
>
> The self-financing work will help us understand the potential benefits and risks of wider reform of the HRA subsidy system. The case for more local control over income and investment decisions has been strongly made. But dismantling a redistributive system would risk creating winners and losers. This is a sensitive issue and we will need to understand how changes could protect those who depend on subsidies generated by the surpluses of others within the current system.[177]

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[174] "Tenants face new rents tax", *Inside Housing,* 16 November 2007: www.insidehousing.co.uk/news/article/?id=1449602

[175] CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007

[176] A number of councils have retained ownership of their housing stock but have set up Arm's Length Management Companies to manage the stock on their behalf.

[177] CLG, *Homes for the Future: more affordable, more sustainable*, (Cm 7191), July 2007, pp77-78

The Minister for Housing and Planning, Yvette Cooper, has made it clear that opting out of the HRA will not be a means by which 'in surplus' authorities will be able to claim a larger share of overall housing resources.[178]

The Bill's Impact Assessment states that the Government's intention is: "to take powers to allow us to run live pilots with a number of councils before deciding whether to offer others this option."[179] Thus **clause 269** will enable the Secretary of State in England and Welsh Ministers to enter into an agreement to dis-apply sections 79 to 80A of the 1989 Act. This would have the effect that no HRA subsidy will be payable in respect of properties covered by an agreement.

There is much support amongst high performing local authorities and ALMOs for a revision of the HRA and the introduction of financial freedoms:

> It remains the case that ALMOs are still not on a level footing with housing associations, either in the eligibility criteria for SHG or in access to private finance. When considering value for money objectives in competing schemes greater consideration should be given to lifetime costs and benefits rather than just immediate capital costs. While councils and ALMOs can deliver other benefits, particularly in terms of utilising land that would not otherwise be developed, they could contribute even more if the government introduced financial freedoms and flexibilities and looked again at the community ownership model promoted in the joint NFA/CIH/HouseMark report *ALMOs – a new future for council housing.* [180]

Local authorities and ALMOs view changes to the HRA system as an essential pre-cursor to them being able to develop social housing again. Since the late 1980s RSLs have almost been the sole providers of new social housing. The CLG press release on the Bill makes it clear that there is an intention to make it easier for councils to build new homes; commenting on the housing finance provisions in the Bill the CLG release states:

> Councils will be able to keep the full rents from new council houses and use any surpluses to help pay for new social homes. [181]

2. Homelessness and allocations (Armed Forces)

a. Current provisions

Part 6 of the *1996 Housing Act* governs the allocation of local authority housing stock. Local authorities must ensure that when allocating their stock 'reasonable preference' is given to certain categories of people, as set out in s167(2) of the 1996 Act.

There is no automatic requirement on local authorities in whose areas forces personnel are based to arrange for their re-housing on leaving the service. These authorities frequently require housing applicants to have a 'local connection' with the area that is not necessarily established by living in service accommodation in the local area.

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www.communities.gov.uk/documents/housing/pdf/439986

178 HC Deb 26 April 2007 cc1215-6W

179 CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007

180 NFA response to *Homes for the Future: more affordable, more sustainable,* July 2007

181 CLG Press Release, *New legislation for greener, more affordable housing*, 16 November 2007

Amendments to Part 6 of the 1996 Act introduced by the *Homelessness Act 2002* were aimed, in part, at breaking down barriers to cross-boundary housing applications as authorities' ability to impose blanket exclusions in relation to applications for social housing were removed. However, the lack of a local connection may be taken into account when an authority decides on the relative priorities to afford to different applicants:

> Housing authorities must consider all applications, and cannot exclude applicants who, for example, are not currently resident in the borough. However, in determining relative priorities for an allocation, authorities are able to have regard to whether or not applicants have a local connection with the district.[182]

In addition, if a former member of the Armed Forces becomes homeless they may make an application for assistance with housing to a local authority under Part 7 of the *Housing Act 1996* (as amended). Authorities must assess whether homeless applicants are unintentionally homeless and in 'priority need.' The 'priority need' categories are set out in section 189 of the 1996 Act. Although an authority might accept an ex-member of the Armed Forces as unintentionally homeless and in priority need, it may refer the applicant to another local authority's area if s/he has no local connection with the authority dealing with the application:

> Under s.199(2) and (3), serving members of the Armed Forces, and other persons who normally live with them as part of their household, do not establish a local connection with a district by virtue of serving, or having served, there while in the forces.[183]

Thus, although Armed Forces personnel may have been based in a certain area for a substantial period of time, on leaving the Armed Forces they frequently find it difficult to obtain social housing within those areas.

On 21 June 2007 the Minister for Housing, Yvette Cooper, announced the Government's intention to amend the local connection provisions "to resolve this disadvantage that members of the Armed Forces have been experiencing in accessing social housing." The full statement is reproduced below:

> **The Minister for Housing and Planning (Yvette Cooper):** My hon. Friend the Under Secretary of State for Defence and Minister for Veterans and I have recently reviewed the way in which current housing legislation impacts on those leaving the Armed Forces. This follows representations from Service personnel and others that the local connection provisions in housing legislation put Service personnel and those leaving the Armed Forces at a disadvantage when trying to access social housing.
>
> Local authorities in England are responsible for framing their own policies and procedures for allocating social housing. In deciding who gets priority for social housing, housing legislation allows local authorities to take into account whether someone has a local connection with their district. Not all local authorities take

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[182] CLG, Code of Guidance for *Local Authorities on the Allocation of Housing*, 2002
[183] CLG, *Homelessness Code of Guidance for Local Authorities,* July 2006, para 18.15

> local connection into account. Where they do, the legislation can put Service personnel at a disadvantage since an individual cannot establish a local connection with an area through residence or employment there when serving in the Armed Forces.
>
> The Government are committed to aiding the effective transition of Service personnel to civilian life, and access to suitable housing is a vital part of this. Many will have bought their own home during their time in Service—and the Ministry of Defence has several schemes in place to encourage this—or will do so on leaving. However, for some Service leavers home ownership may not be an option and they may wish to apply for social housing. We believe it is important that the service they have given to their country does not place them at any disadvantage in this respect. The Government have therefore decided to make the necessary changes to housing legislation, at the earliest opportunity, to ensure that Service personnel are treated fairly and put on an equal footing with other people applying for social housing. [184]

b. The Bill

Clause 270 of the Bill will amend the local connection test in section 199 of the *Housing Act 1996* to enable Armed Forces personnel to establish a local connection in an area through residing there by choice or being employed there, in the same way as a civilian.

3. Building regulations: time limits for prosecutions

Under Section 35A of the *Building Act 1984* the time limit for bringing prosecutions for breaches of the provisions of the Building Regulations is currently within six months of completion of the work.

An exception to these provisions was introduced under Section 13 of the *Climate Change and Sustainable Energy Act 2006* for breaches relating to the conservation of fuel and power, or reducing greenhouse gas emissions, whereby the six months period is triggered on discovery of the breach, providing that action is taken within two years of completion of the offending work.[185] The relevant provisions must be designated in regulations before this can take effect. [186]

This Bill proposes a further amendment to Section 35A of the Building Act, extending the prosecution limit for all other contraventions of the Building Regulations and bringing this into line with the two year limit.

The measures were put out for consultation during summer 2007 with the overall aim of achieving better compliance with building regulations by providing a more effective deterrent to non-compliance.[187] Whilst prosecutions are relatively infrequent, with most enforcement activity centered on serving notices under Section 36 of the Building Act,

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184 HC Deb 21 June 2007 c107WS
185 Climate Change and Sustainable Energy Act 2006
186 Regulations 4, 4A, 4B, 6, 17C and 17D of the Building Regulations 2000 (as amended)
187 Longer time limits for prosecution of breaches of Building Regulations: Consultation, CLG July 2007

the consultation document explains why the normal six months limit may hamper compliance enforcement.

> 2.4. Because prosecutions must be brought in a magistrates' court, they must comply with the rules relating to such courts. Currently, section 127(1) of the Magistrates' Courts Act 1980 requires that any prosecution in a magistrates' court must be brought within 6 months of the date the offence was committed. Consequently, local authorities must bring prosecutions under section 35 of the Building Act for breaches of building regulations within 6 months of completion of the offending work. Representations have been received from representatives of local authorities and others that this can operate as an obstacle to effective enforcement, given that there can be latent breaches or those discovered after the expiry of the 6 months' time limit. Such a regime can be difficult to administer when the pressure of normal building control work can crowd out resources for prosecution. [188]

The majority of respondents were in favour of the measures, including designation of the relevant energy and climate provisions in regulations. A majority considered that all the time limit extensions should be implemented at the same time, rather than by a two stage process.[189]

4. Mobile home sites (gypsies and travellers)

a. Background

The rights and responsibilities of gypsies and travellers on local authority sites are currently governed by the *Caravan Sites Act 1968.* This Act provides limited protection from eviction and harassment. In particular, in order to evict a resident from such a site a local authority need only give a minimum of 28 days' notice to terminate the licence and obtain a court order for possession. Caravan counts undertaken in England and Wales in January 2007 show that there were 304 local authority sites across England and Wales, providing 5,270 pitches and accommodating 7,113 caravans.[190]

The Connors family occupied a caravan on a transit site owned by Leeds City Council for 13 years. They occupied the site under a licence agreement. In 2000 the family was accused of anti-social behaviour and issued with a notice to quit by Leeds City Council. They were subsequently evicted and became homeless.

The Connors family took the case to the European Court of Human Rights (ECHR) where they argued that they had no effective means of challenging what amounted to an interference with their human rights and, in particular, a breach of Article 8 of the European Convention for the Protection of Human Rights. Article 8 provides:

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188 *ibid* p5

189 Longer Time Limits for Prosecution of Breaches of Building Regulations: Summary of Consultation Responses, CLG November 2007

190 CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In May 2004 the ECHR held that the summary eviction of the family from a local authority caravan site, without reasoned justification or sufficient procedural safeguards, amounted to a breach of the right to respect for private life and the home under Article 8.[191] The Court commented:

> The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in decisions in particular cases…. to facilitate the gypsy way of life.

The Government had argued that travelling people on local authority sites should enjoy only minimal security of tenure on the grounds that it was necessary to provide flexible accommodation and to ensure problem occupants could be easily removed. The ECHR disagreed, stating:

> …the mere fact that anti social behaviour occurred on local authority gypsy sites could not, in itself, justify a summary power of eviction, since such problems also occurred on local authority housing estates and other mobile home sites.

The essential message from *Connors* is that the lifestyle of travelling people and nomadic communities must be respected and they should not be treated less favourably than settled communities.

In October 2004 the Joint Select Committee on Human Rights wrote to the Government suggesting that amendments be made to the *Housing Bill 2003-04* regarding security of tenure on county council gypsy and traveller sites. The Committee's letter to the then Minister for Housing and Planning, Keith Hill, is reproduced below:

> As part of the Joint Committee on Human Rights' ongoing review of decisions of the European Court of Human Rights finding the UK in breach of the European Convention on Human Rights (ECHR), I am writing to inquire about implementation of the decision of the Court in *Connors v UK* in May of this year.
> (…)
> I would be grateful if you could provide the Committee with details of your department's response to this case. As you will be aware, the UK is under an obligation under Article 46 of the Convention to introduce general measures to prevent a future repetition of the violation in other cases. We understand that in correspondence with Lord Avebury, you have proposed referring the matter to the

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[191] *Connors v. the United Kingdom* , no. 66746/01 (Sect. 1) (Eng) – (27.5.04)

> Law Commission. In our view rectification of the incompatibility identified by the Court could be achieved by a straightforward amendment to the definition of "protected site" under the Mobile Homes Act 1983. We also understand that an amendment to the Housing Bill to this effect has been drafted by the CRE and will be proposed by Lord Avebury. In light of this, and of the Court's recognition of the gravity of the interference with Article 8 rights involved in the case, it might be thought more appropriate to rectify the incompatibility by the more expeditious route of an amendment to the Housing Bill, or by way of remedial order under the Human Rights Act. If it is the case that the Government has decided not to proceed by one of these routes, we would appreciate your reasons for that decision. [192]

The Housing Bill 2003-04 was amended at Report Stage in the Lords to improve the rights of residents on local authority sites. The 2004 Act enables the court to suspend the enforcement of a possession order against a gypsy or traveller on a local authority site for up to 12 months. However, these amendments did not remedy the incompatibility identified in *Connors.* In its Thirteenth Report of 2005-06 the Joint Committee raised the delay in rectifying the issues raised by the *Connors* case:

> The Government informed the previous Committee that, given the complexity of these issues, they were to be further considered by the Law Commission as part of its review of rented tenure. It was the view of the previous Committee, however, that the incompatibility could have been relatively easily rectified by an amendment to the definition of "protected site" in the Mobile Homes Act 1983, which could have been made in the Housing Act 2004, and it is regrettable that this opportunity was not taken to provide speedy and effective implementation of the judgment. We will continue to monitor progress in the implementation of this judgment. [193]

The matter was returned to in the Committee's Sixteenth Report of 2006-07:

> The Law Commission's Final Report "Renting Homes", published in May 2006, does not deal with the issue of security of tenure for Gypsy and Traveller residents on caravan sites. In July 2006, a group of members of the House of Commons introduced a Private Members' Bill, the Caravan Sites (Security of Tenure) Bill, that would have provided a remedy, by providing for security of tenure to be acquired only after an introductory tenancy, and lost by means of demotion when abused.
>
> We wrote to the Minister to ask what steps the Government intended to take in light of the Law Commission's failure to deal with this issue, and for the Government's views on the Caravan Sites (Security of Tenure) Bill. We also asked whether the Government had considered using the remedial order procedure to provide a remedy. Although the Minister's reply reiterated the Government's commitment to implement this judgment, as soon as parliamentary time allows, the Government has been unable to give a firm timetable for the introduction of legislation on this issue.

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[192] Joint Committee on Human Rights, Twentieth Report of 2003-04, *Scrutiny of Bills: Eighth Progress Report*, HL 182/HC 1187

[193] Joint Committee on Human Rights, Thirteenth Report of 2005-06, *Implementation of Strasbourg Judgments: First Progress Report,* HL 133/HC 954

> We welcome the Minister's commitment to the publication of a consultation paper on improving the rights and responsibilities of Gypsies and Travellers on local authority sites – including the security of tenure issues raised by this judgment – to align them more with those of tenants in social housing. The Minister explained that as there will be legislative proposals on this package of rights and responsibilities, that it would be inappropriate to implement this judgment by means of a remedial order**.** The Housing Law Practitioners Association told us that:
>
> "The issues identified by the ECtHR in the *Connors* case are too important to remain unresolved pending the more comprehensive reform of housing law advocated by the Law Commission."
>
> **We look forward to receiving a copy of the Government's consultation paper on the rights and responsibilities of Gypsies and Travellers. However, we consider that any further delay in the implementation of the judgment in Connors is unacceptable. We are not persuaded by the Government's arguments that a remedy should wait for the preparation of a wider legislative package dealing with these issues. This argument has been deployed time and time again in relation to the implementation of the judgment in JT v UK and the Mental Health Bill (which we consider in detail below). Primary legislation for the wider package will need significant time in the parliamentary timetable and may be delayed or defeated by considerations unrelated to the remedial clauses. We recommend that the Government reconsider using a remedial order to provide a remedy in this case.**
>
> **We welcome the decision of the Government to include interim Guidance to Local Authorities on summary possession and the implications of the Connors judgment in their draft Guidance on the management of Gypsy and Traveller sites. We may consider the substance of this draft Guidance in due course.**[194]

b. The Bill

Clause 272 of the Bill will amend the *Mobile Homes Act 1983* to remove the exclusion for local authority gypsy and traveller sites. This will give residents on these sites the same rights and responsibilities as gypsies and travellers on private sites, and occupants of other types of residential caravan sites such as park home sites, which are already covered by the 1983 Act.

Gypsies and travellers on local authority (LA) sites will benefit from:

- the requirement for a LA to apply to the court and prove grounds and reasonableness to terminate their agreement to occupy the pitch;
- the right for a member of a resident's family living with them to succeed to their agreement if they die;
- the ability to sell or gift their caravan, and assign their agreement;

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[194] Joint Committee on Human Rights, Sixteen Report of 2006-07, *Monitoring Government Responses to Court Judgments Finding Breaches of Human Rights,* HL 128/HC 728

- the requirement for a LA to provide certain information on request;
- the requirement for a LA to make certain repairs to the pitch and maintain the common areas of the site;
- the requirement for a LA to consult on improvements;
- the ability for the court to consider various matters arising under the 1983 Act.[195]

More information on the rights of residents of mobile homes under the 1983 Act can be found in Library Note SN/SP/1080, *Mobile Homes,* November 2007.

5. Commonhold services: financial assistance

Clause 273 will widen the existing power in section 62 of the Commonhold and Leasehold Reform Act 2002 for the Lord Chancellor to provide financial assistance for the giving of advice in respect of the law relating to commonhold land so far as it relates to residential matters. It will be possible to give financial assistance for providing information and training and for running an alternative dispute resolution service.

[195] CLG, *Housing and Regeneration Bill – Impact Assessment*, November 2007

Glossary

ALMO	Arm's Length Management Organisation (manages local authority stock under a management agreement)
ASC	Academy for Sustainable Communities
BPF	British Property Federation
BRE	Building Research Establishment
BURA	British Urban Regeneration Association
CAA	Comprehensive Area Assessment (local authority performance management system)
CCH	Confederation of Cooperative Housing
CIH	Chartered Institute of Housing
CLG	Communities and Local Government
CML	Council of Mortgage Lenders
CPO	Compulsory Purchase Order
CSH	Code for Sustainable Homes
CSR	Comprehensive Spending Review
EP	English Partnerships
EPC	Energy Performance Certificate
FIP	Family Intervention Project (an initiative to tackle anti-social families)
FIT	Family Intervention Tenancy (see above)
FSA	Financial Services Authority
HBF	Home Builders Federation
HCA	Housing and Communities Agency
HMR	Housing Market Renewal (regeneration initiative in areas of low housing demand)
HRA	Housing Revenue Account (local authority 'landlord' account)
LAA	Local Area Agreement (agreements between the Government, the local authority and its major 'delivery partners' in a particular area)
LGA	Local Government Association
LSVT	Large Scale Voluntary Transfer
NAO	National Audit Office
NDPB	Non-departmental Public Body PSA Public Service Agreement
NFA	National Federation of Arm's Length Management Organisations
NFTMOs	National Federation of Tenant Management Organisations
NHF	National Housing Federation
NLUD-PDL	National Land-Use Database of Previously Developed Land
PFI	Private Finance Initiative
RDAs	Regional Development Agencies
RIBA	Royal Institute of British Architects
RICS	Royal Institute of Chartered Surveyors
RSL	Registered Social Landlord (housing association registered with the Housing Corporation)
RTB	Right to Buy (secure tenants' right to buy the home they live in)
RTM	Right to Manage (council tenants' right to manage their homes)
TAROE	Tenants and Residents Organisations of England
TMO	Tenant Management Organisation (organisation set up by tenants that have exercised the right to manage)
UDC	Urban Development Corporation

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