

Investigating regulatory concerns:

inspecting the TSA standards

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Tenant Services Authority consultation

March 2011

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TSA consultation statement

Please respond by	10 June 2011
Please respond to	Amanda Newton Tenant Services Authority 4th Floor One Piccadilly Gardens Manchester M1 1RG Email: inspectionconsultation@tsa.gsx.gov.uk If you would like to discuss any issue raised in this document before sending your response, please contact our Customer Services Team on 0845 230 7000, who can refer you to the relevant TSA officer.
Why we are asking for views	<p>This consultation is on proposals for how we intend to specify the way inspections are carried out from 1 July 2011. We propose to use our existing approach for inspections of Section 194 standards (governance and financial viability) as the basis for inspections of Section 193 standards (also called housing or landlord services).</p> <p>We propose to commission inspections using a brief that requires the inspector to investigate our specific concerns about the provider's compliance with the TSA standards and regulatory requirements. This will replace the Key Lines of Enquiry methodology.</p> <p>The consultation includes a set of principles that will frame the way individual briefs are drawn up.</p>
Consultation questions	<p>Do you support the proposed arrangements and principles for the way TSA will commission inspections from July 2011 onwards?</p> <p>Do you have any comments on the proposed approach to providing transparency to a provider about the focus of its inspection?</p>

The context for consultation	<p>The Regulatory Framework for Social Housing in England from April 2010, and the annexes to it, set out our general approach to intervention and enforcement and guidance on how we intend to use our inspection power. This consultation does not propose changes to this established framework which, in relation to inspection, is articulated principally in chapter 6 and guidance note 9 of the regulatory framework.</p> <p>Inspections are currently carried out under interim arrangements published in a joint TSA/Audit Commission Transition Statement (November 2010). Following consultation, these proposals will replace those transitional arrangements.</p>
Status of consultation	<p>This consultation is about the way TSA commissioned inspections are carried out within the existing statutory framework. This is not, therefore, a statutory consultation but we are adopting a 12-week consultation period in order to allow stakeholders adequate opportunity to contribute their views on our proposals.</p>
Who is being consulted	<p>We are seeking views from tenants, providers, lenders and other stakeholders with an interest in social housing.</p>
How we are consulting	<p>We are consulting primarily through publication of this document which is published electronically. We can provide assistance on this document if required. Please contact our Customer Service Team on 0845 230 7000.</p>
Time to respond	<p>We aim to follow cabinet office guidance to allow a 12-week response time for all consultations. The time period for responses to this consultation is 12 weeks.</p>
Taking account of your views	<p>Our consultation questions are set out on page three.</p>

We expect we may receive different views about our proposals. This means that we may 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 intend to publish a decision statement in June 2011 and to bring the new inspection arrangements into effect on 1 July 2011.

1 Introduction

1.1 The TSA's Regulatory Framework for Social Housing in England from April 2010 established:

- Standards that registered providers are expected to achieve
- How the TSA monitors performance against the standards, based on our commitment to co-regulatory principles and supporting providers' self-improvement
- How the TSA uses our statutory powers to investigate and consider regulatory responses to potential or actual breach of the standards.

1.2 Where we have reason to suspect that there is risk of standards not being met, we have a range of regulatory responses and interventions that are available to us, one of which is inspection. Our stated approach is to use our statutory inspection power as a regulatory investigative tool. The key parts of the regulatory framework that are particularly relevant are:

- Chapter 6: The overarching principles for use of our regulatory, enforcement and general powers
- Annex 1, Guidance Note 9: Use of our Inspection Power (section 201-203, Housing & Regeneration Act 2008)
- Chapter 4: How we commission housing inspections from the Audit Commission

1.3 We have also published a transitional statement¹ describing how, when an inspection is necessary, it would be commissioned and carried out using parts of the Audit Commission's key lines of enquiry (KLOEs) tailored to the specific parts of the TSA standard(s) where we have cause for regulatory concern.

This consultation

1.4 This consultation describes proposals to revise the current arrangements for commissioning inspections. It completes a commitment made in the regulatory framework to carry out a review of the inspection methodology i.e. the way inspections are carried out. It is intended that, following consultation, the proposals will replace or supersede the interim arrangements in the transition statement.

1.5 The proposals in this consultation will operate within the statutory and regulatory framework as set out in chapter 6 and guidance note 9. This consultation does not introduce amendments to those. Guidance note 9 is reproduced in the Annex to this document for reference (it was consulted on in 2009/10 within the regulatory framework).

1.6 We expect the revised commissioning approach to take effect from 1 July 2011 and to last until further notice. We anticipate this means in practice these arrangements will be in place at least until April 2012.

¹ The November 2010 Transition Statement
http://www.tenantservicesauthority.org/upload/pdf/TSA-AC_Joint_statement_11-2010.pdf

1.7 We also expect these proposals, while grounded in the current regulatory arrangements, will be a good foundation for the future as indicated in the Government's October 2010 Review of social housing regulation and inspection. In respect of the regulator's inspection power, the Review concluded that:

- the regulator will retain its power to commission inspections of registered providers, however it should only do so where it has grounds to suspect failure against the standards
- having regard to the Government's announcement to abolish the Audit Commission, the regulator will in future need an ability to procure inspections from alternative sources

1.8 Government's proposals are currently subject to Parliamentary process in the Localism Bill which signals some new or changed priorities for the social housing regulator. These are discussed briefly, in the context of future use of inspection, towards the end of this document. They are unlikely to come into effect until April 2012 and until that date the provisions of the 2008 Act continue to apply.

2 Proposed arrangements for commissioning inspections from July 2011

2.1. The proposals in this consultation cover arrangements the TSA will use for commissioning inspections under the 2008 Act in its current form.

2.2. For standards set under Section 193 of the Act (housing services standards that apply domain-wide to all social housing providers), the Audit Commission retains the right of first refusal on inspections commissioned by the TSA. In the event that they decline to take the commission, the TSA may arrange for another person to carry out the inspection. Procurement of inspection services other than from the Audit Commission will be carried out in accordance with TSA's corporate procedures. In all cases, these consultation proposals will replace the current approach, which uses KLOEs for inspections of landlord services.

2.3. The proposals also cover the arrangements² the TSA uses for commissioning inspections where necessary of registered providers on Section 194 standards (currently the Governance and Financial Viability standard that applies to private registered providers i.e. not local authorities). The Audit Commission's right of first refusal does not extend to these inspections.

² TSA's regulatory framework guidance note 9, reproduced in the Annex to this document

2.4. The TSA proposes the following principles that will apply following consultation, from July 2011 onwards:

1. All inspections will be carried out within the terms specified in the TSA's guidance on the use of its inspection power and also within the powers on inspection contained in sections 201-203 of the Housing and Regeneration Act 2008.
2. Inspections will not be routine, but will be used to establish whether providers are compliant with TSA standards and regulatory requirements where we have reason to believe a provider may be failing in this.
3. Inspection will provide a clear, evidence-based, independent assessment of compliance with the standards and regulatory requirements.
4. Inspections that are commissioned will focus on those areas where concerns have been identified. Our stated approach to regulatory engagement with providers means that in most cases concerns will have been discussed with a provider before we make a decision on whether to commission an inspection.
5. The TSA will commission an inspection by **establishing a brief** that addresses the specific concerns identified in relation to the published TSA standards and regulatory framework. For Section 193 standards, this will replace the key lines of enquiry based methodology.
6. The key principle in drawing up the brief for an inspection will be to investigate compliance with the TSA's requirements as expressed in its standards and regulatory requirements. The principal test will be:
 - is the provider meeting its commitments under specified TSA standard(s)?

7. The brief will require the inspector(s) to give an opinion on whether a standard or specific requirement has been breached, and provide evidence in support of this opinion. The final judgement on whether there is in fact a breach of a standard or specific requirement is a decision that will rest with the TSA.
8. As well as the service areas subject to inspection, the brief will set out matters such as reporting timetables, interim reports, fees and cost control.

2.5. There will not be a programme of inspections. Inspections will generally be commissioned on a short notice basis as they are at present.

2.6. When the TSA has decided to commission an inspection, and has provided a brief to the commissioned inspector, it will notify the provider of:

- the reason why it has commissioned an inspection
- the TSA standards to which the inspection relates; and
- the brief provided to the commissioned inspector as the basis for the inspection

2.7. The commissioned inspector will then make arrangements directly with the provider for carrying out the inspection, including confirmation of dates and any requirements for information or access to services necessary to fulfil the brief, in accordance with the inspector's powers under the 2008 Act.

2.8. The commissioned inspector will aim to carry out the inspection in an efficient way

that minimises the administrative impact on the organisation, while ensuring it investigates the issues that have led to the inspection being commissioned.

What will the inspection look for

2.9. As described in Section 1 above, individual inspections will be bespoke to the specific presenting concerns at the provider. This has led us to conclude that there is little value in establishing and maintaining a comprehensive “off the shelf” set of questions (or an inspection methodology similar to the KLOEs) that ranges across the entire standards framework. This is re-inforced by consideration that the volume of inspection activity overall has diminished significantly (compared to pre-2010 levels) and the focus is on compliance rather than comparisons of performance.

2.10. Therefore, we propose that the **brief** (see para 2.4 point 6 above) will in future establish the remit and detailed scope of the inspection. This has been the basis of our existing approach to Section 194 inspections.

2.11. The brief will not be drawn up in isolation: it will be based on the regulatory engagement that has been carried out with the provider. Our regulatory concerns will in most cases have been discussed with providers before we consider commissioning an inspection. In the further interests of transparency, regulators will where practicable discuss the brief with the provider during the commissioning process, and we will consider any comments the provider wishes to make on the brief.

There may be some circumstances where this is not possible or appropriate because we need to act speedily and decisively to protect the interests of tenants and the taxpayer.

2.12. We are confident that these arrangements, together with the principles established in para 2.4 above will provide clear expectations for providers and their stakeholders in the specific circumstances where the TSA considers it necessary to carry out an inspection.

Consultation questions:

Do you support the proposed arrangements and principles for the way TSA will commission inspections from July 2011 onwards?

Do you have any comments on the proposed approach to providing transparency to a provider about the focus of its inspection?

3 Looking ahead

2012 onwards: the Localism Bill

3.1 The Localism Bill, published in November 2010, is currently progressing through Parliament. The proposals include formalising the classification of standards set by the regulator as either “economic matters” or “consumer matters” with regulation of consumer matters to include greater local accountability mechanisms, leaving the regulator in a more reactive role for only serious

failures. The Bill proposes that a higher threshold is set for the regulator's intervention on consumer matters based on the seriousness of the impact on tenants of the failure.

3.2 The proposals to limit the circumstances when the regulator may use its monitoring and enforcement powers in respect of consumer matters (Section 193 standards) will mean that the regulator will only be able to use these powers where there are reasonable grounds to suspect there has been – or that there is a risk of – a breach of a standard(s) resulting in a serious detriment to tenants.

3.3 We anticipate in due course there will be a need to refresh our regulatory framework to take account of these and any further changes to our powers and how we may use them. We therefore intend to consult on redrafting our framework later in 2011 dependent on the progress of the Bill through Parliament. We will set out at that time arrangements for further review where necessary of matters affecting inspection.

3.4 In the meantime we consider that the approach set out in this consultation and our specific proposals for commissioning arrangements, while established within the remit of the current 2008 Act, will stand in good stead in the overall direction of travel indicated in the Localism Bill.

Fees

3.5 The 2008 Act provides for the regulator to charge fees for inspections, subject to consultation and an Order by the Secretary of State.

3.6 We plan to consult on prospective arrangements for a charging regime later during 2011, which will address fees across the regulatory framework.

Annex

TSA Regulatory Framework Guidance Note 9 (published March 2010)

This Guidance is reproduced here for information only. It is not part of this consultation. It forms part of the regulatory framework that was consulted on during 2009/10. It remains in force. We know that some of the terms used, such as Comprehensive Area Assessment and Local Performance Framework, are now out of date. We intend to deal with any amendments that are necessary to this and other guidance notes in due course. Any changes are unlikely to take effect before April 2012.

Guidance on Housing and Regeneration Act 2008 sections 201 to 203: inspection

Purpose

1 This document gives general advice and guidance on how 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 The Regulatory Framework for Social Housing in England from April 2010, which sets out the objectives and principles that underpin the TSA's approach.

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
- 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 the case before assessing if further action is necessary. Examples of such circumstance might include:

- evidence on performance against national standards from a provider's self-assessment or other indicators of performance

- evidence from a provider's annual reports to tenants on performance against standards
- regulatory concerns arising from complaints about service delivery or a reference from the Ombudsmen
- where we have grounds to suspect that improvement by the provider has not resulted in compliance with the standards or is not doing so in a timely way
- indicators of financial problems or poor financial management from a provider's financial returns to the TSA
- evidence of impropriety (including fraud)
- whistle blowing 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 TSA expects that the Audit Commission will usually obtain all the supporting information it requires for the inspection from the provider in accordance with its own procedures, and using the powers to obtain specified information and documents in the Act only if it is necessary to do so. The TSA will provide any relevant supporting information it holds 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 any Memorandum of Understanding agreed between the two organisations from time to time.

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 expects the provider to give all the background information required for the inspection to the inspector on a timely basis. The TSA will give support to the inspector in circumstances where it is necessary to use the powers to obtain specified information and documents in the Act. The TSA will provide any supporting information it holds to the inspector. 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 The TSA will notify the provider about an inspection. It will also agree the arrangements for the inspection with the inspector and the provider based on the particular circumstances of the case. The TSA will expect the inspector to then make contact with the provider in order to agree the detailed practical arrangements associated with the inspection.

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 Audit Commission carries out the inspection, the inspector will be authorised in writing by the Audit Commission to exercise the powers set out in section 203 of the Act. Where an appropriate professional expert carries out the inspection, 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 produce 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 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 any 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 publicly comment on the findings of an inspection until the report is in the public domain

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