

# STATES OF JERSEY



## **DRAFT SOCIAL HOUSING (TRANSFER) (JERSEY) LAW 201- (P.63/2013): COMMENTS**

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**Presented to the States on 15th July 2013  
by the Health, Social Security and Housing Scrutiny Panel**

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**STATES GREFFE**

## COMMENTS

### 1. Introduction

- 1.1 The Health, Social Security and Housing Scrutiny Panel is comprised of the following members –

Deputy K.L. Moore of St. Peter, Chairman  
Deputy J.G. Reed of St. Ouen, Vice-Chairman  
Deputy J.A. Hilton of St. Helier.

The Review Adviser is Debbie Larnar, Head of Professional Practice at the Chartered Institute of Housing, in conjunction with Anthony Collins Solicitors LLP.

- 1.2 The Chartered Institute of Housing (CIH) is the professional organisation for people who work in housing. Its purpose is to maximise the contribution housing professionals make to the well-being of communities. The CIH has 20,000 members across the UK and overseas working in a range of organisations – including housing associations, local authorities, arm's length management organisations, the private sector and educational institutions.
- 1.3 Debbie Larnar is head of professional practice at the CIH. Since starting out as a housing administration assistant 20 years ago, Ms Larnar's career has spanned the housing association and local authority sectors. She is also a lead officer on the CIH's equality and diversity steering group.
- 1.4 Anthony Collins Solicitors LLP has the largest specialist team of any law firm outside of London with regard to advising over 200 landlords in the Social Housing Sector, including housing associations, ALMOs and local authorities. They advise on a range of issues, including governance and projects, procurement and construction, housing litigation and management, property and development, employment and regulatory and community regeneration. Experts are regularly invited to speak at national conferences on a variety of legal issues and also edit the [Chartered Institute of Housing's](#) online housing manual.

### 2. Comments

- 2.1 This report sets out the work undertaken by the Health, Social Security and Housing Scrutiny Panel on the *Draft Social Housing (Transfer) (Jersey) Law 201-*.
- 2.2 This represents a continuation of Scrutiny's work in this area. In May 2012, the Health, Social Security and Housing Scrutiny Sub-Panel, under the Chairmanship of Deputy K.L. Moore of St. Peter, began a Review of the Housing Transformation Programme as set out in P.33/2013, *The Reform of Social Housing*.
- 2.3 It engaged an adviser, Ms. Abigail Davies, Assistant Director of Policy and Practice at the Chartered Institute of Housing to assist with that work. On 15th April 2013 the Panel presented *S.R.6/2013: Housing Transformation Programme Review*, which made a full appraisal of the proposals to transform

Jersey's social housing sector and the social, economic and financial impact. The report was intended to provide States Members with informed analysis ahead of the debate on the Proposition.

- 2.4 Following the adoption of P.33/2013 in May 2013, the Panel received an initial draft of the *Social Housing (Transfer) (Jersey) Law 201-* which outlined a legal framework for the transfer of Jersey's social housing stock to a new Housing Company owned by the States of Jersey.
- 2.5 After careful consideration, the Panel agreed that the most appropriate approach to its Review would be to produce comments, including a report produced by an individual with expertise in the area of the laws relating to social housing. Through its previous adviser at the Chartered Institute of Housing, the Panel was directed to Ms Debbie Larner, Head of Practice. This was determined to be the best format to inform States Members ahead of the debate on the draft legislation, given its special nature and complexity. The Panel was therefore very pleased to be able to secure the services of Anthony Collins Solicitors LLP through the Chartered Institute of Housing to assist us with this Review, an organisation offering considerable expertise in this area.
- 2.6 On 8th July 2013 the Panel received a short analysis by Anthony Collins Solicitors LLP of the draft legislation (*see Appendix 1*).
- 2.7 This highlighted several key issues with the draft legislation, including a lack of clarity over whether the HC would have charitable status, which in the advisers' opinion would be of benefit to both the HC and the States of Jersey. Representation of the States at Board level was also recommended as a means of protecting the States' interests. Comment was also made about the requirement for sufficient comfort to cover increased pension contributions arising after transfer.
- 2.8 The adviser's overall conclusion was that whilst "*constituting the new HC as a company limited by guarantee is reasonably simple from a governance perspective and fits well with the ethos of a not for profit housing association*", the draft legislation would benefit from clarification and expansion under certain Articles. It was also noted that some of this detail could be covered by Regulations brought forward at a later date.
- 2.9 The Panel subsequently shared these findings with the Minister for Housing and his Department, and a response was received on Thursday 11th July (*see Appendix 2*). In his response, the Minister welcomed the comments from the Panel's adviser as "*generally very positive... the points made in respect of the Draft Law are helpful and constructive.*".
- 2.10 The Panel welcomes the findings of the adviser on the draft Law and is grateful for the Minister's swift response on the points raised. However, the Minister should note that there are certain outstanding areas highlighted by the adviser, and the Panel recommends that these are given further consideration.
- 2.11 In particular, the Panel shared the adviser's concerns about risks to the Housing Company's Business Case arising out of the transference of the pension deficit. The Minister's response indicates that within P.33/2013 "*[pension deficit costs] will be subject to review and confirmation within a*

*Final Business Case at the point transfer is recommended to the States.”*<sup>1</sup> The Panel is not clear as to whether updated information relating to these costs within the Final Business Case has been made available ahead of the debate, and if not, urges the Minister to do so.

- 2.12 The Panel also supports the adviser’s view that “*important protection for the States is a right to sit on the Board of Management, and count towards the quorum of Board meetings.*” The Minister has indicated that representation of the States of Jersey at Board level of the new Housing Company will be via one Director nominated by the Minister for Treasury and Resources, and the Panel considers that the selection and recruitment of this individual will be integral to ensuring that strong and accountable links to the States are maintained during the operation of the Housing Company.
- 2.13 Finally, the Panel strongly urges the Minister to bring forward more information about due diligence that has been carried out to identify and deal with any liabilities inherent in the transfer process. The adviser identified that the omission within the Draft Law of the requirement to carry out due diligence could have a potentially “catastrophic” impact on the business plan of the Housing Company, if unknown liabilities [such as a significant environmental clean-up cost, breach of existing commercial contracts or an employment related claim] are transferred to it. The Minister assures the Panel that “*regulations to effect the transfer of immovable assets will include full details of titles and demise extends together with plans*” and the Panel considers that this information should be made available as soon as possible.
- 2.14 The Panel congratulates the Minister and his Department on the draft Law and urges him to consider the issues raised here during both the debate and in the preparation of future draft Regulations.

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**Statement under Standing Order 37A [Presentation of comment relating to a proposition]**

Due to unforeseen circumstances, the Panel only had sight of the adviser briefing on Tuesday 8th July. This subsequently affected the Panel’s ability to produce comments and also to seek a response from the Minister for Housing within the time limit set.

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<sup>1</sup> The Reform of Social Housing (P.33/2013), p.55, paragraph 5.20

## States of Jersey: draft Social Housing (Transfer) (Jersey) Law 201



### Background

The following briefing has been compiled by Anthony Collins Solicitors for the Health, Social Security and Housing Scrutiny Panel. It provides advice and guidance on the draft legislation which will establish a new housing company to take a transfer of all of the social housing stock owned by the States.

### Context

The new housing company (HC) will be a company limited by guarantee and the States of Jersey will be the sole guarantor member. The new HC will have its own Board which will deal with the day to day management of the HC. There is a robust business plan which is being prepared with the assistance of UK consultants and which has been properly stress tested. The business plan is reasonably cautious and leaves some headroom for unexpected changes. At this stage, the funding of the new HC is anticipated to be from rents and an agreed level of sales, with two loans from the States of Jersey, at reasonable interest rates, reflecting the rates the States of Jersey itself can borrow at.

### Briefing Report

- Constituting the new HC as a company limited by guarantee is reasonably simple from a governance perspective and fits well with the ethos of a not for profit housing association. There is no reference within the draft legislation to whether or not the HC should or might be charitable. We assume that this is not going to be the case, but this may be something that would be of benefit to the HC, if not the States of Jersey Treasury. Unfortunately our knowledge of Jersey law does not extend to whether this is an issue, but it may be worth the Scrutiny Panel considering whether charitability should be considered.
- Although the mechanism to transfer the property to the new HC is by way of Regulations signed by the Greffier of the States and registered in the Public Registry of Contracts, a concern is that the legislation provides for all liabilities as well as assets to pass to the HC. This does not accord with the way housing stock transfers are structured in the UK. Under UK law and practice, by using a warranty mechanism, residual liabilities remain with the transferring Council. This means that any unknown or un-quantified liabilities remain with the transferor. The logic behind this is that transfer to the new HC is on the basis of a defined business plan and if there is, for instance, a significant environmental clean-up cost, breach of existing commercial contracts or an employment related claim, the provisions of the business plan do not cover this and so the business plan could be put at risk.

As a guarantor member, we would anticipate that the limit of the States of Jersey's liability will be a nominal £1 and so without warranty or indemnity provisions being put in place whereby the States of Jersey stand behind the HC, the HC could be at risk.

### The Articles

In particular, the following Articles may be useful to explore in more detail with the Scrutiny Panel:

- Article 2 (5). This Article states that the power to vote on a resolution to wind up the HC may only be exercised by the States, but it might be worth expanding this Article to say whether the States has the absolute discretion to decide to do this, whether this should be on the recommendation of the Board and, crucially, what happens to the assets if the HC is wound up.

## States of Jersey: draft Social Housing (Transfer) (Jersey) Law 201



In the UK, there is no mechanism for housing assets to transfer back to the transferor once transfer has taken place, and we are unsure whether this is something that the States is envisaging could happen in Jersey. If that is the case, we would recommend that it is set out in detail within the Law.

Within Article 2, we would recommend that there is some reference to representation of the States at Board level, if this is not covered elsewhere in the Regulations and the draft constitution of the new HC. Important protection for the States is a right to sit on the Board of Management, and count towards the quorum of Board meetings.

- Article 4 (3). It is unclear precisely what this draft Article is anticipating and it may require expansion or clarification.
- Article 6. As mentioned above, the mechanism for transferring all of the States assets, staff and liabilities is reasonably straightforward and is akin to a transfer of engagements between Industrial and Provident Societies in the UK (as set out in the Industrial and Provident Societies Act 1965). The transfer mechanism, although simple, does mean that the assets transfer can be done without the need for the States to carry out any due diligence. Although this means that resources are not spent doing this, it also means that any liabilities which could be identified and dealt with during a due diligence process remain "live". This, again as mentioned above, potentially could have a catastrophic impact on the business plan of the HC if unknown liabilities are transferred to it.
- Article 8 (3) has the effect of making the pension scheme for the transferring staff fully funded as at the date of transfer. This has caused difficulties in some UK transfers particularly around the time of the credit crunch, but we assume that sufficient comfort to cover increased pension contributions as a result of rises or falls in the value of the fund is factored into the HC's draft business plan.

### General

The following more general issues were noted during consideration of the draft legislation . However, these may be covered in the Regulations and do not need to be covered in the legislation itself:

- Consultation with tenants and testing tenants opinion. Are the States intending to simply carry out the transfer or gauge the opinion of its tenants and only carry out the transfer if tenants are in favour – akin to the ballot process in UK transfers?
- The housing management provisions – i.e. a new form of tenancy agreement and a preserved right to buy – these will need to be considered, but again they might be covered in the Regulations.
- Although the mechanism for transferring assets to the new HC is reasonably straightforward, the States still need to be clear exactly what is being transferred and the HC will need to know exactly which assets it receives. A clear set of plans of the land, particularly, is a cornerstone of the transfer process and will be crucial for the HC in future if it does look to obtain bank finance as opposed to finance from the States.

**Briefing Paper on the Draft Social Housing (Transfer) (Jersey) Law 201-  
issued by the Health, Social Security and Housing Scrutiny Panel  
on 10th July 2013 for Ministerial Response on 11th July 2013**

**MINISTER'S RESPONSE**

**Introduction**

The briefing paper prepared by Anthony Collins Solicitors was only made available to the Minister on 10th July 2013. This has allowed less than 24 hours for the Minister to consider the comments and submit a response.

The Minister is pleased that the comments from the Panel's adviser are generally very positive and that the points made in respect of the Draft Law are helpful and constructive.

Each of the points raised are answered in the order in which they are raised in the adviser's paper.

**Briefing Report**

- The suggestion about Charitable Status is noted and it is presumed that this refers to the benefits for the Company in respect of reducing potential Income Tax liabilities. The Adviser may not have been aware that as a wholly States-owned company, the new Housing entity would be exempted from the payment of Income Tax. This was set out on page 39 of P.33/2013 at paragraph 3.65, where it is made clear that: *'The tax position of the Housing Company in relation to the Income Tax (Jersey) Law 1961 has been discussed with the Income Tax Department. Representatives of the Income Tax Department have stated that as long as the Company was wholly owned by the States, it would benefit from a miscellaneous exemption under the Law as detailed in Article 115(c), namely "Exemption from income tax shall be granted in respect of any income derived by the States from their own property". This exemption would apply to both rental income and other associated income generated from the ownership of the properties.'*

It is also clear that the Charities Commission in the UK has recently warned Registered Social Landlords in the UK that they risk losing their charitable status if they adopt the proposed new 80% affordable rent policy and this is seen as not being charitable. <http://www.insidehousing.co.uk/news/housing-management/associations-face-losing-charity-status/6514019.article>

- It is not quite the case that 'the legislation provides for all liabilities as well as assets to transfer to the HC [Housing Company]'. Article 4 actually allows for the States to transfer what assets, liabilities and rights it deems necessary to transfer and which will be set out in Regulations. That having been said, the points the adviser makes in respect of the transfer of assets and liabilities in the UK are well understood and the principles have been followed. The detailed arrangements will be set out in the relevant Regulations and in the

contractual agreement between the States and the Housing Company, which will be developed in the event that the States approve the Draft Law.

## **The Articles**

- Article 2(5): These matters are understood and will be set out in the relevant Regulations. Specifically in relation to representation of the States on the new Company Board; these proposals are set out on page 34 of P.33/2013 and specifically in paragraph 3.41, where it is made clear that ‘..... *The new Company’s Board would comprise a total of 6 Non-Executive Directors; 3 of whom would be independent Directors, 2 Tenant Directors and one Director nominated by the Minister for Treasury and Resources.*’
- Article 4(3): Article 4(3) exists to deal with the potential issues of residual liability identified by the adviser in bullet-point 2 of his comments on the briefing paper, amongst other things. It allows for a very wide range of circumstances and is beneficial for both the Company and the States.
- Article 6: Appropriate due diligence is being carried out. The Regulations to effect the transfer of immovable assets will include full details of titles and demise extents together with plans.
- Article 8(3): The approach to the pension deficit is set out on page 55 of P.33/2013 at paragraph 5.20, and subject to confirmation within the Final Business Case, it is anticipated that the Housing Company’s business plan does have adequate provision for pension related matters.

## **General**

- The creation of the wholly States-owned Housing Company to manage the States stock means that the assets remain in the overall ownership of the States. There is not the extent of ownership change common with Large Scale Voluntary Transfer (LSVT) arrangements in the UK where a tenant ballot would be necessary. As no such change in overall ownership is proposed for Jersey, no ballot will be held.
- There is no Right-to-Buy to be preserved, as the Right-to-Buy Scheme established in the UK does not extend to Jersey and never has. There is no Jersey equivalent. Existing tenants will not be required to sign new tenancies. Existing tenants will continue to enjoy their existing terms and conditions of tenancy, a matter which will be set out as a requirement in the contractual agreement between the States and the Housing Company.
- As already mentioned, the Regulations to effect the transfer of immovable assets will include full details of titles and demise extents, together with plans.

**Deputy A.K.F. Green of St. Helier, M.B.E.  
Minister for Housing**