



# Guidance on the use of powers under the Housing and Regeneration Act 2008

A statutory consultation

**TSA**

**TENANT  
SERVICES  
AUTHORITY**



# Contents

<b>Consultation statement</b>	<b>2</b>
<b>Summary of key terms</b>	<b>7</b>
<b>Guidance on our use of our powers</b>	<b>8</b>
<b>Using our formal regulatory and enforcement powers</b>	<b>14</b>
<b>Individual guidance notes on the use of our powers</b>	<b>24</b>

# Consultation statement

## TSA consultation statement

This sets out key information about the issues we are consulting on, what effects we think any proposals or changes could have, who we are asking for views, and when and how to respond.

---

**Please respond by** 5 February 2010

---

**Please respond to** Amanda Newton  
Statutory Consultation Project Manager  
Tenant Services Authority  
4th Floor, One Piccadilly Gardens  
Manchester M1 1RG.  
Email: [statutoryconsultation@tsa.gsx.gov.uk](mailto:statutoryconsultation@tsa.gsx.gov.uk)

If you would like to discuss any issue raised in this document before sending your response please contact our Customer Service Team on 0845 230 7000, who can refer you to the relevant TSA lead.

---

**Why we are asking for views** We are introducing a new system of regulation for social housing providers (such as housing associations and local authorities) in England from 1 April 2010. This will implement the powers given to us in the Housing and Regeneration Act 2008. We are consulting on whether our proposals best meet the objectives Parliament set for us<sup>1</sup>.

---

**What it means for you** For tenants, landlords, lenders and other stakeholders who have an interest in the social housing sector, this consultation is an opportunity to influence how we implement our new powers.

---

<sup>1</sup> A glossary of terms is included at Annex 6 of the full statutory consultation document.

---

**Context for this consultation**

The Housing and Regeneration Act 2008 followed the 2007 Cave Review of social housing. The Cave Review made a clear case for reform, to introduce greater protection, choice and involvement for tenants of social housing in England. This consultation is about the implementation stage of a process of reform which began with that Review.

We have issued a formal, statutory consultation in the document A New Regulatory Framework for Social Housing in England, available from our website. After considering responses to that document we will make decisions on the new regulatory framework before 1 April 2010.

This document is a supplementary consultation paper associated with the full statutory consultation document. This guidance consults on the detail of how we intend to use certain powers to complement the general principles contained in Section 13 of the full statutory consultation document. That section is replicated in full within this supplementary paper.

We are not at this stage consulting on Guidance on all our powers. In this document we identify some powers relating to local authorities and some powers that are novel which will be subject to a further supplementary consultation on Use of Powers in due course.

The Government has issued two documents that are relevant to this consultation. The first contained its Directions to us on three particular standards (Directions to the Tenant Services Authority – summary of responses and Government response, November 2009, CLG). These relate to rents, quality of accommodation and tenant involvement. Our standards must comply with these directions. Where our standards reflect the Government's directions, our consultation documents cannot reopen consultation on the Government's policy.

The second contained Government's statement of intent in terms of our powers in relation to local authorities (The Housing and Regeneration Act (Registration of Local Authorities) Order 2009: a summary of responses, November 2009, CLG)

---

**Who is being consulted**

We welcome views from everyone who has an interest in the future of social housing in England.

The 2008 Act requires us to consult with certain statutory organisations; these are listed in Annex 2 of the full statutory consultation document.

---

**Taking account of your views and what happens next**

The full statutory consultation is about:

- our approach to co-regulation and setting standards for providers
- the standards we will be setting to give effect to our powers
- how we will monitor compliance against our standards;
- the ways that we might intervene when compliance issues arise
- the criteria for registration, and deregistration criteria

Ten key consultation questions are set out in Annex 1 to the full statutory consultation document, though views would be welcome on any aspect.

---

This supplementary consultation document contains detailed guidance on how we intend to use specific powers, and builds on Section 13 in the full consultation document. The key consultation question that relates to this document is:

**Q8: Is our general approach to using our formal regulatory and enforcement powers reasonable?**

In addition, based on this supplementary consultation document, feedback is sought on **whether the principles within the detailed Guidance Notes seem a reasonable basis on which we should use our powers.**

There is one further supplementary consultation paper associated with the full statutory consultation document:

Consent to Disposals – this contains our detailed proposals for how we shall grant certain consents in relation to disposals of stock

Social housing matters to people for a great many reasons and we expect to receive many different views about our new approach. This means that we will not be able to do everything that everyone wants. The TSA will have to decide, taking account of the views we receive, and of our legal objectives, duties and powers, what is the best way to proceed.

We will publish a decision statement in March 2010 before the new powers are activated on 1 April 2010.

---

**Publication of responses**

All formal written responses will be published shortly after 5 February 2010, the closing date of this consultation (unless you specifically ask us not to).

---

**Freedom of Information**

The information provided in response to this consultation (including personal information) may be published or disclosed under the access to information regimes, primarily those set out in the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004.

If you want information that you provide in response to this consultation to be treated as confidential, please be aware that we can only do so if it would be consistent with our legal obligations under the Freedom of Information Act. There is a statutory Code of Practice that public authorities must follow and this sets out how confidential information must be dealt with.

Although we cannot guarantee that all information will be kept confidential we will take into account any representations you make. In view of this it would be helpful if you could explain to us why you think any or all of the information you provide is confidential. This will help us establish whether or not there are grounds for not publishing the information you submit to us. An automatic confidentiality disclaimer generated by your IT system will not, in itself, be binding on the TSA.

The TSA will process your personal data in accordance with the Data Protection Act and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

# Summary of key terms

The following provides a summary of the main terms used in this document:

- The 2008 Act – the Housing and Regeneration Act 2008. This establishes the Tenant Services Authority (formally titled under the Act as the Office for Tenants and Social Landlords) and the Homes and Communities Agency (HCA) responsible for public investment in housing and regeneration
  - TSA – the Tenant Services Authority. The new Regulator for Social Housing in England. Regulation was previously undertaken by the Housing Corporation in relation to housing associations. The TSA has been given new powers, duties, and objectives under the 2008 Act
  - Social housing – this includes low cost rented housing, low cost home ownership and most other housing owned by existing registered social landlords (social housing is defined in sections 68 to 77 of the 2008 Act)
  - Tenant – a resident in social housing, whose provider could be a local authority, housing association or any other registered provider.
- In this consultation paper, this term does not include leaseholders<sup>2</sup>
- Provider – this means a registered provider within the definition in the 2008 Act. All providers registered with the TSA as of 31 March 2010 will automatically be registered as providers on 1 April 2010. Subject to Parliamentary approval, all local authority providers will be automatically registered too (both those that directly manage homes or where these services are provided by an Arm's-Length Management Organisation or Tenant Management Organisation). New applicants to be a registered provider after 1 April 2010 must meet the eligibility in the 2008 Act and registration criteria set by the TSA
  - ALMO – an Arm's-Length Management Organisation established by local authorities as management agents of their stock. ALMOs that do not own stock will not be registered under the 2008 Act and hence will not be the legal entity responsible for meeting the standards (it will apply to the sponsoring local authority). The same principle applies to Tenant Management Organisations (TMOs)

<sup>2</sup> The relevant powers in the Housing and Regeneration Act 2008 focus on the tenants of low-cost rented accommodation and low cost home ownership, not leaseholders. This reflected Government's view that leaseholders had a degree of choice to move out of social housing (unlike most tenants in the sector) and are protected by other regulations and legislation. Since many areas of social housing have a mixture of tenures, our regulation, designed to improve outcomes for tenants, is likely to have positive 'spill over' effects for leaseholders.

# Guidance on our use of our powers

## Introduction

- 1 The 2008 Act requires us to consult on guidance on how we use or intend to use certain powers. These powers are set out in the table below along with references to sections in the full statutory consultation document. For some powers, a separate detailed Guidance Note has been published and is contained within this supplementary consultation document.
- 2 There are also a number of powers we have where we are not obliged to consult on guidance but believe doing so is in the interest of transparency. These relate to our powers to direct the HCA not to provide financial assistance to a registered provider (s.106), power to collect information (ss.107), insolvency of a registered provider (ss.144-159), restructuring and dissolution (ss.160-165), petition to wind up a registered provider (s.166), transfer net assets on dissolution (s.167) and give financial assistance (s.95(3)). Guidance on all these areas is contained within this supplementary consultation document.
- 3 We are not at this stage consulting on guidance on all our powers. There are some that relate to local authorities (such as censure of an officer during or after an inquiry, or appointment of an adviser) where we are keen to work with local authority stakeholders to better understand how these powers might be used. There are also some powers that are novel where more time is required for discussion with stakeholders before we can produce guidance. These relate to powers to transfer and tender management. These powers will be subject to a further supplementary consultation document on Use of Powers in due course.

Figure 1 **Guidance on our use of powers**

Power in the 2008 Act	Reference in the 2008 Act	Relevant section where guidance can be found	Separate detailed Guidance Note published for consultation?
Setting standards for provision of social housing	Chapter 6 (s.193)	Sections 3 and 4 of the full statutory consultation document.	No
Setting standards for management	Chapter 6 (s.194)	Sections 3 and 4 of the full statutory consultation document.	No
Codes of Practice	Chapter 6 (s.195)	Sections 3 of the full statutory consultation document.	No
Arranging a survey	Chapter 6 (ss.199-200)	General principles contained in section 13 of the full statutory consultation document.	Yes
Arranging an inspection	Chapter 6 (ss.201-203)	General principles contained in section 12 of the full statutory consultation document.	Yes
Performance information	Chapter 6 (ss.204-205)	Section 12 of the full statutory consultation document.	No

Conduct an inquiry	Chapter 6 (ss.206-209)	General principles contained in section 13 of the full statutory consultation document.	Yes
Arrange an Extraordinary Audit	Chapter 6 (s.210)	General principles contained in section 13 of the full statutory consultation document.	Yes
Changes to non-profit providers management and constitution	Chapter 6 (ss.211-214)	General principles contained in section 13 of the full statutory consultation document.	Yes
Complaints to us	Chapter 6 (s.215)	Section 12 of the full statutory consultation document.	No
Operate an accreditation scheme	Chapter 6 (s.217)	Not contained in these documents as we shall work with the HCA to review the requirements for accreditation after 1 April 2010.	No
Enforcement Notice	Chapter 7 (ss.219-225)	General principles contained in section 13 of the full statutory consultation document.	Yes

Impose fines	Chapter 7 (ss.226-235)	General principles contained in section 13 of the full statutory consultation document.	Yes
Award compensation	Chapter 7 (ss.236-245)	General principles contained in section 13 of the full statutory consultation document.	Yes
Management tender	Chapter 7 (ss.247-248)	General principles contained in section 13 of the full statutory consultation document.	No. Detailed guidance will be published at a later date
Management transfer	Chapter 7 (ss.249-250)	General principles contained in section 13 of the full statutory consultation document.	No. Detailed guidance will be published at a later date
Appointment of manager	Chapter 7 (ss.251-252)	General principles contained in section 13 of the full statutory consultation document.	Yes
Transfer of land	Chapter 7 (ss.253-254)	General principles contained in section 13 of the full statutory consultation document.	Yes

Amalgamation	Chapter 7 (s.255)	General principles contained in section 13 of the full statutory consultation document.	Yes
Restrictions on dealings	Chapter 7 (ss.256-258)	General principles contained in section 13 of the full statutory consultation document.	Yes
Suspension and removal of officers during or following an inquiry or audit	Chapter 7 (s.259-265)	General principles contained in section 13 of the full statutory consultation document.	Yes
Removal of officers other than following an inquiry or audit	Chapter 7 (ss.266-268)	General principles contained in section 13 of the full statutory consultation document.	Yes
Appoint a new officer	Chapter 7 (s.269)	General principles contained in section 13 of the full statutory consultation document.	Yes
Appoint adviser to a local authority provider	s.252A (domain order)	General principles contained in section 13 of the full statutory consultation document.	No. Detailed guidance will be published at a later date

---

Censure a local authority during or after an inquiry s.269A+B (domain order) <sup>3</sup>	General principles contained in section 13 of the full statutory consultation document.	No. Detailed guidance will be published at a later date
---	---	---

---

This supplementary consultation document should be read in the context of our fuller proposals set out in the full statutory consultation document. For ease of reference Section 13 of that document relating to general principles underlying the use of our powers is repeated here in full.

<sup>3</sup> 'Domain order' in this context means the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2009 Consultation, Annex A, July 2009, CLG.

# Using our formal regulatory and enforcement powers

This chapter sets out chapter 13 of our full consultation document, A New Regulatory Framework for Social Housing in England.

## 13 Using our formal regulatory and enforcement powers

13.1 We want to ensure that there are mechanisms by which poor performance by providers is identified and put right in order that tenants receive the service they deserve and to ensure that lenders retain confidence in the sector (in the case of housing associations). As set out in Section 12 of the full statutory consultation document, we expect providers to take responsibility for their self-improvement. We would expect this to be effective in most cases. However, in cases where this approach is either inappropriate or has proved unsuccessful, we will need to consider how to address the issue using our formal powers.

## Guidance on the use of our statutory powers

13.2 Where the TSA considers a provider's performance is of sufficient concern to warrant more intensive regulatory scrutiny and engagement is necessary, it may need to consider the use of its regulatory, enforcement and general powers.

13.3 We are required by the 2008 Act to consult on how we intend to use some of our formal powers. Reference to 'powers' in this chapter relates to those powers listed in the sections below. This chapter constitutes our consultation on the high level objectives and principles that might underpin our approach to dealing with poor performance and using our regulatory and enforcement powers.

13.4 Published alongside the full statutory consultation document is a supplementary consultation document on Guidance on Use of the TSA's Powers. This consults on the detail of how we intend to use many of these powers from 1 April 2010 although guidance in relation to some of our other powers, such as setting standards and how we will deal with complaints about providers' performance, is contained elsewhere in the full statutory consultation document. Figure 1 of the

Use of Powers document sets out a summary where you can find the guidance on each power about which we are consulting. We have developed guidance on our powers in relation to local authorities based on the Government's intentions for these powers but note this is subject to Parliamentary approval<sup>4</sup>.

13.5 We are not at this stage consulting on guidance on the detail of all our powers. There are some powers that relate to local authorities (such as censure of an officer during or after an inquiry and appointment of an adviser) where we are keen to work further with local authority stakeholders to better understand how these powers might be used. There are also some powers that are novel and complex and where more time is required for discussion with stakeholders before we can produce detailed Guidance. These relate to powers to transfer and tender management. These powers will be subject to a further supplementary consultation on our Use of Powers in due course.

13.6 In broad terms, the TSA can exercise the powers described below where it suspects or has evidence of a failure against a standard(s) or where a provider has mismanaged its affairs or, in some cases, for other reasons that are specified in the 2008 Act<sup>5</sup>.

## **Our new graduated range of powers**

### **Monitoring and investigative powers for all providers**

13.7 We have a number of regulatory powers under the 2008 Act to monitor providers' compliance with regulatory requirements or in the event that we suspect a provider is failing to meet a standard or is in breach of other regulatory requirements.

13.8 The following powers will apply from 1 April 2010 to all existing registered social landlords

<sup>4</sup>This is set out in the Government's response to its consultation on our powers in relation to local authorities (The Housing and Regeneration Act [Registration of Local Authorities] Order 2009: a summary of responses, November 2008, CLG).

<sup>5</sup> The term 'mismanaged' in relation to the affairs of a provider is defined in section 275 of the 2008 Act as: managed in contravention of a provision of the 2008 Act or of anything done under the Act; or otherwise conducted improperly or inappropriately.

(RSLs), local authority providers and any new not for-profit and profit-making providers:

- Collect information and documents (S107 to 108)
- Arrange a survey (S199)
- Arrange an inspection (S201 to 203)
- Direct an inquiry (S206 to 209)
- Direct an extraordinary audit (S210)

**If a provider is a current RSL (or is not a local authority and intends to become a registered provider)**

13.9 We have a range of enforcement powers which can require the provider to take specified action to resolve an identified failure or other problem. The following enforcement powers can be used for providers who are not local authorities:

- Enforcement notice (S219 to 225)\*
- Penalty fine (S226 to 235)
- Award compensation (S235 to 245)
- Direct a tender of management (S247 and 248)\*
- Direct a transfer of management (S249 and S250)\*
- Appoint a manager (S251-252)
- Direct a transfer of land (S253 to 254)

- Make and execute an amalgamation of an industrial and provident society (S255)
- Direct restrictions during or following an inquiry (S256 to 265)
- Remove an officer in circumstances such as bankruptcy (S266 to 268)
- Appoint new officers (S269)

\* See para. 13.12 for equivalent powers for local authorities

13.10 The following relevant general powers will also apply to non-local authority providers:

- Give financial assistance (S95(3))
- Direct Homes and Communities Agency not to invest (S106)
- Direct how sums in a disposals proceeds fund are used, allocated or paid (S178)
- Settle the affairs of providers that become insolvent (S144 to 159)
- Petition to wind up a provider (S166)
- Transfer net assets on dissolution (S167)
- Place restrictions on disposals or transfers of property (S170 to 176)

13.11 Some of these powers are similar (but not exactly the same) as those the TSA is currently using to regulate housing associations and other

registered social landlords under the Housing Corporation's 1996 Act powers. Those that are substantially similar include the powers to conduct an inquiry, arrange an extraordinary audit, approve changes to non-profit providers' management and constitution, transfer of land, restriction of dealings during or following an inquiry and suspension, removal and appointment of an officer. Our new enforcement powers include an enforcement notice, a penalty fine, award compensation, direct a tender of management, direct a transfer of management, appoint a manager and make and execute an amalgamation of an industrial and provident society.

#### **If a provider is a local authority**

13.12 The Government intends to give us the following enforcement powers in relation to local authorities:

- Appoint advisors to a local authority (S252A)
- Enforcement notice (S219 to 225)
- Censure a local authority during or following an inquiry (S269A and B)
- Direct a tender of management (S247 and 248)
- Direct a transfer of management (S249 and S250)

13.13 In addition, the following relevant general powers apply to local authorities:

- Direct the Homes and Communities Agency not to invest (S106)
- Collect information and documents (S107 to 108)
- Place restrictions on disposals or transfers of property (S170 to 176)

### **How we will use our powers: general**

13.14 Our approach to using our powers is underpinned by three key components: our fundamental objectives; our standards (and any associated Codes of Practice); and any specific requirements in the 2008 Act in relation to using our powers.

13.15 We may consider the use of our regulatory powers, including inspection, to investigate where we suspect that there may have been a failure to meet the standards or that the affairs of a provider have been mismanaged. The investigation may lead to no further action, an agreed self improvement plan without recourse to our formal enforcement

powers, or in some cases where it is warranted more formal use of our enforcement powers.

13.16 Use of our enforcement powers does not rely on us using our formal investigation powers in advance of this (such as an inspection or inquiry). For example, an enforcement notice could be issued if the TSA is satisfied that a provider has failed to meet a standard<sup>6</sup>.

13.17 We will keep the use of our powers under regular review, and may decide to exercise any of the powers if improvement by the provider is not sustained or if the circumstances of the case make it necessary to do so. The TSA may use its powers either singly or in combination depending on the circumstances and issues of the case.

## **Principles underpinning our approach to using our powers: what providers can expect from us**

13.18 We will adopt the following principles:

- We will generally take into account the role of self-improvement before using any of our enforcement powers. In cases where this approach is either not appropriate or has proved unsuccessful, we will need to consider how to address the issue using our more formal powers
- Where we do use our enforcement powers we will usually adopt a graduated approach unless the merits of the case warrant a different approach at an early stage
- We will have regard to our fundamental objectives when considering any individual case and will seek to balance the interests of the provider, its tenants, its key stakeholders and the impact on public funds when responding to the circumstances of each individual case
- We will be proportionate in our approach, consistent in how we make judgements, accountable for our actions and transparent in

<sup>6</sup> Section 220(8): this section also contains other examples.

our relationships with the provider, its tenants and other stakeholders. There may be occasions where the pursuit of our statutory objectives (eg financial viability) limits how transparent we can be with third-parties whilst we are considering using our powers in relation to a provider

- We will always explain the grounds and give reasons for taking action. We will usually give notice of any action (in some cases we are required to do so by the 2008 Act)
- We will assess the most appropriate course of action taking account of the particular circumstances of the provider (including any structural differences arising from the type of provider or the financing arrangements that they must operate), the level of risk and the potential impact associated with the provider, tailor our regulatory engagement accordingly and always take action which is commensurate with the materiality of the breach or failure
- We will give careful consideration to any remedial strategies proposed by the provider, including any relevant voluntary undertakings, and will seek to agree the way forward with the provider when it is prepared to resolve the presenting issues and we conclude that it has all the resources necessary to do so

- We will take account of any significant changes in circumstances and adapt our approach accordingly

13.19 We may need to react and respond as a matter of urgency to unanticipated and exceptional events that happen from time to time. In circumstances where we consider it necessary and expedient to do so we may adjust the intensity of our engagement with a provider, or exercise one or more of our powers with little or no notice, particularly in circumstances where giving notice would defeat the purpose of taking the proposed action or where it is necessary to protect tenants from immediate harm or to protect public funds.

## How we will engage with providers

13.20 We want to be transparent in our relationship with a provider when we are considering the use of any of our enforcement powers. Our approach will need to have regard to the circumstances of the case, particularly where we think that urgent or immediate action is necessary and we have to apply the power with little or no notice. We will apply the following principles when we engage with a provider in circumstances

where we are considering using our formal powers (whilst respecting the fact that the 2008 Act in some cases establishes a procedure to be followed and this is set out in the detailed Guidance Notes):

- We will have dialogue with the provider before, during and following this process in accordance with our usual approach to regulatory engagement with the provider to ensure we work together to protect tenants, social housing assets and public funding. This includes informing a provider when we are minded to use a power explaining the issues and concerns we have and giving the provider an opportunity to respond to this
- We will give notice to a provider when we propose to use a power. We will explain the power and the issues or concerns that have made us consider using it
- We will invite the provider to make representations in response to our notice and to give us any information or comments, including any relevant voluntary undertaking, it thinks might help us make our decision about whether or not to use the power
- We will carefully consider any representations, information and comments, including any relevant voluntary undertakings received from

the provider in coming to a decision about the action we intend to take

- We will notify the provider of our decision, and give our reasons for making it. We will tell providers about any appeal or challenge procedures related to our decision and any related timescales

## **Factors that may lead to the use of our regulatory, enforcement and general powers**

13.21 In broad terms, any decision will be based on:

- the seriousness of the failure or problem identified
- the urgency with which the problem or failure needs to be addressed
- the level of risk associated with the provider and the potential impact of its failure
- the degree of assurance given by the provider to the TSA in relation to action it is taking or will take to resolve the issue. We may take into account the provider's history in dealing with relevant issues
- the resources available to the provider to resolve the problems

- proportionate use of resources that need to be applied to our regulatory engagement with the provider

13.22 We will notify the provider when we are minded to use any of our regulatory, enforcement and general powers.

13.23 In order to bring about improvements, we may propose an action plan setting out the key corrective actions required and the milestones and timetable in which they should be achieved. We will usually work with the provider to agree how best to implement this plan. We will carefully consider any remedial plan submitted by a provider, including any voluntary undertaking it gives to the TSA.

13.24 We will notify the provider when it has completed the key corrective actions to our satisfaction. This will be confirmed following a comprehensive risk assessment of the provider.

13.25 Our aims will always be underpinned by our fundamental objectives and our standards. Our specific objectives may vary from case to case or change during the course of a case, but broadly speaking we would want to:

- address and resolve the presenting problems and any related or contributory problems
- protect the interests of tenants including by improving standards of performance so that tenants receive a quality of service delivery required by our standards
- require the provider to meet acceptable standards of organisational effectiveness and service delivery
- act as a catalyst for change within the provider and ensure that any improvements in performance are sustained in the long-term
- protect public expenditure and guard against the misuse of public funds;
- reassure lenders
- protect the reputation of providers of social housing as a whole
- address and seek to resolve any additional relevant and material matters that come to light while a provider is subject to our regulatory, enforcement or general powers
- where necessary, co-ordinate our approach with other regulatory bodies, such as the Audit Commission

## Checks and balances on the use of our powers

13.26 There are a number of checks and balances in the 2008 Act which must be applied to the TSA's use of its powers.

### Regulators Compliance Code

13.27 The TSA must regulate in a manner which minimises interference and is proportionate, consistent, transparent and accountable. The 2008 Act requires the TSA to comply with the provisions of the Regulators' Compliance Code<sup>7</sup>. The Code does not apply to the exercise by a regulator of any specific regulatory function in individual cases.

### Consideration before exercising an enforcement power

13.28 The 2008 Act states the TSA must consider four specific matters<sup>8</sup> before deciding whether to or how to exercise an enforcement power<sup>9</sup>. They are:

- the desirability of a provider being free to choose how to provide services and conduct business
- whether the failure or other problem is serious or trivial
- whether the failure or other problem is a recurrent or isolated incident
- the speed with which the failure or other problem needs to be addressed

### Voluntary undertakings

13.29 A provider can give the TSA a voluntary undertaking ('an undertaking') in respect of any matter concerning social housing<sup>10</sup>. The circumstances in which such an undertaking can be given are widely drawn. For example, a provider may offer such an undertaking whilst subject to regulatory, enforcement or general powers.

13.30 In exercising some of our powers we must have regard to any undertaking offered or given by a provider. We will consider any undertaking offered in such circumstances in accordance with published procedures.

<sup>7</sup> Issued under section 22 of the Legislative and Regulatory Reform Act 2006.

<sup>8</sup> Section 218 of the 2008 Act.

<sup>9</sup> Sections 218 to 269 of the 2008 Act.

<sup>10</sup> Section 125 of the 2008 Act.

13.31 We may take into account whether a sufficient undertaking has been offered and honoured. In considering an undertaking, the TSA will:

- assess whether or not we consider the terms of an undertaking are satisfactory, giving reasons for our decision
- monitor the provider's progress towards meeting its undertaking and assess whether the provider has honoured the undertaking, giving reasons for our decision

13.32 Although an undertaking will always be a voluntary matter for the provider, we will respond in the event a provider asks whether an undertaking would address matters that have necessitated enhanced scrutiny by the TSA.

13.33 While we must have regard to any undertaking offered or given by a provider, there may be circumstances where the existence of a voluntary undertaking may not prevent further enforcement activity. This might include circumstances in which we consider that the undertaking is unsatisfactory or insufficient to resolve the problems, or where urgent or immediate action is necessary.

13.34 We will usually make a public statement in circumstances where we accept an undertaking.

## Consultation question

8. **Is our general approach to using our formal regulatory and enforcement powers reasonable?**

# Individual guidance notes on the use of our powers

The remainder of this supplementary consultation document contains individual guidance notes for certain specific powers within the Housing and Regeneration Act 2008. The index below shows the order in which they appear, and references the paragraphs of the Act to which they relate.

For the purposes of this consultation, we welcome feedback on the following question:

**Do the principles within the detailed Guidance Notes seem a reasonable basis on which we should use our powers?**

## Key

Guidance note	Act sections	Title	Page
1	212 - 214 160 - 165	Guidance for constitutional consents Restructuring and dissolution	
2	95(3)	Financial assistance	
3	106	Direction to the HCA	
4	107 - 108	Information	
5	144 - 159	Insolvency	
6	166	Winding up petition by regulator	
7	167	Transfer of property	
8	199 - 200	Survey	
9	201 - 203	Inspection	
10	206 - 209 210	Inquiry Extraordinary audit	
11	219 - 225	Enforcement notices	
12	226 - 235	Penalties	
13	236 - 245	Compensation	
14	251 - 252	Appointment of manager	
15	253 - 254	Transfer of land	

---

16	255	Amalgamation of an industrial and provident society
17	256 - 265	Powers available during or following an inquiry
18	266 - 268	Removal of an officer
19	269	Appointment of a new officer

---

## Guidance note 1

# Guidance for constitutional consents (sections 212 to 214), restructuring and dissolution (sections 160 to 165)

Section 215 of the Housing and Regeneration Act (the Act) requires the regulator to publish guidance on how it intends to use certain powers. This document comprises proposals for our guidance on how the Tenant Services Authority (the TSA) intends to use its power to give consent to requests to rule changes made by Industrial and Provident Societies, changes to objects by charities and article changes from Companies. The specific provisions are set out in chapter 6, sections 212 to 214 of the Act and relate only to non-profit registered providers. The provisions are included at the end of this note. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach to our new regulatory framework.

### Our proposals for using this power

When considering applications for changes to constitutions the TSA will balance a range of factors, including the need to safeguard tenants' rights, relevant legislation, our duties as a public body, our fundamental objectives and the standards we expect registered providers to meet.

Our expectation is that non-profit registered providers' objects will include the following clauses:

- not for profit
- the provision of social housing
- non-distribution of assets to members

### Dealing with 'group structures'

Groups structures are not defined in the Act, but we treat registered providers as being in a group structure where any combination of two or more organisations are working together and where one, the parent, has constitutional control of the other(s), subsidiaries.

The term 'subsidiary' and 'associate' are defined in section 271 of the Act.

Applications for registered providers becoming or ceasing to be a subsidiary or associate of another body will be considered in the context of the TSA's fundamental objectives, the TSA's eligibility criteria and conditions for registration and the standards for social housing providers. Factors that we will, therefore, take into consideration when appraising applications include:

- the overall business case

- the level and quality of consultation with tenants and relevant stakeholders in particular local authorities and lenders
- evidence that the new structure will improve services to current and future residents
- rationalisation of stock holding and management issues
- value for money of the proposal
- simple, clear and straightforward governance structures
- desirability of maintaining a choice of providers and competition in a region

### Procedural guidance

To help applicants in this process, the TSA will publish a detailed procedural note for registered providers to follow when amending their constitutions. The note will include the specific requirements and arrangements for industrial and provident societies, registered companies and registered charities which are not also registered companies. The note will include details of:

- who the note applies to
- what documentation we will require
- where applications should be sent
- how long it will take us to deal with your application
- contact details

Chapter 4 of the Act includes some general provisions relating to **non-profit registered providers**. The following processes are only effective if the TSA has first consented:

### Restructuring and dissolution

s160 Company arrangements and reconstructions

s161 Company conversion into an industrial and provident society

s162 Company winding up

s163 Industrial Society restructuring

s164 Industrial and provident society winding up

s165 Industrial and provident society dissolution.

Although these processes are not governed by s215, the TSA thinks it will be helpful to applicants to publish guidance on these processes so that they can see how they will work. As in the case with constitutional consents the TSA will publish a procedural note for registered providers to follow when applying for any of these processes.

When considering applications the TSA will have regard to residents' rights, relevant legislation, our duties as a public body, our fundamental objectives and the standards we expect registered providers to meet.

Applications for these processes will be considered in the context of any ring fencing arrangements and policy constraints the TSA has in place. Factors that we are likely to take into consideration when appraising applications include:

- the overall business case
- the level and quality of consultation with tenants and relevant stakeholders in particular local authorities and lenders
- evidence that the new structure will improve services to current and future residents
- rationalisation of stock holding and management issues
- value for money of the proposal
- simple, clear and straight forward governance structures

Relevant sections of the Act:

### **211 Non-profit providers only**

This group of sections applies only to non-profit registered providers

212 Industrial and provident society: change of rules

(1) This section applies to an industrial and provident society

(2) An amendment of the society's rules requires consent if it:

- (a) alters the society's objects
- (b) makes provision about the distribution of assets to members, or
- (c) enables the society to become, or cease to be, a subsidiary or associate of another body

(3) An amendment of the rules which requires consent is effective only if the regulator has first consented

(4) The regulator may not consent to an amendment which it thinks would turn the society into a profit-making organisation

(5) The society must notify the regulator of an amendment of the rules which does not require consent

(6) In relation to an amendment which requires consent the requirement in Section 10(1) of the Industrial and Provident Societies Act 1965 (c 12) (sending copies of amendment of rules to FSA) is satisfied only if the copies are accompanied by a copy of the regulator's consent

(7) The preceding provisions of this section shall be treated as if they formed part of that Act as well as of this Act

(8) The Secretary of State may by order amend the list in subsection (2)

### **213 Charity: change of objects**

- (1) This section applies to a registered charity which is not a registered company
- (2) An amendment of the charity's objects is effective only if the Charity Commission has first consented
- (3) Before giving consent the Charity Commission must consult the regulator

### **214 Companies: change of articles**

- (1) This section applies to a registered company
- (2) An amendment of the company's articles of association requires consent if it:
  - (a) alters the company's objects
  - (b) makes provision about the distribution of assets to members, or
  - (c) enables the company to become, or cease to be, a subsidiary or associate of another body
- (3) An amendment of the articles of association which requires consent is effective only if the regulator has first consented
- (4) The regulator may not consent to an amendment which it thinks would turn the company into a profit-making organisation

- (5) The company must notify the regulator:
  - (a) of an amendment of the articles of association which does not require consent, or
  - (b) of a change to its name or registered office
- (6) In relation to an amendment which requires consent the requirement in section 30 of the Companies Act 2006 (c 46) (sending copy of resolution to registrar) is satisfied only if the copy is accompanied by a copy of the regulator's consent
- (7) The Secretary of State may by order amend the list in subsection (2)

# Guidance note 2

## Guidance on section 95(3): Financial assistance

### Purpose

1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power relating to the provision of financial assistance to a registered provider. This is a general power and is set out in Chapter 2 Section 95(3) of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to registered providers with the exception of local authority providers. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.

### Background and context to the use of the power

2 A registered provider is expected to manage its business affairs to ensure that it remains viable in the short, medium and long terms. It should take appropriate steps to ensure that it has access to the finance necessary to meet its ongoing commitments. The TSA is not a funding authority and does not hold budgets to enable it to act as one. Its powers to provide financial

assistance are ancillary to its main powers, and the TSA considers that it would only propose their use in exceptional circumstances.

### The power

#### The circumstances in which the power can be exercised

3 The power can be exercised where the TSA thinks it advances one or more of the fundamental objectives of the TSA set out in Section 86 of the Act. It is restricted by the fact that financial assistance can only be given with the consent of the Secretary of State which in turn must have the approval of the Treasury. Financial assistance under this Section can be in the form of a loan, a guarantee or an indemnity.

4 The TSA envisages seeking consent to use this power only in exceptional circumstances. Examples might be where tenants are in danger of losing their homes or their health and safety is at risk, or where temporary support protects existing public investment while a rescue plan is being developed. The TSA would only consider a case for such support where all other possible avenues for obtaining finance had been

exhausted. Any case would have to demonstrate that TSA assistance would facilitate a strategy for permanent resolution of the underlying problem, and financial plans would have to make provision for repayment of any TSA loan or recovery of a guarantee or indemnity.

## Consultation

- 5 Apart from the need to obtain the necessary consents the Act does not require the TSA to consult relevant persons in exercising its power under Section 95(3). However, the TSA recognises that, in a situation where financial assistance was required, full regard would have to be paid to a wide range of legitimate interests. The TSA is committed to as full consultation as is possible with relevant stakeholders.

## Guidance note 3

# Guidance on section 106: Direction to the HCA

### Purpose

1 This document gives general advice and guidance on how the Tenant Services Authority (TSA) may exercise the power to Direct the Homes and Communities Agency (HCA) not to invest in a registered provider of social housing. This power is set out in chapter 2 Section 106 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to a registered provider in the specific circumstances set out in the section of this guidance describing the scope of the power. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.

### Potential triggers to the exercise of the power

2 Section 106 of the Act sets out three specific circumstances in which the TSA may exercise the power to direct the HCA not to give financial assistance in connection with social housing to a specified registered provider. They are where:

- The TSA has decided to hold an inquiry into the affairs of the provider under section 206 of the Act, and the inquiry has not been concluded
  - The TSA has received notice in respect of the provider under section 145 of the Act
  - The TSA has appointed an officer of the provider under section 269 of the Act and the person has not vacated office
- 3 In circumstances where one or more of the actions that might trigger a direction have taken place, the TSA will assess the most appropriate course of action and in particular, whether it is necessary to issue such a direction to the HCA. If there is a significant risk to the public funding that the HCA has committed to the provider previously, or may commit to the provider in the future, the TSA may issue a direction.
- 4 The TSA would not normally issue a direction in relation to projects where the HCA has issued a grant confirmation and the provider has entered a contractual commitment. It will also take account of the potential impact on the provider's financial viability and on its services to its tenants.

## Scope

- 5 The power may be exercised in relation to:
- All providers including a non-profit private registered provider, a for-profit private registered provider or a local authority provider where an inquiry under section 206 of the Act is the trigger
  - Registered providers which are registered companies or industrial and provident societies where a notice under Section 145 of the Act is the trigger
  - A non-profit private registered provider where the appointment of a new officer under section 269 of the Act is the trigger

## The direction

- 6 A direction may prohibit the HCA from giving assistance of a specified kind. However, a direction may not prohibit grants to a provider where these are payable by the HCA in respect of statutory discounts given by the provider on disposals of dwellings to tenants. The TSA will review the need for the direction on a regular basis, but it will remain in effect until it has notified the HCA that it has been withdrawn.
- 7 The TSA will inform the HCA of the reasons for the direction, and all communication between the TSA and the HCA will be in accordance with the terms of the memorandum of understanding between the two organisations.

## Guidance note 4

# Guidance on sections 107 and 108: information

### Purpose

1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power on the collection of information and documents. This is a general power and is set out in chapter 2 Sections 107 and 108 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to all registered providers. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England which sets out the objectives and principles that underpin the TSA's approach.

### Scope

2 The power may be exercised in relation to all providers, including a non-profit private registered provider, a for-profit private registered provider and a local authority provider. It may also be exercised in relation to anyone who has applied to become a registered provider.

### Background and context to the use of the power

3 The TSA needs to collect and hold reliable information so it can undertake its functions as an effective regulator. The TSA will use this information to assess compliance with the standards framework. The TSA is committed to minimising the additional burden of its information requirements through the best use of information that is already available. This may include information produced by providers for public reporting or for internal management purposes. The TSA expects providers to produce the information and documents it requires on a regular and timely basis under this general power. However, it may be necessary for the TSA to exercise this power in circumstances where providers are unable or unwilling to provide the documents or information which the TSA requires routinely to carry out its functions, or where it believes there may have been a breach of the standards. This guidance sets out how the TSA would use the power in those circumstances.

## Potential triggers to the exercise of the power

- 4 Sections 107 and 108 of the Act set out the circumstances in which the TSA may exercise the power to collect information. The TSA may, for a purpose connected with its functions, require a person to provide a document or information which it believes is, or may be, in the person's possession and which relates to:
  - The financial or other affairs of a provider
  - Activities which are, or may be, carried out by a person who is, or who has applied to become, a registered provider
- 5 The TSA is most likely to exercise the power where:
  - There is a potential failure against a standard
  - The provider has failed to produce the information and documents required on a routine basis by the TSA
  - The provider is either slow or unwilling to produce additional information and documents requested by the TSA when the TSA has grounds to believe that there may be a problem

with a provider's performance and needs to undertake further regulatory scrutiny

- The provider has failed to honour a voluntary undertaking to the satisfaction of the TSA
- The provider has failed to deal with previous regulatory interventions to the satisfaction of the TSA
- It is necessary to collect information or documents as part of the exercise of the TSA's wider regulatory or investigatory powers such as an inspection or an inquiry
- This is not an exhaustive list and the TSA may conclude that it is necessary to exercise the power in other circumstances to those set out above

## The power

### Who can be required to provide documents and information?

- 6 The application of the provisions of sections 107 and 108 of the Act is not restricted to a provider. The TSA can require a document or information from any person who is, or may be, in possession of it. This may include any person who is, or has been an officer, member, employee or agent of a provider or anyone providing goods or services to

a provider. A requirement may be imposed on a person other than a provider only if:

- The provider has been asked to produce a document or information but has failed to do so, or
  - The TSA concludes that the provider is unable to produce it
- 7 The provisions of the Act do not require a person to produce anything which they would be entitled to refuse to disclose on the grounds of legal professional privilege in proceedings in the High Court.
- 8 The provisions of the Act do not require a banker to breach a duty of confidentiality owed to a person who is not the provider to whose affairs or activities the documents or information relates, a subsidiary of the provider or an associate of the provider.

## The process

### A requirement

- 9 The TSA will send a notice, or a requirement, to the provider which will:
- Clearly state that the information is required under this power
  - Specify the document or information required
  - The form and manner in which the document or information is to be provided, which may include the provision of a legible copy of information stored electronically
  - When and where the document or information is to be provided

### Response

- 10 The TSA expects the provider or other person to produce the document or information in accordance with the terms of the requirement. If the provider or other person does so, the TSA will acknowledge receipt. The TSA may copy or record the document or information produced.

## Failure to comply with a requirement

11 If a provider or other person fails to comply with a requirement without reasonable justification, the TSA will consider whether further action may be necessary. If a provider or other person is unable to produce the document or information, they may give the TSA a written explanation setting out the reasons for the failure to comply with the requirement. Any such representations will be considered by the TSA and taken into account in deciding whether or not to take further action.

- A provider or other person intentionally alters, suppresses or destroys a document or information to which a requirement relates

14 Where information has been altered, suppressed or destroyed, the TSA may consider using one or more of its other powers.

## Further action

12 The TSA may apply to the High Court to make an order to remedy the failure to comply with a requirement. In such circumstances the TSA may seek provision for costs.

13 The Act makes provision for the TSA or the Director of Public Prosecutions to bring proceedings, or to consent to proceedings, in circumstances where:

- A provider or other person fails without reasonable excuse to comply with a requirement

## Guidance note 5

# Guidance on sections 144 to 159: Insolvency etc

### Purpose

1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) envisages the power relating to the potential insolvency of a registered provider working. This is a general power and is set out in Chapter 4 sections 144 to 159 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to registered providers with some exceptions which are set out in the section below on Scope. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.

### Scope

2 The power may be exercised in relation to a registered provider which is a registered company or an industrial and provident society. It cannot be applied to a local authority provider or to a charity which is not incorporated as a registered company. Many of the actions required in a potential insolvency are specified in the Act and the TSA does not have discretion as to their application.

### Background and context to the use of the power

3 Where a registered provider identifies a potential problem with, or threat to, its viability, for whatever reason, the TSA expects the provider to notify it immediately. The TSA will intervene as it sees fit with the objective of ensuring that viability is maintained. It may be possible to avert a potentially damaging situation without the need for formal insolvency powers to be employed.

4 The purpose of the TSA's insolvency power is to allow the TSA a period of time in which to seek a solution to the provider's viability problem, thereby protecting the interests of the provider's residents and safeguarding any public funds invested in the provider. The power should not be construed as implying that the TSA will underwrite the provider's financial position in any way. The TSA will make every effort to make proposals acceptable to the secured creditors for the future ownership and management of the provider's land, with a view to ensuring continued management of housing property by a registered provider. The future owner or manager might not be the existing provider. The TSA will attempt

to ensure that the interests of all the provider's creditors are protected in any solution.

## The power

### The circumstances in which the power can be exercised

5 Section 145 of the Act specifies six actions, described in the Act as 'steps', any one of which would trigger the use of the TSA's insolvency power. They are:

- 1 Any step, of a kind prescribed for the purposes of this section by the Secretary of State, to enforce a security over land held by a registered provider
- 2 The presenting of a petition for winding up a registered provider (but not if the TSA presents a petition under Section 166 of the Act)
- 3 The passing of a resolution for the winding up of a registered provider (but not where the TSA's consent is required for a resolution under Sections 162 and 164 of the Act)

- 4 A decision by the governing body of a registered provider to present a petition for its winding up
- 5 The making of an Administration Order in respect of a registered provider which is a registered company
- 6 The appointment of an Administrator in respect of a registered provider which is a registered company.

### The effect of action under Section 145

- 6 If an action under Section 145 is taken in respect of a registered provider, a moratorium on the disposal of land (1) by the provider begins. The initial period of moratorium is 28 working days. During a moratorium the TSA may:
  - Appoint an interim manager of the registered provider
  - Make proposals about the future ownership and management of the registered provider's land with a view to ensuring that the property will be properly managed by a registered provider

If the TSA makes proposals, those proposals only have effect if they are agreed by each of the

provider's secured creditors as the TSA is able to locate after making reasonable enquiries. The Act envisages the proposals making provision for a manager to be appointed by the TSA to implement those proposals. The powers which may be conferred upon the manager are set out in the Act. The TSA has the power under Section 158 of the Act to give financial or other assistance to a registered provider for the purpose of preserving its position pending the agreement of proposals, or to a registered provider or an appointed manager to facilitate the implementation of agreed proposals. Certain forms of financial assistance require the prior consent of the Secretary of State.

(1) 'Land' has the meaning given by Section 205 (1) of the Law of Property Act 1925 and includes housing or other buildings.

## **Notice to be given to the TSA**

7 The relevant provisions of the Act are triggered when a 'step' is taken. Section 144 provides for notice to be given to the TSA before any such step is taken, otherwise the purported action is ineffective. The Act makes no provision as to when the prior notice must be given or the form that such a notice should take. However,

receipt of prior notice might allow the TSA an opportunity of assisting in the resolution of the problem, thus rendering the actual taking of the step unnecessary.

8 On receipt of a notice under Section 144 the TSA will contact the person who gave the notice to gain an understanding of the problem. The TSA is likely to seek an early meeting with the registered provider to explore options for resolving the problem. The action to be taken will depend on the circumstances of the case, and may include use of another of the TSA's statutory powers, such as the power to make appointments to the governing body of the provider. At this stage it may also be necessary for the TSA and/or the provider to commission an independent accountant's review of the provider's financial position. The TSA will keep the person who gave the notice informed throughout the period of its discussions with the provider and, in particular, will advise that person immediately in the event that resolution does not appear to be possible.

9 Section 145 of the Act requires the persons specified therein to notify the TSA when a defined step is taken in respect of a registered provider. The Act makes no provision as to the

form of notice, and in terms of timing only states that it should be given “as soon as is reasonably practicable”. The taking of a step triggers a moratorium on the disposal of land which lasts until the expiry of 28 working days after the TSA receives the notice (Section 146). Therefore, any delay in giving notice simply lengthens the period of the moratorium. Failure to give the notice does not invalidate the step itself but does affect the start of the moratorium. As the purpose of the legislation is to give the TSA an opportunity to seek a solution to the problems faced by the provider, it follows that early notification under Section 145 is essential.

- 10 A notice under Section 144 or Section 145 should be served in writing on the Executive Director, Risk and Assurance, Tenant Services Authority, Maple House, 149 Tottenham Court Road, London W1T 7BN. The notice should state clearly the step under which the person is serving the notice and the reasons why this action is being taken. The TSA will, as required under the Act, give the Homes and Communities Agency a copy of any notice received under Section 145.

## The moratorium

- 11 The moratorium on disposal of land by the registered provider lasts at least 28 working days from the taking of a step as defined in paragraph 5 above, and, once the moratorium is in place, the taking of a further step by another party would not start a new moratorium period. Section 146 makes provision for the TSA to extend the moratorium with the consent of the secured creditors. The TSA is likely to seek consent to extend a moratorium where it believes that it can make acceptable proposals under Section 152 about the future ownership and management of the provider's land, but it requires more time to finalise those proposals.
- 12 Section 146 makes provision for the TSA to cancel a moratorium if it is satisfied that it is not necessary to make proposals, and also sets out requirements for the TSA to consult the person who took the original step and to notify relevant stakeholders. In some cases the TSA may find that the problem is capable of being resolved without the need to produce a formal proposal. An example might be where the provider arranges a partnership deal with another financially strong registered provider.

The TSA will then assess the capability and capacity of the provider for continued ownership and management of the land, and, if it is satisfied in this respect, the TSA will cancel the moratorium.

- 13 It is possible that, despite the best efforts of the TSA and other stakeholders, the problems which first gave rise to the moratorium cannot be resolved. Alternatively, proposals put together by the TSA might not be agreed by the secured creditors. In those cases, the TSA is likely to stand aside and, at the end of the moratorium period, give formal written notice of this fact, including the reasons why proposals are not being pursued, to the provider and to its secured creditors. Those creditors will then be free to take action as they see fit (as will the provider itself). It should be noted that where a moratorium ends without any proposals being agreed, the taking of a further step within the next three years will not trigger another moratorium without the consent of the secured creditors of the provider (Section 147).

## Effect of a moratorium

- 14 During a moratorium the TSA's prior consent is required under Section 148 to a disposal of the provider's land, clarified in the Act to include disposal of a present or future interest in rent or other receipts arising from the land. Section 149 outlines some exceptions where consent is not required, mainly covering specific types of lettings, Right to Buy and Right to Acquire. The Homes and Communities Agency (HCA) is prevented under Section 148 from giving the provider a direction in relation to recovery of social housing grant or enforcing any such direction previously given, during a moratorium. The TSA will ensure that the HCA is advised of this restriction when it gives the HCA a copy of the notice received under Section 145 (see paragraph 15 above).
- 15 Section 150 contains another exception to the Section 148 consent regime by permitting a non-profit registered provider to dispose of a single dwelling without consent if the provider believes that the buyer intends to use the property as the buyer's principal residence.

16 As a general rule, the TSA will not give consent to disposals during a moratorium. However, the TSA will consider each request for disposal on its merits, and may agree to provide consent where it believes that it is reasonable to do so. The most likely situation where TSA consent would be forthcoming is where a disposal would stabilise or improve the provider's financial position, thus giving time to facilitate the development of proposals for an overall solution. The TSA would consult with the provider's secured creditors before issuing such consent, and would have regard to the position of creditors in general. Any such consent may be given subject to conditions which would be dictated by the circumstances of the particular case.

## Interim manager

17 Section 151 gives the TSA the power to appoint an interim manager of a registered provider during a moratorium. An appointment may relate to a provider's affairs generally or to specific affairs, and the terms and conditions of the appointment should be specified. An appointment lasts until the earliest of the end of the moratorium, or the agreement of proposals

made by the TSA, or a date specified in the appointment. An interim manager may be given wide-ranging powers in relation to the provider's affairs, but the Act forbids an interim manager from disposing of land or granting security over land. There is no provision in the Act for meeting the costs of an interim manager. The TSA anticipates that those costs will be met by the provider, but in cases where this is clearly not possible the TSA may underwrite the costs of an interim manager.

18 The TSA envisages appointing an interim manager in all cases where the moratorium is triggered. The purpose is to assist in controlling the provider's affairs and to maintain services to tenants, while the TSA considers making proposals. The skills and expertise required of the interim manager and the powers conveyed in the appointment will be determined by the circumstances in each case. The TSA anticipates that an interim manager will be a senior housing executive, a professionally qualified person, or an insolvency practitioner. In most cases the TSA expects to give the interim manager full executive powers over the provider's affairs, although this will depend on an assessment of the skills and expertise already available to the provider. The TSA will

consult with the provider's secured creditors before making an appointment.

- 19 When it receives a notice under Section 144 or Section 145 the TSA will make an early assessment of the capacity and willingness of the registered provider's governing body to oversee its affairs during a moratorium. The TSA will consider taking steps to strengthen the governing body, probably by way of making statutory appointments under Section 269 of the Act (see separate guidance on such appointments).

## Making proposals

- 20 Section 152 permits the TSA to make proposals about the future ownership and management of the registered provider's land with a view to ensuring that the property will be properly managed by a registered provider. The TSA must have regard to the interests of the provider's creditors as a whole and, so far as is reasonably practicable, avoid worsening the position of unsecured creditors. Section 152 also makes provision for protecting the status quo in respect of preferential creditors. Proposals may provide for the appointment of a manager under Section 155 to implement all or part of the proposals (see paragraphs 29 to 33 below). Where the provider is a charity, the TSA's proposals will not require it to act outside the terms of its trusts and will only provide for disposal of accommodation to another charity with similar objects.
- 21 In drawing up proposals the TSA will have regard to the interests of all stakeholders. It is not possible to outline the precise form that proposals would take. The particular circumstances of each case will determine the TSA's strategy. The TSA will dedicate resources throughout the moratorium period in seeking to devise a rescue plan. Meetings will normally be arranged with the provider itself and its secured creditors. Under Section 153, before making proposals, the TSA must consult with the provider and (so far as is reasonably practicable) its tenants, and with the Financial Services Authority or the Charity Commission as appropriate.
- 22 If the TSA makes proposals it must, under Section 153, send a copy of those proposals to the registered provider, such of the secured creditors as the TSA is able to locate after making reasonable enquiries, and to any

appointed insolvency office holder. The TSA expects to be able to agree a list of secured creditors with the provider at an early stage and will take legal advice as appropriate to determine which creditors might be deemed to have secured status. The TSA must also make arrangements to bring proposals to the attention of the provider's members, its tenants and its unsecured creditors.

- 23 Proposals can only be taken forward for implementation if they have been agreed by all of the identified secured creditors. The TSA expects that, through its prior engagement with the secured creditors, it will know what proposals are likely to be acceptable. Section 153 makes provision for modifications to be incorporated in the proposals in order to reach agreement.
- 24 If proposals are agreed the TSA must send a copy of those proposals to the registered provider and its officers, the secured creditors, any appointed insolvency office holder, and the Financial Services Authority or the Charity Commission as appropriate. The TSA must also make arrangements to inform the provider's members, its tenants, and its unsecured creditors. Any subsequent amendments to

proposals must follow the same process as that for the original proposals.

- 25 The TSA's objective in drawing up proposals will be to seek to avoid the formal insolvency of the registered provider, while recognising that it may be difficult to satisfy the competing interests of all stakeholders. The TSA will seek to ensure that any proposals do not cause a conflict of duties for any appointed insolvency holder. Preserving the independence of the provider will not be a primary consideration. In many cases where a moratorium is in place, other registered providers are likely to be able to assist with a solution. The TSA will hold early discussions with such other providers as it believes may have the capacity and capability to provide the necessary assistance.

## Effect of agreed proposals

- 26 Under Section 154 the TSA, the registered provider, its creditors, and any appointed insolvency office holder must implement agreed proposals. The directors, committee members, or trustees of the provider are required to co-operate with the implementation of agreed proposals, with the proviso that they should not

commit a breach of a fiduciary or other duty to the provider. The TSA will take enforcement action through the courts against any persons who do not comply with their obligations in respect of agreed proposals (see also paragraph 34 below).

## **Appointment of manager and related powers**

27 Section 155 enables the TSA to appoint a manager when proposals are agreed and those proposals must make provision for the payment of the manager's reasonable remuneration and expenses. This is a separate power from the power to appoint an interim manager of a registered provider during a moratorium (see paragraphs 22 and 23 above). The TSA may give the manager general or specific directions. If the provider is a charity the TSA must notify the Charity Commission that a manager has been appointed. Section 156 lays down a non-exhaustive list of powers which may be conferred on the manager. In general, these powers enable a manager to carry on the business of the provider while proposals are implemented. They include a power to appoint a solicitor, accountant or other professional to

assist the manager. A manager must, so far as is reasonably practicable, consult and inform the provider's tenants about an exercise of powers likely to affect them.

- 28 The TSA considers that the appointment of a manager will be necessary in most cases but will look at each case on its merit. The appointment details and the identity of the manager will be included in the agreed proposals. The skills and expertise required of the manager and the powers conveyed in the appointment will be determined by the circumstances in each case. The TSA anticipates that a manager will be an experienced senior housing executive, an experienced professional person, or an experienced insolvency practitioner. The manager may be the same person who acted as interim manager during the moratorium. The proposal will make provision for the payment of the manager's remuneration and expenses.
- 29 Section 157 gives the manager additional powers where the registered provider is an industrial and provident society. Under this provision the appointment of a manager may confer on the manager power to take the legal steps necessary to amalgamate the society

with another industrial and provident society or to transfer its engagements.

- 30 The TSA believes that the power to amalgamate or transfer engagements is an effective power which is likely to find favour in making proposals. This is because the recipient registered provider would be chosen for its capacity and capability to resolve the problems. It would ensure that properties would be properly managed by a registered provider (as required under Section 152), while the interests of tenants, public funding, and creditors would be protected.
- 31 The TSA would expect a manager to act expeditiously to ensure implementation of agreed proposals and to work closely with all interested parties to achieve this objective. A manager may apply to the High Court for directions in relation to his or her actions, and High Court directions would overrule any directions given by the TSA on the same matter. The TSA would expect a manager to exercise the duty to consult or inform tenants where any actions are likely to affect their continuing rights, their rents, or the level of services being provided.

## Assistance by the regulator

- 32 Section 158 permits the TSA to give financial or other assistance to a registered provider for the purpose of preserving its position pending the agreement of proposals, or to a registered provider or a manager to facilitate the implementation of agreed proposals. In particular, the TSA may lend staff and may arrange for payment of the manager's remuneration and expenses. The TSA's power to provide financial assistance is restricted by the need to obtain the consent of the Secretary of State (SoS) to make grants or loans, to indemnify a manager, to make payments in connection with secured loans, or to guarantee payments in connection with secured loans.
- 33 The TSA expects agreed proposals to make provision for the payment of a manager's remuneration and expenses, but, in the unlikely event that without such provision a proposal would otherwise fail to be agreed, the TSA would consider underwriting the costs of a manager. The TSA does not expect to seek the consent of the SoS to other forms of financial assistance as, generally speaking, to do so would mean public funds taking the place of

existing creditors. The TSA believes that there may be exceptional circumstance where, for example, an additional line of temporary credit is needed during a moratorium, it may be necessary for the TSA to consider whether an approach to the SoS is warranted.

## Applications to the court

34 Once they are agreed, proposals are binding on the relevant parties as noted in paragraph 28 above. Section 159 makes provision for the registered provider or a creditor of the provider to make application to the High Court where they think that action by a manager is not in accordance with the agreed proposals. It also allows any party bound by the proposals to make application to the High Court where it thinks that action by another bound party is in breach of the obligation to implement agreed proposals.

## What the TSA expects from the provider

35 The TSA expects a registered provider (including its officers and its directors, committee members or trustees) affected by Sections 144 or 145 to:

- Notify the TSA immediately where the provider identifies a potential problem with, or threat to, its viability, for whatever reason
- Notify the TSA immediately where it has reason to believe that a step under Section 144 or Section 145 is about to be taken
- Take legal and financial advice as to its trading position and duties under the Act and under insolvency legislation, to include specific advice to the provider's officers and its directors, committee members or trustees
- Provide up-to-date details to the TSA of the provider's officers and its directors, committee members or trustees
- Provide such information and assistance as the TSA requires in order to identify all the secured creditors of the provider
- Provide details to the TSA of any insolvency office holder appointed in respect of the provider's affairs

- Supply relevant details, to be agreed with the TSA, to enable the TSA to bring information to the attention of the provider's members, its tenants and its unsecured creditors
- Co-operate with any interim manager appointed by the TSA, and provide facilities and information to assist the manager to discharge his or her specified duties
- Provide such information as the TSA requests, and access to relevant books and records, to enable an assessment of the provider's financial position to be undertaken
- Co-operate fully with the TSA, and provide such support as the TSA requires, in the development of proposals for the future ownership and management of the provider's land
- Co-operate fully with the TSA in its use of any other regulatory powers during the period of a moratorium
- Co-ordinate a communications strategy on all matters relating to the use of these powers with the TSA, and ensure that no public statements are made without the TSA's agreement
- Implement proposals agreed between the TSA and the secured creditors

## Consultation

36 The Act requires the TSA, in exercising its insolvency powers, to consult relevant persons at certain stages and also to notify other identified persons. The TSA also recognises that regard would have to be paid to a number of legitimate interests and would consult or inform accordingly. Consultees may include:

- Secured creditors – any proposals made by the TSA under Section 152 can only be implemented with the agreement of the secured creditors (see also paragraphs 24 and 25 above). The TSA will work closely with the secured creditors throughout the process envisaged by the Act. The TSA will hold an early meeting with the provider and the secured creditors to agree an action plan, which will include a communications strategy
- Tenants - the TSA recognises that any situation where insolvency powers are triggered could cause anxiety for tenants and leaseholders, and the TSA will take all steps it can to mitigate that anxiety. The TSA will ensure that the TSA itself and any manager appointed as part of proposals comply with the legal requirements for consulting and informing tenants. The nature of

consultation will depend on the circumstances of the case and the timescales involved. It will not be practicable in some situations to make direct contact with each individual tenant. The TSA will use various techniques to consult and inform tenants including where appropriate, liaison with recognised tenant representative groups, appointment of a tenant adviser, telephone help-lines, advertisements in local newspapers and tenant meetings

- The registered provider – the TSA will ensure that it complies with the legal requirements for consulting and informing the provider. The provider (including its officers and its directors, committee members or trustees) and its senior staff are likely to be involved fully from the outset. The TSA's expectations of the provider are outlined in paragraph 40 above
- Any insolvency office holder – the TSA recognises that, in certain situations, an insolvency office holder could also be appointed in respect of the provider or its land. The TSA would want to facilitate the person appointed in the performance of his or her duties, and would hold an early meeting with that person to make appropriate arrangements. In cases where an insolvency office holder is in place, and the TSA wishes to appoint an interim manager, the TSA will consider, in consultation with the relevant

parties, whether it would be appropriate to appoint that person as the interim manager

- Unsecured creditors – the TSA must make arrangements for bringing proposals (both before and after their agreement) to the attention of the unsecured creditors. The TSA will require the provider to give the TSA a list of unsecured creditors for this purpose. If, for any reason, it is not possible to obtain contact details for all unsecured creditors, the TSA will make arrangements for advertising the proposals in an appropriate publication such as the London Gazette
- Other regulators – the TSA will ensure that it complies with the legal requirements for consulting and informing the Financial Services Authority and the Charity Commission as appropriate. In addition to its formal obligations the TSA will keep these two bodies, as well as the Registrar of Companies (where the provider is a registered company), informed of the ongoing situation during a moratorium
- Local authorities – the TSA recognises that local authorities in whose areas a registered provider operates may have various levels of interest in the provider's affairs. Where a local authority is a secured creditor its position is the same as other secured creditors as outlined above. In other situations the TSA does not have a legal duty to

consult or inform local authorities, but the TSA will endeavour to keep local authorities informed as appropriate to the particular circumstances of each case

- Central government – the TSA will keep relevant persons at the Department of Communities and Local Government (CLG) informed at all stages in the exercise of these powers and will agree with CLG on a case by case basis which other government departments should also be kept informed
- Cross border regulators – where the TSA's insolvency power is triggered in respect of a registered provider which undertakes business activities or has operating subsidiaries in Scotland or Wales, the TSA will notify the Scottish Housing Regulator or the Welsh Assembly Government as appropriate

## **Direction to the Homes and Communities Agency**

37 Under section 106 of the Act, in circumstances where the TSA has received notice in respect of a registered provider under Section 145, it may give a direction to the Homes and Communities Agency (the HCA) which prohibits the HCA from giving financial assistance to

the provider. As noted in paragraph 15 above the TSA will give the HCA a copy of any notice received under Section 145. The circumstances applicable to each case will be different and the TSA will be mindful of its objective of protecting public funds. However, as a general rule, the TSA will not give a direction to the HCA where to do so would worsen the financial position of the provider thus hastening the onset of insolvency. Therefore, the TSA envisages the use of the power to direct the HCA being restricted to financial assistance where a contractual commitment has not been entered into by the provider. In the absence of directions from the TSA the HCA is, of course, free to take its own decisions about continued funding. At the outset of a moratorium the TSA will meet with the HCA to gain a full and detailed understanding of the position of the provider in respect of existing and proposed HCA financial assistance, and to ensure that the HCA is aware of the circumstances of the case. Further advice about the TSA's approach to the exercise of the power to direct the HCA is set out in the relevant guidance note.

## Guidance note 6

# Guidance on section 166: Winding up petition by regulator

### Purpose

- 1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power relating to petitioning for the winding up of a registered provider. This is a general power and is set out in Chapter 4 Section 166 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to registered providers with some exceptions which are set out in the section below on Scope. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.

### Scope

- 2 The power may be exercised in relation to a non-profit registered provider which is a registered company or an industrial and provident society. It cannot be applied to a local authority provider or to a registered charity which is not a registered company.

### Background and context to the use of the power

- 3 Where problems are identified with a provider the TSA will intervene as it sees fit to assist the provider to resolve those problems. The TSA has a number of intervention and enforcement powers which it can employ depending on the circumstances of the case. The TSA believes that the vast majority of problem cases will be resolved through timely and effective intervention. However, in the unlikely event that problems cannot be resolved in the normal course of events and where particular conditions exist, the TSA can petition the court under the Insolvency Act 1986 to wind up a registered provider. The TSA considers this power to be a residual power that will only be used in rare and exceptional circumstances.

### The power

#### The circumstances in which the power can be exercised

- 4 The power can only be exercised on any of three grounds as follows:

- That the provider is failing properly to carry out its objects
- That the provider is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986
- That the TSA has previously directed the provider under Section 253 of the Act to transfer all its land to another person

## Failure to properly carry out objects

- 5 Under Section 112 of the Act, in order to be eligible for registration with the TSA a body which is not a local authority must be a provider of social housing or intend to become a provider of social housing. The TSA therefore considers that carrying out objects in the context of Section 166 relates solely to the provision of social housing.

## Inability to pay debts

- 6 Section 123 of the Insolvency Act 1986 sets out the meaning of a company's inability to pay its debts. The TSA considers that it is highly unlikely that it would use this ground to petition

for the winding up of a provider. This is because the prime responsibility for complying with the law in such a situation rests with the provider's officers, directors, committee members or trustees and with its senior staff. Also it is up to the creditors of a provider to take whatever action is open to them to enforce payment of monies due to them. Action taken by the provider or its creditors could trigger the use of the TSA's insolvency power contained in Sections 144 to 159 of the Act (see separate guidance on that power).

## Where land has been transferred

- 7 Where all of the land of a provider is transferred to another person following a direction by the TSA under Section 253, the provider will remain as a constituted body, although it will not be able to function as a registered provider. In that case, unless the provider's members take action to dissolve the body in accordance with its constitution, the TSA will petition the court to wind up the provider.

## The effect of an exercise of the power

8 While the TSA can put a petition to the court it is entirely a matter for the court as to whether it grants an order for the winding up of the provider or not. If it does grant an order the court will give responsibility for putting the winding up into effect to the Official Receiver. The TSA will provide the Official Receiver with all the information and assistance the Official Receiver requires to enable his or her duties to be discharged. The TSA will consider whether it is necessary to use any of its other enforcement powers in order to facilitate a winding up. When the Official Receiver confirms to the TSA that a winding up is complete the TSA will remove the provider from its register and will liaise with other regulatory bodies as appropriate regarding removal from their registers.

## Consultation

9 The Act does not require the TSA to consult relevant persons in exercising its power under Section 166. In the limited circumstances which the TSA envisages using the power there are unlikely to be any significant legitimate interests remaining. The TSA is committed to as full consultation as is possible with any relevant stakeholders.

## Guidance note 7

# Guidance on section 167: Transfer of property

### Purpose

1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power relating to the transfer of property following the dissolution or winding up of a registered provider. This is a general power and is set out in Chapter 4 Section 167 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to registered providers with some exceptions which are set out in the section below on Scope. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.

### Scope

2 The power may be exercised in relation to a non-profit registered provider which is a registered company or an industrial and provident society. It cannot be applied to a local authority provider or to a registered charity which is not a registered company.

### Background and context to the use of the power

3 The principles behind the constitutional and operating frameworks of non-profit providers are such that any assets held by them should be applied in furtherance of their own objects or the objects of similarly constituted bodies. As any assets remaining after a provider ceases to exist cannot be distributed to its members the Act provides assurance that those assets will continue to be used for their intended, or similar, purposes.

### The power

#### The circumstances in which the power can be exercised

4 The power can only be exercised where a non-profit registered provider is dissolved under the Industrial and Provident Societies Act 1965 or is wound up under the Insolvency Act 1986. The power overrides anything contained in the Industrial and Provident Societies Act 1965, the Insolvency Act 1986, the Companies Act 2006 or the constitution of the provider.

## The effect of an exercise of the power

- 5 Any surplus property that is available after satisfying the provider's liabilities must be transferred to the TSA or, if the TSA directs, to a specified non-profit registered provider. Where the provider that is dissolved or wound up is a charity its surplus property can only be transferred to another charity which has similar objects to those of the transferring charity. The Act gives the TSA the power to decide whether the objects of the two charities are similar. The TSA will consult with the proposed recipient charity, and will take advice from the Charity Commission as necessary, before making a decision on similarity of objects.
- 6 The TSA considers that the legal processes for dissolution and for winding up will ensure that all assets and liabilities of a provider are properly identified such that the TSA will not need to undertake a separate process to satisfy itself in that regard.
- 7 The Act also gives the TSA the power to discharge liabilities of a provider in order to avoid the sale of the provider's land and instead

secure a transfer of that land. The TSA does not envisage using this power as to do so would mean public funds taking the place of existing creditors. There may be exceptional circumstance, for example if tenants are in danger of losing their homes, where the TSA would consider a case for providing financial assistance. The TSA would only consider such a case where all other possible avenues for meeting the liabilities had been exhausted.

## Directing a transfer of surplus property

- 8 Where the TSA holds surplus property transferred to it under Section 167 (and under previous legislation) the TSA will transfer such property to other non-profit registered providers in accordance with criteria determined by the Board of the TSA and made available from time to time. In general, surplus property will be used to facilitate strategies for the resolution of serious problem cases, and in some cases may take the form of direct financial assistance.

## Consultation

- 9 The Act does not require the TSA to consult relevant persons in exercising its power under Section 167. As the provider which owned the property will be dissolved or wound up there are unlikely to be any significant legitimate interests remaining. The TSA is committed to as full consultation as is possible with any relevant stakeholders.

## Guidance note 8

# Guidance on sections 199 to 200: Survey

### Purpose

- 1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power to carry out a survey. This is a regulatory power and is set out in chapter 6 Sections 199 to 200 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to all registered providers. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.

### Scope

- 2 The power may be exercised in relation to all providers, including a non-profit private registered provider, a for-profit private registered provider and a local authority provider.
- 3 The term 'premises' is not defined in the Act, but the TSA will only exercise the power to carry out a survey in relation to social housing, that is to homes or dwellings. The term 'dwelling' is defined in section 275 of the Act as "a house

or flat or other building occupied or intended to be occupied as a separate dwelling", and "includes any garden, yard, outhouse or other appurtenance". The TSA considers that common parts will fall within this definition.

### Background and context to the use of the power

- 4 A provider is responsible for ensuring that it achieves the standards set by the TSA. A provider has primary responsibility for ensuring that its tenants live in good quality accommodation which is repaired and maintained to the highest standards. The TSA expects providers to have good quality information on the condition of its social housing stock. It may be necessary for the TSA to step in and exercise this power when it suspects that a provider is failing to maintain its premises in accordance with the standards under Section 193 of the Act.

## Potential triggers to the exercise of the power

- 5 Sections 199 and 200 of the Act set out the circumstances in which the TSA may exercise the power to carry out a survey. The TSA may arrange for a survey of the condition of identified homes by an authorised person.
- 6 Indicators of a potential breach of the standards could include:
  - A potential generic problem in design, construction or condition which may impact across the provider's social housing stock or across the wider social housing domain
  - A failure by the provider to honour a relevant voluntary undertaking to the satisfaction of the TSA
  - A failure by the provider to deal with previous relevant regulatory interventions to the satisfaction of the TSA
  - A survey is necessary as part of the exercise of the TSA's wider regulatory or investigatory powers such as an inspection or an inquiry
  - A high level of relevant complaints from the provider's tenants

- Concern about the extent of the provider's compliance with the Decent Homes standard

## The process

### Who can carry out a survey?

- 7 A survey can be carried out by anyone who is authorised by the TSA. An 'authorised person' may be a member of the TSA's staff, or any other person who has been authorised in writing by the TSA for the purposes of carrying out a survey under this power. The TSA will ensure that the authorised person is qualified for the intended purpose of the survey.

### Authority to carry out the survey

- 8 The TSA will give the authorised person written authority to carry out the survey. The TSA will send a copy of this authority to the provider. When carrying out the survey, or seeking to enter premises in order to carry out the survey, the surveyor must produce a copy of the authorisation if requested to do so by the occupier of the premises. The surveyor may

enter the premises at any reasonable time to carry out the survey.

## Notice

- 9 The Act places obligations on both the TSA and the provider in relation to giving notice of the survey:
- The TSA, or the authorised person, must give the provider at least 28 days' notice
  - The provider must give each occupier of the premises at least seven days' notice

## Report

- 10 After carrying out a survey, the surveyor must produce a written report for the TSA. The TSA will send a copy of the report to the provider.

## Costs

- 11 The Act makes provision for the TSA to require the provider to pay some or all of the costs of the survey and report. This is discretionary, but the TSA will usually seek to recover the full cost of the survey and report from the provider,

having taken into account the outcome of the report and the circumstances of the provider.

## Sanctions

- 12 The Act makes provision for the TSA or the Director of Public Prosecutions to bring proceedings in circumstances where:
- A provider fails without reasonable excuse to comply with the requirement to give each occupier of the premises at least seven days' notice of a survey
  - A provider, or an officer of a provider, obstructs an authorised person in exercising the power to carry out a survey

# Guidance note 9

## Guidance on sections 201 to 203: Inspection

### Purpose

- 1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise its power on inspection. This is a regulatory power and is set out in chapter 6 and sections 201 to 203 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to all registered providers. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out proposals for the objectives and principles that might underpin the TSA's approach to dealing with the assessment of performance by landlords, with a particular emphasis on poor performance.

### Background and context to the use of the power

- 2 The TSA will use the inspection process to assess performance against national standards and to inform key parts of our regulatory assessment. A provider is responsible for ensuring that the organisation achieves the standards. In circumstances where there

may have been a failure against a standard, where the affairs of a provider may have been mismanaged, or to verify performance against any of the standards, the TSA may exercise the power to inspect. The TSA will commission and decide the scope of the inspection.

### Potential triggers to the exercise of the power

- 3 Section 201 of the Act specifies that the TSA may arrange for a person to inspect:
  - A provider's performance of its functions in relation to the provision of social housing, or
  - The financial or other affairs of a provider
- 4 The TSA is likely to exercise the power predominantly in circumstances where it has reason to believe that a provider is failing to meet one or more of the standards, and it is necessary to establish whether or not this is correct before assessing what remedial action may be required. Examples of such circumstance might include:

- Evidence on performance against national standards from a provider's self-assessment of its performance
- Evidence from a provider's reports to tenants on performance against standards
- A high level of complaints about service delivery from a provider's tenants
- Indicators of financial problems or poor financial management from a provider's financial returns to the TSA
- Evidence of impropriety (including fraud)
- Whistleblowing involving allegations of a serious nature
- Performance issues arising from Comprehensive Area Assessment that relate to providers

## Scope

- 5 The main purpose of an inspection is to assess a provider's performance in relation to standards set under sections 193 and 194 of the Act. The power may be exercised in relation to all providers including a non-profit registered provider, a for-profit registered provider and a local authority provider. An inspection of the social housing activities of a local authority provider will include liaison with managing agents where management services are provided

by an arm's-length management organisation (ALMO), a tenant management organisation (TMO), or other manager under contract.

## The power

### Who can conduct an inspection?

- 6 If the main purpose of an inspection is to assess a provider's performance in relation to standards set under section 193 of the Act, the TSA is required to first invite the Audit Commission to carry it out. Should the Audit Commission decline to do so the TSA may arrange for another person, an appropriate professional expert, to carry out the inspection. The TSA can appoint any appropriate person to conduct an inspection with the exception of a member of its own staff.

## Inspections by the Audit Commission

- 7 It is for the TSA to decide whether an inspection is needed and its scope, taking into account the particular circumstances of the provider. Where the inspection is to be carried out by the Audit Commission, the TSA will identify the provider,

the services for inspection and the main focus of the inspection. The Audit Commission will obtain the supporting information it requires for the inspection from the provider under its statutory powers in accordance with its own procedures. The TSA will provide any relevant supporting information to the Audit Commission. The Audit Commission will ensure that inspections are delivered in a timely, efficient and cost-effective way. In practice, particularly in circumstances where the TSA believes that there may have been a failure against a standard, it will ensure that the inspection is focussed on the potential failure. This is likely to be through a short-notice inspection. The TSA and the Audit Commission will work together to deliver inspections within the terms of the Memorandum of Understanding (MOU) which has been agreed between the two organisations.

## **The Local Performance Framework for local authorities**

8 In the Local Performance Framework all inspection activity is subject to a 'gate-keeping' function. This is designed to ensure that inspection activity across inspectorates is managed effectively. The Audit Commission is

responsible for gate-keeping all inspections of local authorities following consultation with other inspectorates who work within the local performance framework. In practice this means the Audit Commission would inform the TSA if it intends to decline any request for an inspection or delay its implementation, and the reasons for that decision.

## **Inspections by an appropriate professional expert**

9 Again it is for the TSA to decide whether an inspection is needed and its scope, taking into account the particular circumstances of the provider. Where the inspection is to be carried out by bodies or individuals other than the Audit Commission the TSA will ensure that the inspector is qualified for the intended purpose of the inspection. The inspection will be focussed on any potential failure against a standard. The TSA will set the brief and the terms of reference for the inspection, including the main focus and any specific matters to be inspected. These will include the timetable for completion of the inspection and the reporting arrangements. The TSA will agree the inspector's remuneration. The TSA will provide the supporting information

required for the inspection to be delivered. The inspector will ensure that the inspection is delivered in a timely, efficient and cost-effective way, and the TSA will monitor the inspector's progress in order to achieve these outcomes.

## Notification and initial contact with the provider

10 Where the inspection is to be undertaken by a professional expert the TSA will notify the provider about an inspection. It will also agree the amount of notice and the practical arrangements for the inspection with the inspector and the provider based on the particular circumstances of the case. Where the inspection is to be carried out by the Audit Commission, the Audit Commission will follow its own procedures for notifying the provider, and the TSA will expect the Audit Commission to notify the provider in accordance with them.

## An inspector's powers

11 Section 203 of the Act sets out an inspector's powers. In summary these are:

- To require a person to provide specified documents or information. The TSA would expect a provider, or its agents, to produce information and documents when requested to do so by the inspector as listed in Section 107 (1) (see the Guidance Note on s107). Where the provider does not do so, the inspector may by notice require the information and documents to be produced
- To enter premises occupied by the provider at any reasonable time
- To inspect copy or take away documents found on the premises. This includes all relevant documents held by the provider, including documents stored on computers
- To inspect any computer on which documents have been created or stored
- To require any person, including any person having charge of a computer, to provide such facilities or assistance as the inspector reasonably requests

Where the inspection is carried out by the Audit Commission, the inspector will be authorised in writing by the Audit Commission to exercise the powers set out in section 203 of the Act. Where the inspection is carried out by an appropriate professional expert, the inspector will be authorised in writing by the TSA to exercise the powers set out in section 203 of the Act.

### **Giving draft reports to the provider**

12 The Audit Commission has its own procedures for sharing its inspection reports with a provider in draft form, and for considering and responding to challenge to its findings by a provider. In those cases where the Audit Commission carried out the inspection the TSA would expect the Audit Commission to follow its own procedures. In those cases where an appropriate professional expert carried out the inspection, the TSA will require the inspector to give the provider an opportunity to comment on the draft report.

### **The inspection report**

13 The Act requires that the appointed inspector produces a written report. The TSA will ensure that a copy of the report is given to the provider together with its own assessment of the outcome. The Act makes provision for both the TSA and the inspector to have discretion to publish the report, and the TSA will take into account all relevant factors in coming to a decision on publication, including all legal requirements and commercial confidentiality. In those cases where an appropriate professional expert carried out the inspection, the TSA will consider whether to publish the report, and where it decides that it would be appropriate to do so, it will determine the basis on which the report is published having taken account of the views of the inspector and the provider.

14 The Audit Commission has its own procedures for publishing inspection reports and in those cases where the Audit Commission carried out the inspection the TSA would require the Audit Commission to publish the report in line with those procedures and as reflected by the MoU between the Commission and the TSA.

15 In all cases the TSA will expect the inspection to be concluded as quickly as possible in order that any remedial action that is necessary can be taken swiftly.

## Follow up action

16 The TSA will consider whether it is necessary to follow up an inspection report with the provider. Where the inspector's report makes recommendations we would expect the provider to make proposals for how it will achieve them. The TSA will consider the proposals and monitor the provider's progress towards achieving them. Where an inspection demonstrates a failure against a standard or mismanagement in the affairs of a provider, the TSA may consider further action against the provider, including the possible exercise of one or more of its enforcement powers. Where an inspection has been undertaken by the Audit Commission, the TSA may commission it to carry out follow up work as part of its assessment of the effectiveness of any remedial work that the TSA required as a result of that inspection. The TSA will ensure that inspection findings are reflected in its published Regulatory Judgement where they are material

and its overall assessment of the provider is changed as a result of them.

17 In considering the outcome of the inspection, the TSA will assess any wider implications for the management and governance of the provider.

## The costs of an inspection

18 The Act makes provision for the TSA to reimburse the costs incurred by the Audit Commission in carrying out an inspection and for payment to an appropriate professional expert. It also makes provision for the Secretary of State by order to authorise the TSA to charge fees for inspections. The Secretary of State has not made such an order, so the TSA will not charge fees for inspections carried out during 2010-11. The CLG and TSA will consult about charging fees at a future date.

## **Sanctions for failing to co-operate with an inspector**

19 The Act makes provision for the TSA or the Director of Public Prosecutions (or someone else with their consent) to bring proceedings in circumstances where a person without reasonable excuse obstructs an inspector exercising the powers set out in section 203 (4-8) of the Act.

## **What the TSA expects from the provider**

20 The TSA expects a provider that is subject to inspection to:

- Co-operate fully with the TSA and the inspector
- Give access to premises, staff and tenants where required to the inspector
- Provide information and documents to the inspector on a timely basis
- Provide facilities and assistance to the inspector when requested
- Not to comment publicly on the findings of an inspection until the report is in the public domain

# Guidance note 10

## Guidance on sections 206 to 209: Inquiry Guidance on section 210: Extraordinary audit

### Purpose

1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the powers on inquiry and extraordinary audit. These are regulatory powers and are set out in chapter 6 and sections 206 to 209 and section 210 of the Housing and Regeneration Act 2008 (the Act). They may be exercised in relation to all registered providers, subject to the exceptions applying to local authorities and for-profit providers that are set out under 'scope' below. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England which sets out the objectives and principles that underpin the TSA's approach to dealing with poor performance by landlords.

### Scope

2 These powers may be exercised in relation to all providers including a non-profit private registered provider, a for-profit private registered provider (in relation to its social housing) and a local authority provider (in relation to its social housing).

3 An extraordinary audit of the accounts and balance sheet of a local authority provider may only cover the extent to which they relate to the provision of social housing.

4 These powers may be exercised in relation to a registered charity only if the charity has received public assistance. The term 'public assistance' is defined in section 274 of the Act, but in summary, it means that the registered charity must have received certain specified loans or grants from public sources or had property transferred to it by a local authority. An inquiry into a registered charity may only relate to its social housing activities. An extraordinary audit of the revenue accounts of a registered charity may only cover the extent to which they relate to its social housing activities. If an inquiry is held into a registered charity, the TSA will notify the Charity Commission in accordance with section 209 of the Act.

5 During the course of an inquiry, the inquirer may consider the affairs of a body which at the relevant time was a subsidiary or associate of a registered provider. The terms 'subsidiary' and 'associate' are defined in section 271 of the Act, but in summary, they include any organisation falling within the meaning of 'subsidiary' in either

the Companies Act 2006 or the Friendly and Industrial and Provident Societies Act 1968; any organisation where the provider has the power to appoint or remove all or a majority of the board of directors; or any organisation where the provider holds more than half in nominal value of the company's equity share capital.

inquiry will be considered by the Board of the TSA, which will decide on any action that may need to be taken on it, including the use of any of the TSA's powers.

## Background and context to the use of the powers

6 The provider is responsible for ensuring that the organisation is properly governed, is viable, and achieves the standards set by the TSA. In circumstances where there may have been a failure against a standard, or where the affairs of a provider may have been mismanaged, it may be necessary for the TSA to step in and use the power to hold an inquiry. An extraordinary audit may be required as part of an inquiry. The TSA will appoint one or more inquirers and will commission the inquiry. Although the TSA must appoint one or more persons who are independent of the TSA to conduct an inquiry, it is conducted on behalf of the TSA, with the inquirer(s) presenting its findings on matters specified by the TSA, which may include making recommendations. The report of a statutory

## Potential triggers to the exercise of the power

- 7 Sections 206 to 209 of the Act specifies that the TSA may hold an inquiry if it suspects that the affairs of a provider may have been mismanaged. The term 'mismanaged' in relation to the affairs of a provider is defined in section 275 of the Act as:
- Managed in contravention of a provision of Part 2 of the Act or of anything done under Part 2 of the Act, or
  - Otherwise conducted improperly or inappropriately
- 8 The TSA is most likely to exercise the power to hold an inquiry in circumstances where it considers that:
- There may have been a failure against a governance or viability standard for a private registered provider

- There may have been a failure against a social housing standard leading to a persistent under-performance in the delivery of services to tenants
  - The provider may have failed to honour its commitments as set out in a voluntary undertaking
  - The provider may have failed to comply with an order or direction made by the TSA or to resolve problems that led to previous regulatory interventions.
  - The provider may have been involved in activities that might endanger the security or interests of tenants or put the social housing funds or assets of the provider at risk
  - The provider may have been involved in the misuse or misapplication of public, charitable or other assets or funds
  - There may have been a failure to operate within the provider's constitution, governing instrument or standing orders which has been detrimental to the provider, its tenants or its operations
  - The provider may have knowingly given false information to the TSA or to other organisations
  - The provider may have been involved in persistent unlawful discrimination or other breaches of legislation
  - The provider may have been involved in unlawful or unacceptable conflicts of interest, including breaches of charity law
  - The shareholding membership of a non-profit private provider may have failed to act in the best interests of the provider or of its tenants
- This is not an exhaustive list and the TSA may conclude that it is necessary to exercise the power in other circumstances to those set out above.
- 9 The TSA is most likely to exercise the power to hold an extraordinary audit in circumstances where it considers that:
- There may have been a material mis-statement in the accounts
  - The accounts have been qualified
  - A private registered provider's solvency is in doubt
  - There may have been a fraud
  - Auditors have raised matters of serious concern, for example in their management letter

## The powers

### Who can conduct an inquiry?

10 As mentioned above, an inquirer must be independent of the TSA. An inquirer is deemed to be independent in circumstances where they and the members of their family:

- Are not members, employees or consultants of the TSA, and
- Have not been members or employees of the TSA within the previous five years

11 The term 'consultant' is defined in section 206 of the Act as an individual providing services to the TSA otherwise than by virtue of employment with the TSA or an appointment as an inquirer. For the avoidance of doubt, the TSA takes this to mean that an individual consultant who is providing services to the TSA when the TSA decides to hold an inquiry cannot be appointed as an inquirer, but an individual consultant who has provided services to the TSA previously and who has completed the work associated with that commission may be appointed as an inquirer.

12 The TSA will appoint an inquirer on the basis of the skills and experience required in the circumstances of each individual case.

## The process

13 The process for an inquiry is set out in detail below.

## Costs

14 The TSA will meet the cost of the inquiry on terms to be agreed with the inquirer. Section 207 of the Act specifies that a local authority may contribute to the cost of any inquiry should it wish to do so.

## Extraordinary Audit

15 Section 210 of the Act specifies that where an inquiry is being held, or has been held, the TSA may require the provider to allow its accounts and balance sheet to be audited by a qualified auditor appointed by the TSA.

## Who can conduct an Extraordinary Audit?

- 16 The Act defines the term 'qualified auditor' as a person eligible for appointment as auditor of the provider's ordinary accounts. The TSA will ensure that the auditor is qualified for the intended purpose of the extraordinary audit.

## The process

- 17 The auditor will be appointed and briefed by the TSA, except in the case of a local authority provider where the appointment will be made by the Audit Commission. The provider subject to the inquiry, and others, will be notified in the same way as for an inquiry. See those sections of this guidance headed Appointing an Inquirer, Briefing an Inquirer and Notification of an Inquiry. The TSA will determine the matters to be audited during the Extraordinary Audit and the form of the report. The TSA will agree a work plan, timetable and costs of the Extraordinary Audit with the auditor. On completion of the Extraordinary Audit, the auditor will report to the TSA on such matters and in such form as determined by the TSA.

## Costs

- 18 The Act specifies that the provider subject to the inquiry must pay the costs of the Extraordinary Audit including the auditor's remuneration (Section 210(5)).

## Appointing an inquirer

- 19 Before appointing an inquirer, the TSA will seek proposals from the prospective inquirer in relation to the possible methodology, likely time input and fees, overall timetable as well as estimated cost. The prospective inquirer will be asked to identify any additional support that is needed to facilitate the inquiry including professional services. The TSA will consider the prospective inquirer's proposals and will direct the parameters for the inquiry, including the proposed methodology; the likely time input by the inquirer; the likely time input by other professional services; spending limits for specific items; overall timetable; overall budget; format, content and frequency of reports
- 20 The TSA will appoint one or more individuals as inquirers, and they will conduct the inquiry.

The TSA will ensure that the inquiry has access to all the skills necessary to meet the inquiry brief, including, where appropriate, specialists such as lawyers or forensic auditors. The TSA and the inquirer will consider the most appropriate method of procuring the services of such individuals: they may be appointed as an additional inquirer; alternatively the inquiry may choose to buy-in their services. Where the inquiry buys-in services, the persons providing the service will not be an inquirer, but will undertake work for and on behalf of the inquiry under the direction of the inquirer. In all such cases, the TSA will approve the terms under which such individuals are appointed, including fee levels and the budget for the work to be undertaken. The TSA will ensure that the inquirer, and persons or organisations providing services to the inquiry do not have any actual or potential conflicts of interest which might be prejudicial to their involvement. The TSA may appoint an additional inquirer during the course of an inquiry if it becomes necessary to extend the scope of the inquiry.

- 21 The TSA will nominate a named member of staff to commission the inquiry on its behalf and to fulfil the client role to the inquiry. The TSA will also nominate a named member or members

of staff as the main point or points of contact between the TSA and the inquirers, and, where necessary, between the TSA and the provider during the course of the inquiry. The TSA may also provide administrative support or other facilities to the inquiry. Where such support is in place, the member of staff providing it will not be the same person as one of the nominated points of contact.

## The inquiry

- 22 As mentioned above, an inquirer is independent of the TSA, but conducts the inquiry on behalf of the TSA. The inquirer:
- Shall determine the procedure for an inquiry
  - May make interim reports
  - Shall make a final report on matters specified by the TSA
- 23 Section 208 of the Act sets out the powers of an inquirer in relation to evidence. In summary these are:
- To require a person to provide specified documents or information. The TSA would expect a provider, or its agents, to produce

information and documents when requested to do so by the inquirer. The inquirer may by notice require the information and documents to be produced. The notice will specify the document or information required, the form and manner in which the document is to be provided and when and where the document or information is to be provided. This power applies to the documents and information set out under sections 107 and 108 of the Act, and a failure to comply with such a requirement is subject to the same sanctions that are available under those sections. See the separate guidance note on this power

- Such a notice might require evidence to be given on oath and the inquirer may administer oaths for that purpose
- To take evidence on oath
- To serve a notice on an appropriate person directing him to attend [the inquiry] at a specified time and place in order to give evidence or produce specified documents in their control or custody that are relevant to the inquiry

circumstances of the case. This is not an exhaustive list, but the brief will include:

- The TSA's powers
- The inquirer's powers, responsibilities and duties
- The general approach to the conduct of the inquiry
- Information about the provider and its operations
- Background to the TSA's concerns
- The TSA's principal concerns
- The parameters of the inquiry including the specific matters and time period that is to be investigated
- The timetable for the inquiry
- Financial considerations
- The arrangements for reporting to the TSA, including any requirement by the TSA to provide interim reports
- The TSA's expectations of the inquirer
- How success against the brief will be monitored and measured
- Any other matters that the TSA may consider to be relevant to a particular inquiry

## The inquiry brief

24 The TSA will draft the brief for the inquiry. The contents will vary depending on the

25 The TSA will keep the brief under very close review during the course of the inquiry. If it becomes necessary to amend or extend the brief or allow additional time for the inquiry, the

TSA will agree a revised brief to the inquirers and provide a copy to the provider.

## Briefing the inquirer

26 The TSA will provide both written and oral briefings to the inquirer covering both the inquiry process and key background on the provider. The inquirer will be given all relevant information and documents about the provider's affairs and the specific areas for investigation that it is aware of or has in its possession. Since the circumstances of and the reasons for an inquiry will vary from case to case, it is not possible to provide an exhaustive list of documents, the following material is likely to be made available to the inquirer, depending on the nature of the provider:

- The provider's constitution
- The most recent audited accounts and auditor's management letter
- Business plan
- Financial returns provided to the TSA
- Performance information and compliance statement provided to the TSA
- Any relevant voluntary undertaking given to the TSA

- The most recent TSA Regulatory Judgement
- The most recent TSA Annual Viability Review
- Key correspondence between the TSA and the provider
- Any documents directly relevant to the matters to be investigated
- The latest Comprehensive Area Assessment for a local authority
- Any other relevant background material

## Notification of an inquiry

27 Depending on the nature of the issues that are subject to an inquiry, it may not be possible to give a provider advanced notice of the decision to undertake an inquiry. However, the TSA will notify the provider about the inquiry by a letter addressed to the Chair or other suitable person, and will normally arrange to meet the governing body to explain the reasons for the inquiry, the process that will be followed and the anticipated timetable. The notification will usually include:

- A copy of the order appointing the inquirer
- The brief for the inquiry
- The powers of the inquirer
- A copy of these guidance notes

- The terms of any public statement that the TSA requires the provider to make
- A draft news release to announce the inquiry
- The proposed lines of communication between the TSA and the provider

28 The provider will be asked to notify its key stakeholders. The TSA will notify other relevant organisations that it has decided to hold an inquiry. These may include:

- Communities and Local Government
- The Financial Services Authority or the Charity Commission as appropriate
- The Audit Commission
- A local authority in its capacity as the strategic housing authority for any area in which the provider operates where the inquiry is into the affairs of a private registered provider
- An appropriate body that represents the provider
- Secured creditors

The TSA will keep relevant organisations informed of the progress of the inquiry as necessary. In doing so it will seek to balance the expectations of such organisations to be properly and fully informed against to the disclosure of qualified, sensitive or privileged material.

29 The TSA will issue a news release to announce the inquiry. The provider will usually be given an opportunity to comment on the factual accuracy of any such news release.

## Conduct of an inquiry

30 It is for the inquirer working to the brief and within the parameters, timetable and budget set by the TSA to determine the procedure for the conduct of the inquiry.. The inquirer is expected to establish matters of fact relating to the particular matters under investigation. If any matter of concern not within the brief comes to the inquirer's attention during the course of the inquiry, the inquirer should seek instructions from the TSA on whether or not the matter should be followed within the inquiry. If the TSA agrees it will issue a revised brief to the inquirer and to the provider.

31 The inquirers have wide-ranging powers to obtain information and documents from the provider, its subsidiaries, from associated organisations and from current and former officers, members, employees and agents including any professional advisers or persons acting for or on behalf of the provider. Any

person failing to comply with such an order from the inquirers is liable to be prosecuted. The inquirers may take copies of any books, accounts or documents produced. Where an extraordinary audit is being carried out, inquirers may make an order for such information with a view to passing it on to the auditor.

- 32 The TSA will expect an inquiry to be conducted in accordance with the principles of natural justice. The inquirers may interview anyone who may have been involved in the matters under investigation. Any person interviewed may, if he or she wishes, be accompanied by a representative, provided that that person is not also someone who has been or is to be interviewed by the inquirers. Where appropriate, those interviewed may be asked to give evidence under oath, to make a declaration of the truth or to agree and sign written statements. Neither the TSA, nor the inquiry, will pay for any person or their representative to attend the inquiry. No payment will normally be made for loss of earnings or professional fees or out of pocket expenses .

- 33 The inquirer will be asked to provide regular reports on the progress of the inquiry to the TSA, including in particular progress in

terms of timetable and budget. If the inquirer anticipates that the previously agreed timetable or budget is likely to be exceeded, the inquirer should inform the TSA and seek guidance about whether the TSA is minded to grant an extension and/or is prepared to authorise additional expenditure. If the TSA agrees it will issue a revised brief to the inquirer and to the provider.

## An interim report

- 34 The inquirer may make one or more interim reports to the TSA, or as required by the TSA. If as a result of an inquirer's interim report, the TSA is satisfied that the affairs of the provider have been mismanaged, the TSA may exercise a number of its enforcement powers. See separate guidance notes.

## The final report

- 35 Section 207 of the Act makes provision for the inquirer to make a final report on matters specified by the TSA.

36 The TSA will expect the inquirer to send the final report, or relevant extracts, in draft form to any individual who is likely to be criticised in the final report in order to give them the opportunity to respond to those criticisms. A copy of the final report will also be sent to the governing body of the provider. The inquirer should give the relevant parties a reasonable amount of time to respond. The TSA will expect the inquirer to demonstrate that the views of those individuals responding have been taken into account in making the final report. Where responses are received after the deadline set by the inquirer, it will be a matter for the discretion of the inquirer whether or not they will be taken into account.

37 While the form and content of the final report will vary from case to case, in compiling the final report, the TSA will expect the inquirer to record:

- Findings about the matters for investigation set out in the inquiry brief
- The facts of the case
- The conclusions the inquirer has drawn from those facts, including specific conclusions as to whether or not there has been mismanagement, and, if there has, who was responsible for it

- Any facts about which there was dispute
- Any material conflicts of evidence
- How the inquirer has taken account of any responses to the draft final report from relevant parties in making the final report

38 Where the inquirer wishes to make suggestions for improving the performance of the provider in particular, or that of providers generally, or wish to comment on matters outside their brief these should be discussed first with the TSA and, if agreed, recorded in a separate letter to the TSA.

## **Consideration of the final report and representations**

39 The TSA's Board will consider the facts of the case as set out by the inquirer in the final report. It may not agree with some or all of the inquirer's conclusions or may form different conclusions from the evidence. The Board may refer the report back to the inquirer at any point in order to seek clarification on, or a supplementary report about, some specific part or parts or the whole of the report. Where this reveals that the report contains an error of fact, the Board will consider whether the error

was sufficiently material to change the findings detailed in the report.

40 The Board will seek to finalise its consideration of the report as soon as it is reasonably practicable to do so, but the process may require more than one meeting. The TSA will notify the provider of the provisional timetable in which the Board is expected to consider the report. This will include the date of any relevant Board meeting, or meetings and the anticipated deadline for the receipt of any written representations

41 The purpose of TSA Board meeting, or meetings, is to consider all the relevant material and to decide:

- Whether the Board is satisfied, as the result of an inquiry, that the affairs of the provider have been mismanaged
- If they have been mismanaged, whether any person or group of persons contributed to the failure or mismanagement
- If they have been mismanaged, whether the Board is minded to exercise any of the TSA's enforcement powers in the Act

- Whether the Board requires the provider to take any remedial action in relation to issues raised in the report

42 If the Board concludes that the affairs of the provider have not been mismanaged, or if the Board is satisfied that only minor remedial action is required, the inquiry will usually be concluded.

43 Once the Board has made its findings, the provider will be informed as soon as possible in writing, setting out the reasons for the Board's decisions. If the Board concludes that there has been a failure or mismanagement, the TSA will inform the provider and any individuals who appear to have contributed to it. They will also be advised of any enforcement action that the Board is minded to take. Copies of the final report, or relevant extracts, will be sent to the provider or to individuals or to third parties (referred to subsequently in this guidance as 'relevant persons') and they will be invited to make representations to the TSA's Board. Any such invitation is entirely at the discretion of the TSA, and will only be extended to an individual or an organisation that appears to the TSA to have a direct and relevant interest in the

governance, management and operations of the provider.

- 44 The TSA would usually expect the relevant persons to make written representations. In addition, the TSA may be prepared to consider oral representations made in person. The purpose of the representations is to offer the relevant persons an opportunity to correct matters of fact or to refute the contents of the final report.
- 45 Where the relevant persons wish to make written representations they will be asked to submit them by a specified deadline. It is in the best interests of the relevant persons to provide material by the deadline since this will give Board members sufficient time to give it careful consideration. Where representations are received after the deadline, the TSA will use its best endeavours to circulate the material to Board members before the meeting, but it cannot guarantee to do so. The TSA will not usually grant requests for additional time to submit written representations, although it may be prepared to do so if exceptional circumstances can be demonstrated.
- 46 Where the TSA is prepared to consider oral representations, the relevant persons will be invited to do so at a meeting of the Board. The TSA will not usually grant requests to postpone such a meeting, although it may be prepared to do so in exceptional circumstances. The TSA may set a time limit for the provider, the individual or the third party to make their representations.
- 47 Anyone making oral representations may be accompanied by a legal adviser or other representative if they so wish, provided that the person has not previously been interviewed by the inquirers, and the TSA has been notified in advance that they will be attending. The TSA will not pay for any person or their representative to attend the meeting with the Board. No payment will be made for loss of earnings, or professional fees or out of pocket expenses, other than if exceptional circumstances can be demonstrated.
- 48 The Board will determine how a meeting at which oral representations are to be made is to be conducted. The TSA may arrange for a verbatim transcript of the representations to be made. If it does so a copy will be sent to those making the representations or

their representatives. When the Board is satisfied that the relevant persons have had a reasonable opportunity to state their case, it will conclude its consideration of the report. The TSA will notify the relevant persons of the outcome of the Board meeting as soon as it is practicable to do so.

- 49 At the conclusion of the inquiry, the provider, and all the organisations notified of the start of the inquiry will be notified of the conclusions reached and any action taken by the TSA.

## Publication of an inquiry report

- 50 Section 207 of the Act sets out the TSA's power to publish all or part of an interim or final report. While the TSA is, in principle, committed to publishing all inquiry reports in full, it recognises that some reports may contain some material where publication might not be in the public interest or might compromise the safety of individuals or might deter others from coming forward with information. The TSA will always consider whether publication is in the public interest. If it is, the TSA will consider the most appropriate form for publication which could be:

- The full report
- A summary of the report
- Any representations made by the provider or by any individual

- 51 Where the TSA does intend to publish material it will notify the provider and any relevant individuals of its intention to do so. The TSA will issue a news release to announce the publication of the report.

## Expectations

### What an inquirer can expect from the TSA

- 52 The TSA will:
- Brief the inquirer
  - Agree appropriate liaison and reporting arrangements with the inquirer
  - Consider reports on the progress of the inquiry and respond in a timely manner to any requests for amendments to the inquiry brief
  - Give reasonable consideration to any requests made by the inquirer
  - In holding the inquiry pay due regard to the standards in public life and the TSA's

Fundamental Objectives as set out in the Act, particularly Objective 8, to avoid the imposition of an unreasonable burden (directly or indirectly) on public funds, and Objective 9, to guard against the misuse of public funds

## What the TSA expects from an inquirer

53 During the course of the inquiry, the TSA expects the inquirer to:

- Carry out the inquiry in accordance with the brief and this guidance
- Strive to ensure that the inquiry is completed within a reasonable period and at a reasonable cost
- Ensure that parties are given a fair opportunity to correct or contradict any relevant statement prejudicial to their interests
- Conduct the inquiry fairly, expeditiously and proportionately in accordance with the rules of natural justice and without incurring unreasonable expenditure
- Agree the nature and cost of the involvement of any support staff and other professional staff with the TSA at the outset, and in advance of any such expenditure being incurred

- Provide value for money and 'best value' in conducting the inquiry
- At all times to be mindful of the fact that the TSA is a public body, and of the TSA's Fundamental Objectives as set out in the Act, particularly Objective 8, to avoid the imposition of an unreasonable burden (directly or indirectly) on public funds, and Objective 9, to guard against the misuse of public funds.

## What the TSA expects from the provider

54 During the course of the inquiry, the TSA expects officers, members, staff and agents of the provider to:

- Co-operate fully with the inquiry
- Respond positively and in a timely manner to all reasonable requests from the inquirers
- Comply with any timetable set by the inquirer
- Co-ordinate its communications strategy on all matters relating to the inquiry with the TSA, and to give the TSA the opportunity to comment on the content and timing of any news releases or other public statements
- At all times to be mindful of the fact that they along with the TSA provide public functions

and therefore should observe the standards in public life and the TSA's Fundamental Objectives as set out in the Act, particularly Objective 8, to avoid the imposition of an unreasonable burden (directly or indirectly) on public funds, and Objective 9, to guard against the misuse of public funds

## Direction to the Homes and Communities Agency

55 Under section 106 of the Act, in circumstances where the TSA has decided to hold an inquiry, it may give a direction to the Homes and Communities Agency (the HCA) which prohibits the HCA from giving financial assistance to the provider. In circumstances where it has decided to hold an inquiry, the TSA will also consider whether to issue such a direction to the HCA. The TSA will review its approach on a regular basis until the inquiry is concluded. All communication between the TSA and the HCA will be in accordance with the terms of the memorandum of understanding between the two organisations. Further advice and guidance about the TSA's approach to the exercise of the power to direct the HCA is set out in the relevant guidance note.

## Powers exercisable during or following an inquiry

56 The Act gives the TSA a range of powers which can only be exercised during or following an inquiry. The powers are:

- To direct a transfer of management (sections 249 and 250)
- To direct a transfer of land (sections 253 and 254)
- To make and execute an instrument of amalgamation for an industrial and provident society (section 255)
- To direct restrictions on dealings, including the powers to suspend or remove an officer, employee or agent of a provider, to direct a bank not to part with money or security and to restrict payments and transactions (sections 256 to 265)
- To censure a local authority (order and sections 269A and 269B)

Further advice and guidance about the TSA's approach to the exercise of these powers is set out in the relevant guidance notes.

57 The TSA may decide to exercise any of its enforcement or general powers during or following an inquiry. Further advice and guidance about the TSA's approach to the exercise of these powers is set out in the relevant guidance notes.

# Guidance note 11

## Guidance on sections 219-225: Enforcement notices

### Purpose

- 1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) proposes to exercise the power on enforcement notices. This is an enforcement power and is set out in chapter 7 Sections 219 to 225 of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out proposals for the objectives and principles that might underpin the TSA's approach to dealing with poor performance by landlords.

### Scope

- 2 The power may be exercised in relation to all providers including a non-profit registered provider, a for-profit registered provider and a local authority provider.

### Background and context to the use of the power

- 3 A provider is responsible for ensuring that it manages itself effectively, achieves the standards set by the TSA, and engages positively with the TSA's regulatory framework. Where a failure against a standard or other problem has been identified, the TSA expects providers to respond in a prompt and effective manner. It may be necessary for the TSA to step in and exercise this power when a provider fails to do so.

### Potential triggers to the exercise of the power

- 4 Section 220 of the Act includes ten specific circumstances in which the TSA may exercise the power of enforcement notices. They are:
  - 1 Where the registered provider has failed to meet a standard under sections 193 or 194 of the Act
  - 2 Where the affairs of the registered provider have been mismanaged
  - 3 Where the registered provider has failed to comply with an earlier enforcement notice

- |  |  |
|--|--|
| <p>4 Where the registered provider has failed to publish information in accordance with a requirement under section 228(3) or 240(3) of the Act</p> <p>5 Where the interests of tenants of the registered provider require protection</p> <p>6 Where the assets of the registered provider require protection</p> <p>7 Where the registered provider has given an undertaking under section 125 of the Act and failed to comply with it</p> <p>8 Where the registered provider has failed to pay an annual fee under section 117(2) of the Act</p> <p>9 Where an offence under Part 2 of the Act has been committed by a registered provider</p> <p>10 Where the registered provider has failed to comply with an order made by an ombudsman appointed by virtue of section 124 of the Act</p> | <p>resources available to the provider to undertake the necessary action.</p> <p>6 Although the power potentially covers a wide range of activities, the TSA intends only to use this power on a limited basis. Examples of such circumstances may include:</p> <ul style="list-style-type: none"> <li>▪ Where a provider has failed to co-operate in addressing a performance failure or weakness</li> <li>▪ Where action is needed to protect the safety or interests of tenants</li> <li>▪ Where a provider has failed to honour a voluntary undertaking</li> <li>▪ Where the assets of the provider or public investment are at risk</li> <li>▪ Where the provider has responded unsatisfactorily to a previous regulatory intervention</li> </ul> |
|--|--|
- 5 Except in cases where urgent action is required, the TSA will attempt to secure the voluntary agreement of the provider to take the necessary action before issuing an enforcement notice. In reaching a decision to issue a notice, the TSA will have regard to the willingness, capacity and

## Process

- 7 When a problem is identified, the TSA will bring it to the notice of the provider and seek information on the provider's intended response. The TSA will take account of this intended response in considering whether an enforcement notice is needed. If the TSA considers that an

enforcement notice is required it will be issued in writing to the provider.

8 When issuing an enforcement notice the TSA will:

- Specify the grounds on which an enforcement notice is given
- Specify the action the TSA requires the registered provider to take
- Specify when the action is to be taken
- Specify what information the registered provider must provide to the TSA to demonstrate that the required action has been completed
- Explain that a registered provider who is given an enforcement notice may appeal to the High Court
- Explain that the TSA may withdraw the enforcement notice by giving notice to the registered provider
- Explain that if a registered provider does not comply with the enforcement notice the TSA will consider exercising another regulatory or enforcement power

9 The TSA expects the provider to:

- Take prompt and effective action in accordance with the direction in the enforcement notice
- Provide evidence to demonstrate its achievement of the actions specified in the notice
- Co-operate fully with the TSA
- Co-ordinate its communications strategy on all matters relating to enforcement with the TSA, and to give the TSA the opportunity to comment on the content and timing of any news releases or other public statements

## **Notification to the Homes and Communities Agency**

10 When the TSA issues an enforcement notice it will send a copy of it to the HCA.

# Guidance note 12

## Guidance on sections 226-235: Penalties

### Purpose

- 1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power of the imposition of penalties. This is an enforcement power and is set out in chapter 7 and sections 226 to 235 of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out proposals for the objectives and principles that might underpin the TSA's approach to dealing with poor performance by landlords.

### Scope

- 2 The power may be exercised in relation to a non-profit registered provider, or a for-profit registered provider. It may not be exercised in relation to a local authority.

### Background and context to the use of the power

- 3 This power allows the TSA to penalise failure on the part of registered providers by the imposition of fines.

### Potential triggers to the exercise of the power

- 4 Section 227 of the Act includes six specific circumstances in which the TSA may exercise the power on imposing penalties. They are:
  - 1 Where the registered provider has failed to meet a standard under sections 193 or 194 of the Act
  - 2 Where the affairs of the registered provider have been mismanaged
  - 3 Where the registered provider has failed to comply with an enforcement notice
  - 4 Where the registered provider has given an undertaking under section 125 of the Act and failed to comply with it
  - 5 Where the registered provider has failed to pay an annual fee under section 117(2) of the Act

- 6 Where an offence under Part 2 of the Act has been committed by a registered provider
  - 5 In considering whether to penalise a provider, the TSA will take into account all relevant circumstances of the case, including the provider's financial position and any potential detrimental imposition on its tenants. It will also consider whether a penalty is the most appropriate response in each case, or if it should use one or more of its other powers.
  - 8 The pre-penalty warning will be copied to the HCA and any other persons the TSA thinks appropriate, in particular any person who provided information as a result of which the pre-penalty warning is being issued.
- imposition of the penalty or its amount. It will indicate whether or to what extent the TSA would accept a voluntary undertaking instead of, or in mitigation of, a penalty. The warning will also include details of the enforcement of the proposed penalty (see below).

## Process Warning

- 6 Before a penalty notice is issued, the TSA will give the provider a 'pre-penalty warning'. This will warn the provider that the TSA is considering imposing a penalty and will set out the grounds on which the TSA believes the penalty can be imposed.
- 7 The pre-penalty warning will include any details the TSA is able to give concerning the likely amount of the penalty. It will provide details of how the provider can make representations to the TSA and how they can appeal the

## Representations

- 9 The TSA will specify a period in the pre-penalty notice during which the provider may make representations to the TSA concerning the imposition of the proposed penalty or its amount. This period will be of at least 28 days and will begin on the date the pre-penalty notice is received by the provider. We will normally send such notices by recorded delivery and we will work on the basis that the documents are received by the provider the day after they are sent. At the end of the period the TSA will consider any representations and decide whether to impose the penalty.

## Imposition

- 10 A penalty is imposed by the TSA giving a penalty notice to the provider. The notice will set out the grounds on which the penalty is imposed, the amount, payment method, payment period, the interest to be charged on any late payment and the means of appeal. The notice may require the provider to publish information about the penalty and may set out the manner of that publication.

## Notifying the Homes and Communities Agency

- 11 When a penalty is imposed the TSA will send a copy of the penalty notice to the HCA.

## Amount

- 12 Penalties for an offence under Part 2 of the Act may not exceed the maximum amount of fine that a magistrates' court could impose for the relevant offence, and the notice will confirm that the penalty falls within the current limit. For

all other instances the penalty imposed may not exceed £5,000 or other maximum amount as ordered by the Secretary of State.

## Destination

- 13 Money received by way of a penalty will be paid to the HCA, to be used at its discretion for investment in social housing. Before making such payment, the TSA may deduct a sum representing its direct and indirect costs and expenditure in administering the penalty. The TSA will establish and publish a methodology for calculating these deductions.

## Enforcement

- 14 The penalty will be treated as a debt owed to the TSA. If payment is not made by the date specified in the notice the TSA may charge interest on the debt from that date and may impose one or more additional penalties in accordance with any regulations that may be made by the Treasury.
- 15 The TSA may include a provision in the penalty notice allowing a discount if the penalty is

paid on or before the specified date. The TSA will establish and publish a methodology for calculating any discounts.

## Appeal

- 16 A provider who is given a penalty notice may appeal to the High Court against the imposition of the penalty, its amount, or both.

# Guidance note 13

## Guidance on sections 236-245: compensation

### Purpose

1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power on the award of compensation. This is an enforcement power and is set out in chapter 7 and sections 236 to 245 of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out proposals for the objectives and principles that might underpin the TSA's approach to dealing with poor performance by landlords.

### Background and context to the use of the power

2 This power allows the TSA to award compensation to a victim of a failure on the part of a registered provider

### Potential triggers to the exercise of the power

3 Section 237 of the Act includes two specific circumstances in which the TSA may exercise the power on awarding compensation. They are:

- Where the registered provider has failed to meet a standards under sections 193 or 194 of the Act
- Where the registered provider has given an undertaking under section 125 of the Act and failed to comply with it

4 The TSA is most likely to exercise the power in circumstances where a breach of the standards has resulted in a tenant, or tenants, not receiving the quality of service required by the standard, or if the provider has failed to pay compensation that has been awarded by an ombudsman.

### Scope

5 The power may be exercised in relation to a non-profit registered provider or a for-profit registered provider. It cannot be applied to a local authority.

- 6 Awards of compensation may be made to persons who have suffered as a result of the failure provided that they are tenants of the provider.
- 7 If the housing ombudsman has already awarded compensation to a particular person on a particular matter the TSA may not award compensation to that person on that matter unless the provider has not made the payment directed by the ombudsman.

## Process

### Warning

- 8 Before a compensation notice is issued, the TSA will give the provider a 'pre-compensation warning'. This will warn the provider that the TSA is considering awarding compensation and will set out the grounds on which the TSA believes the compensation can be awarded.
- 9 The pre-compensation warning will include any details the TSA is able to give concerning the likely amount of the award. It will provide details of how the provider can make representations to the TSA and how they can appeal the award

of compensation or its amount. It will indicate whether or to what extent the TSA would accept a voluntary undertaking instead of, or in mitigation of, an award. The warning will also include details of the enforcement of the proposed award (see below). Before issuing a pre-compensation warning, the TSA will consult with the relevant ombudsman.

- 10 The pre-compensation warning will be copied to the HCA and any other persons the TSA thinks appropriate, in particular any person who provided information as a result of which the pre-penalty warning is being issued.

### Representations

- 11 The TSA will specify a period in the pre-compensation notice during which the provider may make representations to the TSA concerning the proposed award of compensation or its amount. This period will be of at least 28 days and will begin on the date the pre-compensation notice is received by the provider. At the end of the period the TSA will consider any representations and decide whether to impose the penalty.

## **Award of compensation**

- 12 Compensation is awarded by the TSA giving a compensation notice to the provider and the person(s) to be compensated. The TSA will establish and publish a methodology for determining when an award of compensation would be appropriate and for setting the level of compensation to be awarded.
- 13 The notice will set out the grounds on which the award is made, the amount, to whom it must be paid, the payment period, the interest to be charged on any late payment and the means of appeal. The notice may require the provider to publish information about the award and may set out the manner of that publication.

## **Impact**

- 14 When considering whether to award compensation or the amount of compensation to be awarded, the TSA will take account of information it has on the financial situation of the provider and the likely impact of the award on the provider's ability to provide services.

- 15 The TSA will aim to avoid jeopardising the financial viability of the provider, preventing the provider from honouring financial commitments or preventing the provider from taking action to remedy the matters on the grounds of which the compensation might be awarded.

## **Enforcement**

- 16 The award will be treated as a debt owed to the person to whom it is awarded. If payment is not made by the date specified in the notice the TSA may charge interest on the debt from that date and may impose additional compensation.

## **Appeal**

- 17 A provider who is given a compensation notice may appeal to the High Court against the award of compensation, its amount, or both.

# Guidance note 14

## Guidance on sections 251-252: Appointment of manager

### Purpose

- 1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power of appointment of a manager. This is an enforcement power and is set out in chapter 7 and sections 251 to 252 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to non-profit private registered providers and for-profit private registered providers. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out proposals for the objectives and principles that might underpin the TSA's approach to dealing with poor performance by landlords.

### Scope

- 2 The power may be exercised in relation to non-profit registered providers and for-profit registered providers. It may not be exercised in relation to a local authority provider.

### Background and context to the use of the power

- 3 A provider is responsible for ensuring that it manages itself effectively, achieves the standards set by the TSA, and engages positively with the TSA's regulatory framework. In some circumstances, where a failure against a standard or other problem has been identified, it may be necessary for the provider to change, replace or reinforce its management to achieve the necessary improvements.

### Potential triggers to the exercise of the power

- 4 The Act sets out the specific circumstances in which the TSA may exercise this power. These are:
  - Where the registered provider has failed to meet a standards under sections 193 or 194 of the Act
  - Where the affairs of the registered provider have been mismanaged in relation to social housing

- 5 The TSA is most likely to exercise the power in circumstances where it considers that the provider:
- is facing critical financial viability problems that require urgent action to remedy
  - is failing to address serious deficiencies in the delivery of services to its tenants
  - requires additional leadership and/or staffing resources to deliver essential organisational change
- 6 Key factors in a decision to appoint a manager will include our assessment of the seriousness of the problem, the need for additional professional support, and the provider's willingness and ability to take effective action without the need for the TSA to use this power.

## Appointment process

- 7 Before making an appointment the TSA will give the provider a warning notice. This notice will explain that the TSA is considering exercising this power, set out the grounds on which that action is proposed and explain its effects. The warning notice will specify a period during which the provider may make representations to the

TSA. That period will commence on the date the registered provider receives the notice and will be for no less than 28 days. We will normally send such notices by recorded delivery and we will work on the basis that the documents are received by the provider the day after they are sent.

- 8 The warning notice will indicate whether or to what extent the TSA would accept a voluntary undertaking instead of, or in mitigation of, the appointment of a manager.
- 9 The TSA will send a copy of the warning notice to the HCA.

## Terms of appointment

- 10 The TSA will normally require the registered provider to appoint the manager. In exceptional cases, for example where it has serious concerns about the performance of the governing body, the TSA may appoint the manager itself.

- 11 Managers will be individuals, rather than corporate bodies, although the individual may work for a corporate body. The individual will be selected by the TSA on the basis of relevant professional experience. The appointment may relate to the provider's affairs generally in regard to social housing or in relation to a specific aspect of social housing.
- 12 The manager's terms and conditions (including remuneration, which will be paid by the provider) will be specified by the TSA and included in the notice of appointment. In setting the remuneration level, the TSA will have regard to market rates for the specified work and the financial circumstances of the provider.
- 13 The manager will have any power specified in the notice of appointment and any other additional power he or she requires to achieve the purposes of the appointment. Where the manager considers that additional powers are required he or she will discuss and agree these with the TSA.
- 14 The TSA may require the manager to report to it on the affairs specified in the appointment notice.

## **Notification to the Homes and Communities Agency**

- 15 When a manager is appointed the TSA will notify the HCA.

## **Appeal**

- 16 A provider may appeal to the High Court against the appointment of a manager or a requirement to appoint.

## Guidance note 15

# Guidance on sections 253 and 254: Transfer of land

### Purpose

1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power relating to the transfer of the land of a registered provider. This is an enforcement power and is set out in Chapter 7 sections 253 and 254 of the Housing and Regeneration Act 2008 (the Act). It may be exercised in relation to registered providers with some exceptions which are set out in the section below on Scope. This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.

### Scope

2 The power may be exercised in relation to a registered provider which is a registered company or an industrial and provident society. It cannot be applied to a local authority provider or to a registered charity. It can be applied to a for-profit provider only in relation to its social housing and associated land.

### Background and context to the use of the power

3 Where the TSA suspects that the affairs of a registered provider may have been mismanaged, the TSA may hold an inquiry in accordance with Section 206 of the Act. As part of an inquiry the TSA may require the provider's accounts and balance sheet to be audited by a qualified auditor appointed by the TSA (Section 210). If, as a result of such an inquiry or audit, the TSA is satisfied that the affairs of the provider have been mismanaged in relation to social housing or is satisfied that a transfer of the provider's land would be likely to improve the management of the land, the TSA may require the provider to transfer specified land to the TSA or to another registered provider. Further advice about the TSA's approach to the exercise of the power to hold an inquiry is set out in the guidance note on Section 206.

## The power

### The circumstances in which the power can be exercised

- 4 The power can only be exercised as a result of the TSA's conclusions following an inquiry under Section 206. The conclusions will be those of the Board of the TSA following completion of the inquiry process. Under Section 254 the TSA can only require a provider to transfer land having first obtained the consent of the Secretary of State to both the transfer of that land and to the terms of the transfer. Any requirement to transfer land under Section 253 will be authorised by the Board of the TSA.

## The transfer

- 5 A transfer of land may be to the TSA or to another specified registered provider. The purpose of a transfer is to ensure that the land will be properly managed. Therefore, a transfer of land is likely to be to another registered provider which has the capability and the capacity to ensure proper management in the future. As a general rule the TSA will not require transfers

of land to be made to the TSA itself. In the unlikely situation that a transfer to the TSA became necessary, the TSA would treat this as a temporary measure pending onward transfer to a registered provider. The TSA can only dispose of land transferred to it under Section 253 to a registered provider and, if the original transfer was from a non-profit provider, a disposal must be to another non-profit provider.

- 6 The TSA will select a suitable recipient registered provider for a transfer of land. In making its selection the TSA will have regard to the quality and management of services to residents provided by the potential recipient, the quality of its governance systems, its financial viability, general regulatory compliance and management and financial capacity.
- 7 A for-profit provider can only be required to transfer its social housing and associated land. Social housing has the meaning given to it by Section 68 of the Act. The Act gives the TSA the power to decide what land belonging to a for-profit provider is associated with social housing. The TSA would expect social housing and associated land to be readily identifiable within the assets of a for-profit provider, and

would expect to agree these with the provider at an early stage in any transfer process.

- 8 A non-profit provider can only be required to transfer its land to another non-profit provider. An unregistered charity can only be required to transfer its land to another charity which has similar objects to those of the transferring charity. The Act gives the TSA the power to decide whether the objects of the two charities are similar. The TSA will consult with the two charities, and will take advice from the Charity Commission as necessary, before making a decision on similarity of objects. This provision does not apply to registered charities.

## The terms of transfer

- 9 Section 254 makes provision for determining the price of a transfer of land and the terms on which the transfer takes place. The price at which a transfer will take place will not be less than the amount certified by the district valuer to be the amount the land would fetch if sold by a willing seller to another registered provider. The onus is therefore on the district valuer to prepare a valuation of the land to be transferred and to decide on the appropriate valuation methodology

to be applied to reach that valuation. The TSA will commission, and pay for, valuations from the district valuer on transfers of land under Section 253. At an early stage in the commission the TSA will meet with the district valuer and agree the valuer's information and other requirements for the work necessary to prepare a valuation. The TSA will expect the registered provider to co-operate with the valuer in supplying relevant information and facilitating access to manual and computerised records, as well as physical assets, in accordance with the valuer's requirements.

- 10 The terms of a transfer of land under Section 253 will be specified by the TSA in the requirement to make the transfer. Those terms must include provision for the payment of any debts or liabilities in respect of the land, whether or not those are secured on the land. The details of the terms will depend on the circumstances of the case, and, in particular, the amount of land to be transferred. Where a transfer of all of a provider's land takes place, the terms of the transfer will make provision for all assets and liabilities of the provider to be passed to the recipient provider. The terms will ensure that the transfer is as close as possible to a complete transfer of engagements, leaving the transferor behind as a shell organisation

only. The TSA will make provision for the solvent winding-up of the transferor to be undertaken as soon as is practicable after the transfer has been completed. Section 166 of the Act gives the TSA the power to petition the Court for the provider to be wound up under the Insolvency Act 1986 where a transfer of the provider's land has taken place under Section 253.

- 11 Where a partial transfer of land takes place, the terms of the transfer will make provision for payment of any debts or liabilities associated with the land being transferred. The TSA expects the provider to co-operate fully in enabling the TSA to identify those debts and liabilities and, where relevant, to agree to also transfer cash or other assets, or an appropriate portion thereof, held by the provider in respect of the land. The TSA will seek to reach an equitable solution in the allocation or apportionment of assets and liabilities and, in particular, will seek to avoid giving preferential treatment to any creditor who is not lawfully entitled to such treatment. The TSA reserves the right to use its power under Section 201 to inspect the provider's financial or other affairs to inform the TSA's task of setting the terms of the transfer.

- 12 The TSA recognises the rights of secured creditors in respect of any security held over land that the TSA proposes to transfer from one registered provider to another, and that the secured creditors will need to give their consent to a transfer. The TSA will take appropriate steps with the provider to identify all relevant secured creditors, and will consult with the secured creditors about the proposed transfer and the terms of the transfer.

## The consent of the Secretary of State

- 13 The TSA can only require a provider to transfer its land if the Secretary of State (SoS) has first given consent to the transfer and to the terms of the transfer. The TSA recognises that the decision for the SoS is not the same one as the decision for the TSA and therefore the SoS will need to be fully informed about the details of the case as well as the process followed by the TSA in undertaking its responsibilities. The TSA will agree working arrangements in advance with the Department of Communities and Local Government for the handling of any future applications for SoS consent.

## Consultation

14 The Act does not require the TSA to consult relevant persons in exercising its power under Section 253. However, the TSA recognises that it would be appropriate to have regard to a wide range of legitimate interests and is, therefore, committed to as full consultation as is possible with a number of different stakeholders. Those stakeholders will include:

- Tenants – the TSA recognises that any situation where land is transferred could cause anxiety for tenants and leaseholders, although their legal rights would not be affected. The TSA will take all steps it can to mitigate that anxiety. The TSA will ensure that tenants are consulted and informed, as far as is reasonably practicable, prior to a final decision on a transfer of land which affects them. The nature of consultation will depend on the circumstances of the case and the timescales involved. It will not be practicable in some situations to make direct contact with each individual tenant. The TSA will use various techniques to consult and inform tenants including where appropriate, liaison with recognised tenant representative groups, appointment of a tenant adviser, telephone help-

lines, advertisements in local newspapers and tenant meetings

- Secured creditors – the TSA will work closely with the secured creditors throughout the exercise of the power to require a transfer of land (see also paragraph 12 above)
- The registered provider – the TSA will ensure that the provider (including its officers and its directors, committee members or trustees) and its senior staff are consulted and informed as appropriate throughout. The TSA expects the provider to co-operate in achieving an effective and timely outcome in the interests of all of its stakeholders
- The proposed recipient registered provider – the TSA will work closely with the proposed recipient provider throughout the exercise of the power
- Other regulators – the TSA will consult and inform the Financial Services Authority, the Charity Commission and the Registrar of Companies as appropriate
- Local authorities – the TSA recognises that local authorities in whose areas a registered provider operates may have various levels of interest in the provider's affairs. Where a local authority holds security over land to be transferred its position is the same as other secured creditors as outlined above. In some cases a local authority may need to provide consent to a

transfer of contracts or undertakings. The TSA will consult with and keep local authorities informed as appropriate to the particular circumstances of each case

- Central government - the TSA will keep relevant persons at the Department of Communities and Local Government informed at all stages in the exercise of these powers

## Guidance note 16

# Guidance on section 255: Amalgamation of an industrial and provident society

### Purpose

- 1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power of the amalgamation of industrial and provident societies. This is an enforcement power and is set out in chapter 7 and section 255 of the Housing and Regeneration Act 2008 (the Act).
- 2 This power is separate from, and will be used in different circumstances to, the TSA's power to consent to a (voluntary) amalgamation proposed by two or more providers as set out in various parts of sections 160 to 169 of the Act.
- 3 This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out proposals for the objectives and principles that might underpin the TSA's approach to dealing with poor performance by landlords.
- 4 This power can only be used after a statutory inquiry and/or audit and this document should be read in conjunction with the guidance on those powers

### Scope

- 5 The power may be exercised only in relation to a non-profit registered provider which is an industrial and provident society. It may not be exercised in relation to a for-profit provider, a local authority provider or a non-profit registered provider which is not an industrial and provident society.

### Background and context to the use of the power

- 6 Where the TSA suspects that the affairs of a registered provider may have been mismanaged, the TSA may hold an inquiry in accordance with Section 206 of the Act. As part of an inquiry the TSA may require the provider's accounts and balance sheet to be audited by a qualified auditor appointed by the TSA (Section 210).

### Potential triggers to the exercise of the power

- 7 Section 255 of the Act includes two specific circumstances in which the TSA may exercise

the power on amalgamation. They are where, as a result of an inquiry under section 206 or an audit under section 210, the TSA is satisfied that:

- The affairs of a non-profit registered provider which is an industrial and provident society have been mismanaged in relation to social housing, or
- The management of social housing owned by a non-profit registered provider which is an industrial and provident society would be improved if the provider were amalgamated with another industrial and providence society

8 The power can only be exercised as a result of the TSA's conclusions in these two areas following an inquiry under Section 206 or an audit under section 210. The conclusions will be those of the Board of the TSA following completion of the inquiry or audit process.

9 If, as a result of an inquiry or audit, the TSA is satisfied that the affairs of the provider have been mismanaged in relation to social housing or is satisfied that an amalgamation of the provider with another industrial and provident society would be likely to improve the management of social housing, the TSA may make and execute

an instrument on behalf of the provider which provides for its amalgamation with another industrial and provident society.

10 Under Section 255 the TSA can only make and execute an instrument amalgamating the two industrial and provident societies having first obtained the consent of the Secretary of State. Any making and executing of an amalgamation instrument under section 255 will be authorised by the Board of the TSA.

## Process

11 In considering its findings following a statutory inquiry or extraordinary audit, the Board of the TSA will decide whether to exercise the power to amalgamate an industrial and provident society.

12 If the Board so decides, the TSA will seek the consent of the Secretary of State to the proposed amalgamation. Following receipt of the consent of the Secretary of State to the amalgamation, the TSA will follow the outline process below in executing the Board's decision.

13 For ease of reference, in the remainder of this document the provider subject to the statutory inquiry or extraordinary audit will be referred to as RP1, the provider with which RP1 will be amalgamated will be referred to as RP2 and the resultant organisation referred to as RP3.

14 In general, the TSA will expect RP2 to take the lead on business and operational planning for RP3. The TSA expects RP1 to work positively with the TSA and RP2 in taking the amalgamation forward.

15 RP3 must be an industrial and provident society, registered by the TSA and designated as a non-profit registered provider. Pending registration by the TSA, RP3 shall be treated as registered and designated as a non-profit provider.

## **Selection of RP2**

16 The TSA will select organisation RP2. In identifying a suitable, willing organisation and making its selection the TSA will have regard to the quality and management of services to residents provided by potential RP2 organisations, the quality of their governance

systems, their financial viability, general regulatory compliance and management and financial capacity.

## **Due diligence and business planning**

17 RP2 will be expected to conduct due diligence as it sees fit on RP1.

18 RP2 will be expected to prepare a business plan for RP3 and to submit that for consideration by the TSA.

19 RP2 will be expected to develop a plan to establish RP3 and to submit that for consideration by the TSA.

## **Consultation**

20 The TSA expects RP1 and RP2 to conduct appropriate consultation regarding the amalgamation with their residents, lenders and local authorities in which they work

- 21 Where necessary RP1 and RP2 will need to obtain the formal consent of their lenders to the propose amalgamation
- 22 The TSA will agree with RP2 and RP1 which organisation will undertake which aspects of consultation.

### **Governing Instrument (Rules)**

- 23 The TSA will invite RP2 to draft a set of Rules for RP3. These will be expected to be based on the most up to date version of model rules for industrial and provident societies and will need to be approved by both RP1 and RP2. The TSA will provide comments and in principle agreement to the new rules before they are considered by the Board of the TSA.

### **Agreement to the amalgamation by the Board of the TSA**

- 24 The Board of the TSA will receive a report setting out the detail of the proposed amalgamation and covering the outcome of consultation and due diligence, business and operational planning for RP3, views of lenders

and local authorities and the new Rules for RP3. If the Board of the TSA agrees to the detail of the proposed amalgamation it will seek the consent of the Secretary of State to that proposal.

### **Registration of the amalgamation**

- 25 Following receipt of the Secretary of State's consent to the proposal, the TSA will prepare an instrument of amalgamation and send a copy of it to the Financial Services Authority (FSA). The copy will be sent for registration within fourteen days of the date of execution. A copy registered after that fourteen day period is valid. The FSA will register the instrument (the amalgamation does not take effect until it is registered by the FSA). The TSA will advise RP3 of the FSA's registration of the instrument of amalgamation.

# Guidance note 17

## Guidance on sections 256-265: Powers available during or following an inquiry

### Purpose

- 1 This document gives general advice and guidance on the powers that the Tenant Services Authority (the TSA) may exercise during or following an inquiry. This is an enforcement power and is set out in chapter 7 and sections 256 to 265 of the Housing and Regeneration Act 2008 (the Act). These powers do not apply to local authorities.
- 2 This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out proposals for the objectives and principles that might underpin the TSA's approach to dealing with poor performance by landlords.
- 3 This document follows on from and should be read in conjunction with the guidance on inquiries and audit.

### Scope

- 4 The powers in sections 256 to 261 may be exercised only in relation to non-profit registered providers. They do not apply to for-profit registered providers or a local authority provider.

- 5 The powers in sections 262 to 265 apply to all registered providers except local authorities.

### Background and context to the use of the power

- 6 Where the TSA suspects that the affairs of a registered provider may have been mismanaged, the TSA may hold an inquiry in accordance with Section 206 of the Act. As part of an inquiry the TSA may require the provider's accounts and balance sheet to be audited by a qualified auditor appointed by the TSA (Section 210).

### Potential triggers to the exercise of the power

- 7 The Act sets out the circumstances in which the TSA may exercise this power and they are set out below.
- 8 Following receipt of an interim or final inquiry report the Board of the TSA may conclude that it is necessary to use one or more of the powers available.

9 In particular, the Board may conclude that it is necessary to suspend or remove officers, employees or agents of the registered provider in order to ensure the proper conduct of the inquiry and/or the proper management of the provider's functions, including the delivery of services to its tenants. It may also conclude that it is necessary to restrict the dealings of the registered provider in order to protect its assets and the public investment.

10 Where a person is removed from their position following a statutory inquiry or extraordinary audit the TSA may conclude that it would not be appropriate for that person to serve as an officer of another provider and so the TSA may disqualify that person.

## The power

### Restrictions on dealings during an inquiry

11 Section 256 of the Act includes two specific circumstances in which the TSA may exercise the power on restrictions on dealings during an inquiry under section 206 of the Act into a non-profit registered provider. They are:

- 1 Where the regulator has reasonable grounds for believing that the affairs of the non-profit registered provider have been mismanaged and that its assets or the interests of its tenants require protection
- 2 Where the regulator is satisfied that, as a result of an inquirer's interim report under section 207 of the Act, the affairs of the non-profit registered provider have been mismanaged

### Restrictions on dealings following an inquiry

12 Section 257 of the Act includes two specific circumstances in which the TSA may exercise the power on restrictions on dealings following an inquiry under section 20 of the Act into a non-profit registered provider. They are:

- 1 Where the regulator is satisfied that, as a result of an inquiry under section 206 of the Act, the affairs of the non-profit registered provider have been mismanaged

- 2 Where the regulator is satisfied that, as a result of an audit under section 210 of the Act, the affairs of the non-profit registered provider have been mismanaged

### **Suspension of officers, employees or agents during an inquiry**

- 13 Section 259 of the Act includes two specific circumstances in which the TSA may exercise the power on suspension during an inquiry under section 206 of the Act into a non-profit registered provider. They are:

- 1 Where the regulator has reasonable grounds for believing that the affairs of the non-profit registered provider have been mismanaged and that its assets or the interests of its tenants require protection
- 2 Where the regulator is satisfied that, as a result of an inquirer's interim report under section 207 of the Act, the affairs of the non-profit registered provider have been mismanaged

### **Removal or suspension of officers, employees or agents following an inquiry**

- 14 Section 260 of the Act includes two specific circumstances in which the TSA may exercise the power on removal or suspension following an inquiry under section 20 of the Act into a non-profit registered provider. They are:

- 1 Where the regulator is satisfied that, as a result of an inquiry under section 206 of the Act, the affairs of the non-profit registered provider have been mismanaged
- 2 Where the regulator is satisfied that, as a result of an audit under section 210 of the Act, the affairs of the non-profit registered provider have been mismanaged

## Disqualification of a removed person

15 Section 262 of the Act includes one specific circumstance in which the TSA may exercise the power on disqualification of a removed person. It is:

- Where a person has been removed under section 260 of the Act.

## Process Restrictions on dealings

16 The TSA may order a bank or other person holding money or securities on behalf of the non-profit registered provider not to part with them without the TSA's consent. Before issuing an order the TSA will take all reasonable steps to give notice to the non-profit registered provider and the person to whom the order is made.

17 The order may restrict:

- The transactions that may be entered into by the non-profit registered provider, or

- The nature and amounts of payments that may be made by the non-profit registered provider

18 The order may in particular stipulate that transactions or payments may not be entered into or made without the TSA's consent. The TSA may only make an order in respect of a registered provider that is a registered charity if that provider has received (financial) public assistance.

19 An order made following an inquiry has effect until revoked by the TSA. An order made during an inquiry has effect until the end of a period of six months beginning on the day the inquirer's final report is made. The TSA may revoke the order before that time or extend it for a further period of up to six months.

20 The bank or person to whom the order is made will be informed that if they contravene the order, they will commit an offence and may be prosecuted.

## Suspensions and removals

- 21 During an inquiry, the TSA may, by order, suspend any officer, employee or agent of the non-profit registered provider who the TSA thinks has contributed to the failure or mismanagement.
- 22 Suspension ceases at the end of the period of six months beginning on the day the inquirer's final report is made. The TSA can revoke the order before the end of that period.
- 23 Following an inquiry, the TSA may, by order, remove any officer, employee or agent of the non-profit registered provider who the TSA thinks has contributed to the failure or mismanagement. Pending a decision whether to remove such a person the TSA may suspend them for a specified period of up to six months.
- 24 Before making an order to remove an officer, employee or agent of the non-profit registered provider the TSA will take all reasonable steps to give at least 14 days' notice to the person and the registered provider.
- 25 The TSA may only suspend or remove an officer, employee or agent of a registered charity if the charity has received public assistance. The TSA will notify the Charity Commission if it suspends or removes an officer, employee or agent of a registered charity.
- 26 Where a person has been suspended or removed the TSA may give directions to the non-profit registered provider about the performance of the suspended/removed person's functions or any other matter arising from the suspension/removal. The TSA may appoint a person to perform the suspended/removed person's functions.

## Disqualification

- 27 If a person has been removed (not suspended) as an officer under section 260 they are disqualified from acting as an officer of any registered provider except local authorities (for the avoidance of doubt this covers non-profit registered providers and for-profit registered providers).

- 28 The TSA may waive disqualification either generally or in relation to a particular registered provider or class of registered providers. A waiver will only be granted following an application by the disqualified person. The TSA will notify the person if any aspect of their disqualification has been waived.
- 29 The TSA will maintain a register of disqualified persons that shows the details of any waivers and which is available for inspection by the public.
- 30 If a disqualified person acts as an officer for a registered provider, the person's acts are not invalid by reason of the disqualification only.
- 31 A person who acts as an officer while disqualified is committing an offence and may be prosecuted.
- 32 A person who acts as an officer while disqualified and who receives payment or other benefits from the registered provider may be required by the TSA to repay the sum or a specified amount representing the whole or part of the value of the benefit. If the person fails to comply with a requirement to repay, the non-profit registered provider may recover the sum or specified amount as a debt.

## Guidance note 18

# Guidance on sections 266 to 268: Removal of an officer

### Purpose

- 1 This document gives general advice and guidance on how the Tenant Services Authority (the TSA) may exercise the power on the removal of an officer. This is an enforcement power and is set out in chapter 7 and sections 266 and 267 of the Housing and Regeneration Act 2008 (the Act). It may be exercised only in relation to a non-profit registered provider (and excludes local authorities). This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.
- 2 This document does not cover the power on the suspension or removal of an officer during or following an inquiry which is set out in sections 259 to 265 of the Act. There is separate advice and guidance on this power.

### Scope

- 3 The power may be exercised only in relation to an officer of a non-profit registered provider. It

cannot be applied to a local authority provider or to a for-profit registered provider.

- 4 The term 'officer' is defined in section 270 of the Act. It covers any member of the board or governing body of a provider, including a committee member of an industrial and provident society, a trustee of a registered charity and a director of a registered company.
- 5 This power may be exercised in relation to an officer of a registered charity only if the charity has received public assistance. The term 'public assistance' is defined in section 274 of the Act, but in summary, it means that the registered charity must have received certain specified loans or grants from public sources or had property transferred to it by a local authority.

### Background and context to the use of the power

- 6 In general, the TSA expects a provider's constitution to make provision for removal where an officer fulfils one or more of the criteria specified in the Act, and for the provider to take action against an officer when it is appropriate to do so within the terms of its constitution.

## Potential triggers to the exercise of the power

- 7 Section 266 of the Act includes seven specific circumstances, or cases, in which the TSA may exercise the power on the removal of an officer. The TSA may remove a person who:
  - 1 Has been adjudged bankrupt
  - 2 Has made an arrangement with his or her creditors
  - 3 Is subject to a disqualification order or a disqualification undertaking under the Company Director's Disqualification Act 1986 or equivalent legislation in Northern Ireland
  - 4 Is subject to an order under Section 429 (2) of the Insolvency Act 1986 relating to disabilities on revocation of a county court administration order
  - 5 Is disqualified under section 72 of the Charities Act 1993 from being a charity trustee
  - 6 Is incapable of acting by reason of mental disorder
  - 7 Is impeding the proper management of the provider by reason of absence or failure to act
- 8 The TSA is most likely to step in and exercise this power when a person is impeding the proper management of the provider through absence or failure to act, particularly in circumstances where the TSA considers that:
  - The absence of officers means that the governing body fails to hold quorate meetings
  - The failure to act puts at risk the financial viability of the provider or the services to tenants in accordance with the standards set by the TSA.
- 9 The TSA may decide to step in where there is clear evidence one or more of the criteria specified in the Act applies, and where a provider has not taken action in a timely manner. It may be necessary for the TSA to step in and exercise this power against more than one officer of a provider.

## Process

### Notice

- 10 Before making an order under section 266, the Act requires the TSA to take all reasonable steps to give at least 14 days' notice to both the officer and the provider.
- 11 While it is not required to do so by the Act, in circumstances when it gives notice of removal, the TSA will seek representations from both the officer and the provider and, if any are received, it will take account of them in making its decision.

### Appeal

- 12 An officer removed under this section of the Act may appeal to the High Court.

## The power to appoint a new officer

- 13 The TSA may exercise its power to appoint a new officer under section 269 to replace an officer removed under section 266.

# Guidance note 19

## Guidance on section 269: Appointment of a new officer

### Purpose

1 This document is our proposed guidance on how the Tenant Services Authority (the TSA) intends to use the power to appoint new officers to the governing body of a registered provider (excluding local authority providers). This is an enforcement power and is set out in chapter 7 and section 269 of the Housing and Regeneration Act 2008 (the Act). This document should be read in conjunction with A New Regulatory Framework for Social Housing in England, which sets out the objectives and principles that underpin the TSA's approach.

### Scope

2 The power may be exercised only in relation to an officer of a non-profit registered provider. It cannot be applied to a local authority provider or to a for-profit registered provider.

3 The term 'officer' is defined in section 270 of the Act. It covers any member of the board or governing body of a provider, including a committee member of an industrial and provident society, a trustee of a registered charity and a director of a registered company.

4 This power may be exercised in relation to an officer of a registered charity only if the charity has received public assistance, as defined in section 274 of the Act. In summary, this means that the registered charity must have received certain specified loans or grants from public sources or had property transferred to it by a local authority. The power to appoint an officer to a registered charity may be exercised only if the TSA has consulted the Charity Commission.

### Background and context to the use of the power

5 The provider is responsible for ensuring that the organisation is properly governed and viable and achieves the standards set by the TSA. In circumstances where there has been a failure against a standard or where a provider has been mismanaged, the TSA will assess the most appropriate course of action. We will consider the willingness of members of the provider's governing body to contribute positively to a timely resolution of the presenting problems and whether they have the capability, expertise and skills in sufficient depth to achieve a satisfactory outcome. If the TSA concludes that they do not, it may appoint officers to the governing body.

6 The appointment of officers is intended to give the provider a range of relevant additional skills and expertise to assist in addressing the TSA's concerns. It is a supportive action designed to act as the catalyst for the changes necessary to resolve the failure or mismanagement.

## Potential triggers to the exercise of the power

7 Section 269 of the Act includes three specific circumstances in which the TSA may exercise the power on the appointment of new officers. They are:

- 1 To replace an officer removed under section 266 of the Act, that is the removal of an officer without an inquiry
- 2 Where there are no officers
- 3 Where the TSA thinks an additional officer is necessary for the proper management of the provider's affairs

8 The TSA is most likely to appoint an additional officer because it is necessary to do so for the proper management of the provider's affairs, particularly where in the opinion of the TSA one or more of the following circumstances apply:

- The provider's affairs have been mismanaged
- There has been a failure against a governance or viability standard
- There has been a failure against a social housing standard and persistent under-performance in the delivery of services to tenants
- The provider has failed to deal with previous regulatory interventions to the satisfaction of the TSA
- The governing body lacks the skills and experience to run the business
- There has been a lack of proper control by the governing body
- There has been a failure to effectively challenge the executive team by the governing body, and that failure has been detrimental to the business
- It is necessary to replace an officer suspended or removed during or following an inquiry
- It is necessary to replace an officer removed in accordance with the provisions of section 266 of the Act, that is in certain specified circumstances such as bankruptcy
- Where there are no officers
- The case raises matters of wider significance or concern to the social housing sector

This is not an exhaustive list and the TSA may conclude that it is necessary to exercise the power in other circumstances to those set out above.

- 9 When the TSA exercises its power to remove an officer under section 266, it will always consider whether it is necessary to replace the officer who has been removed. It will make its decision in the light of the circumstances of the provider. In particular, it will assess the level of risk associated with the provider and whether the governing body has the capability, expertise and skills in sufficient depth to achieve the proper management of the provider's affairs in the light of that regulatory risk assessment.
- 10 It is most unusual for there to be no officers on the governing body of a provider, so the TSA expects to have to exercise its power to appoint a person as an officer in these circumstances on very rare occasions. The trigger for such action is clear.
- numbers of officers imposed by the provider's constitution. However, this is balanced by a restriction that in most circumstances the number of appointed officers must be a minority of officers of the provider. The TSA may appoint more than a minority of the officers of a provider only if:
- The provider has fewer officers than required by its constitution
  - The provider's constitution does not specify a minimum number of officers
- 12 The TSA will decide how many appointments to make based on the circumstances of the case and the constitution of the provider. The TSA will review the number of appointed officers from time to time and may adjust the number where it concludes that the circumstances of the case make it necessary to do so.

## The power

### The restrictions on the number of appointed officers

- 11 The TSA may appoint more than one officer to the governing body of a provider. The Act specifies that in general the use of this power overrides any restriction on eligibility or

### The period and the terms of an appointment

- 13 The Act requires the order appointing an officer to specify the period for which, and the terms on which, office is to be held. The TSA will usually appoint officers for an initial period of

six months. The TSA will review the need for the appointments and may extend the period of office or may withdraw the appointed officers at any time, depending on the circumstances of the case. An appointed officer can resign at any time within the rules of the provider. In these circumstances, the TSA will decide whether to replace an appointed officer who has resigned. The terms on which an appointed officer holds office will be set out in the order making the appointment.

## **The rights, powers and obligations of an appointed officer**

- 14 The Act specifies that an appointed officer has the same rights, powers and obligations as any other officer of the provider's governing body.

## **Direction to the Homes and Communities Agency**

- 15 Under section 106 of the Act, in circumstances where the TSA has appointed an officer to the governing body of a provider, it may give a direction to the Homes and Communities

Agency (the HCA) which prohibits the HCA from giving financial assistance to the provider. In circumstances where it has appointed an officer, the TSA will also consider whether to issue such a direction to the HCA. The TSA will review its approach on a regular basis until the person appointed has vacated office, at which point the direction to the HCA will be withdrawn. All communication between the TSA and the HCA will be in accordance with the terms of the memorandum of understanding between the two organisations. Further advice and guidance about the TSA's approach to the exercise of the power to direct the HCA is set out in the relevant guidance note.

## **Who can be an appointed officer?**

- 16 The Act places no restrictions on who can be an appointed officer. They could be drawn from any source. The TSA will always try to match the best and most suitable people to the provider and to the particular circumstances of each case. The TSA will appoint people with relevant knowledge, skills and expertise. They should have the interpersonal and relationship management skills to operate effectively on the

governing body and to represent the provider at the highest level in its dealings with other bodies.

- 17 An appointed officer could be a member of staff of the TSA, although the TSA is only likely to appoint its staff in exceptional circumstances such as where there are no officers.
- 18 The TSA has established an appointed officer panel, a pool of expert individuals who are available to act as appointed officers. In identifying individuals to act as an appointed officer to the governing body of a particular provider, the TSA will always consider whether any individuals on the panel would be suitable. However, the TSA accepts that restricting its options to individuals on the panel might not be appropriate in some circumstances. For example, this might be because the number of people on the panel with the required skills who are prepared to serve in the area in which the provider operates is limited. Consequently, the TSA may also consider appointing suitable individuals who are not on the panel. Our overriding objective will be to identify the most appropriate people for the case.

## Notification and initial contact

- 19 The TSA will notify the provider about the appointments by a letter addressed to the Chair or Company Secretary or other suitable person. The TSA will serve an order on the provider for each appointed officer and the orders will be copied to the appointed officers. The TSA will issue a news release to announce the appointed officers. The provider will usually be given an opportunity to comment on the factual accuracy of any such news release.
- 20 The TSA will hold a meeting with the appointed officers to brief them and to provide them with all the background material they will need to carry out their duties. As a minimum, such background material is likely to include:
  - The provider's constitution
  - The most recent audited accounts and auditor's management letter
  - The most recent TSA Regulatory Judgement
  - The most recent TSA Annual Viability Review
  - Key correspondence about the provider's special measures status
  - The terms of any public statement that the TSA requires the provider to make

- A draft news release to announce the appointed officers

21 The TSA will hold a meeting with the provider, usually with its governing body and senior staff, in order to:

- Introduce the appointed officer(s)
- Explain the role of the appointed officer(s), their relationship with the provider and with the TSA and the TSA's expectations of appointed officers
- Explain the TSA's expectations of the provider
- Explain the implications of the provider's regulatory status and the actions that the TSA expects the provider to take to overcome the failure or problem
- Agree lines of communication between the TSA and the appointed officers and between the TSA and the provider

## Expectations

### What appointed officers can expect from the TSA

22 The TSA will:

- Agree appropriate liaison and reporting arrangements with appointed officers at the outset, including nominating a member of TSA staff as the main point of contact for all aspects of the appointments
- Provide support to appointed officers, and meet them from time to time in order to check progress and ensure that the underlying

concerns are resolved to the satisfaction of the TSA

- Provide an indemnity to appointed officers to the effect that any individual appointed officer who has acted honestly and in good faith will not have to meet out of their own personal resources any personal civil liability which is incurred in execution or purported execution of their appointed officer functions save where the person has acted recklessly

### What the TSA expects from appointed officers

23 The TSA expects an appointed officer to:

- Work in the best interests of the provider
- Act in the knowledge that they have the same rights, powers and obligations as any other officer of the provider's governing body, and to exercise their judgement accordingly
- Work within the constitution, code of conduct, standing orders, policies and procedures of the provider or, where these are not properly documented, to exercise their judgement to comply with generally accepted good practice
- Take an objective approach to implementing any special measures strategy or action plan
- Be circumspect about making any public comments about the provider or about their role as an appointed officer and to generally act within the provider's rules on confidentiality
- Refer any news enquiries to the provider and to generally act within the provider's communications strategy

- Maintain contact with the TSA, to keep it informed of key developments and to provide it with feedback on the progress of its regulatory strategy and action plan

## What the TSA expects from the provider

24 The TSA expects the officers and staff of the provider to:

- Co-operate fully with the TSA
- Co-operate with an appointed officer
- Facilitate the full involvement of an appointed officer in the affairs of the provider
- Provide copies of all documents, codes of conduct, standing orders, policies and procedures relevant to their membership of the governing body to an appointed officer
- Send copies of all notices, agendas and papers for meetings to an appointed officer
- Consult an appointed officer about the dates and times of meetings that they will be required to attend
- Inform any other relevant authority, for example Companies House in the case of a registered company, that an appointed officer has joined

the governing body as it is required to do when any new member joins the governing body

- Provide details of the liability insurance cover it provides for all members of its governing body to an appointed officer, and to inform the insurers that an appointed officer has joined the governing body if it is required to do so under the terms of the insurance
- Admit the appointed officer to membership and issue a share certificate where the provider has a shareholding membership
- Reimburse an appointed officer for all reasonable expenses they incur in accordance with the established policy and practice for all members of the governing body
- Offer to pay appointed officers where the provider pays members of its governing body. It will be for each appointed officer to decide whether or not to accept the offer
- Co-ordinate its communications strategy on all matters relating to an appointed officer or to special measures with the TSA, and to give an appointed officer and the TSA the opportunity to comment on the content and timing of any news releases or other public statements

## Our offices

Maple House  
149 Tottenham Court Road  
London W1T 7BN

Fourth Floor  
One Piccadilly Gardens  
Manchester M1 1RG

For enquiries, contact us at:  
Tel: 0845 230 7000  
Fax: 0113 233 7101  
Email: [enquiries@tsa.gsx.gov.uk](mailto:enquiries@tsa.gsx.gov.uk)  
Website: [www.tenantservicesauthority.org](http://www.tenantservicesauthority.org)

The publication is made of a recycled paper containing a minimum 75% recovered waste and manufactured at a mill accredited with the ISO 14001 environmental management standard.

For further information about this publication please call 0845 230 7000 or e-mail [enquiries@tsa.gsx.gov.uk](mailto:enquiries@tsa.gsx.gov.uk)

We can provide copies in large print, Braille and audio cassette, on request. Other language versions may also be available.



