

A photograph of the Cardiff skyline at sunset. The image shows the historic red-brick Cardiff Castle on the left and the modern, curved, metallic Millennium Stadium on the right. The sky is a mix of orange, yellow, and blue.

# The Welsh Government Consults on Deregulation

## Purpose of this briefing note

This briefing note provides guidance and our initial views on the consultation paper issued by Welsh Government on deregulation.

## Our headline thoughts

Deregulation represents a significant change.

The Welsh Government's ability to block RSL decisions will recede, but the ability of the regulator to influence will remain. This will, inevitably, represent a change in approach to regulation.

Equally, as the regulator's role becomes more reactive, so we anticipate the proactive role of other key stakeholders will increase; principally funders and investors. And, an existing risk; "political risk" will become more significant and require careful management.

The change for LSVTs is also significant. It brings opportunities for a renewal of the relationships with their sponsoring local authority and consider their governance structures.

Wales already operates a regulatory framework which is different from that in England and broadly it has served it well. This has provided sufficient comfort for lenders and investors to provide the funding essential for delivery of new social housing where central Government is unable to provide this funding itself. The lender market is however "thin" and therefore it will be essential to ensure that in making any changes, the investment market remains positive.

There may also be efficiencies for lenders in keeping the deregulatory outcome close to that in England so that

credit committees in these lending institutions are not put off by the complexity of understanding the distinctions.

## Background

In September 2016, The Office of National Statistics reclassified Registered Social Landlords (RSLs) in Wales to the public sector. This followed the reclassification of Registered Providers in England which occurred in 2015.

The Welsh Government had made it clear that it intends to implement the changes required as are necessary to enable RSLs to be reclassified as private sector bodies. As a result, it has published a Consultation Document on proposed deregulatory measures for RSLs.

As may be expected at consultation stage, the proposed measures are not fully fleshed out but resemble the deregulatory changes that took effect in England on 6 April 2017.

The Welsh Government is keen to emphasise that these measures will not mean that the RSL sector is no longer regulated; it has proposed, or already introduced, new powers and a regulatory framework for RSLs that will continue to operate in the post deregulation world.

It remains an open question as to whether these measures will be sufficient to get RSLs 'off the books' of the Government. The first clues will come when the ONS (re)reviews the classification of Registered Providers in England later this year.

## Who will deregulation affect?

All Registered Social Landlords in Wales. Local authorities that have transferred their housing stock

will also be affected by the proposals to reduce local authority influence.

### What has the Welsh Government done already?

- Introduced a new Regulatory Judgement framework on 1 January 2017, intended to provide an improved risk-based framework for RSLs post-deregulation.
- Consulted on new performance standards for RSLs, with a stronger focus on decision making, leadership and financial viability, to be published “in due course”.
- Prepared a Consultation Document on their proposed de-regulatory changes and circulated this to stakeholders in the sector on 8 May 2017.

### What is proposed?

#### Removal of the disposal consents regime:

RSLs will no longer need Section 9 consent to dispose of any land. Nor will Section 133 consent be required for disposals of LSVT Stock.

The Welsh Government's proposal is to replace these consent requirements with a duty on the RSL to notify.

The Consultation Document does not go into detail over the proposals; in particular there is no detail yet of which disposals will fall within the notification regime (and when notification would be required). We would expect that the Welsh Government will consult separately on these notification proposals; and that, as in England, certain types of disposal will be of greater interest to the regulator.

Where tenanted stock is being transferred, the Welsh Government will still require robust tenant consultation in accordance with the 2017 Framework. The Welsh Government has indicated that there will be an on-going review of this framework to ensure that this works in practice.

Section 9 of the Act (and s133 of the Housing Act 1988) restricts disposals of “land”, whereas s172 of the Housing and Regeneration Act 2008 (which governed the disposals regime in England) affected social housing dwellings only albeit “social housing” is broadly defined. It will therefore be interesting to see whether the Welsh Government intends to liberalise the treatment of non-social housing assets so that RSLs will gain the same flexibility as English RPs to deal with non-social assets without reference to Welsh Government, or whether these will also fall within the new notification regime.

It is also not clear whether Welsh Government plans to change the terms of consents for the disposal of properties in National Parks and rural protection areas

as part of deregulating the disposal consents regime. No changes took place to this process when deregulation took effect in England.

#### Continuing limitations on disposals:

Local authorities have agreements with RSLs which require them to use land as social housing (s106 Agreements). These restrictions will continue to apply giving local authorities ongoing powers to ensure that properties remain in the RSL sector where this is the clear contractual outcome of the restrictions.

And, where properties have received grant, they will remain subject to the relevant grant conditions. Given the multiplicity of grant conditions, understanding what these are can be interesting.

#### Disposals by Registered Charities may now need consent of the Charity Commission:

Most RSLs with charitable status are registered as Community Benefit Societies and as such what are known as ‘exempt charities’. These entities are exempt from registration with the Charity Commission because, as CBSs, they are registered with and regulated by the Financial Conduct Authority.

But an RSL that is constituted as a company (as opposed to a CBS) is not an exempt charity and is directly regulated by the Charity Commission.

The disposal of land by charities that are registered with the Charity Commission is subject to the requirements contained in the Charities Act 2011. These requirements involve the charity needing to jump through various hoops imposed in s119 or s120 of the Charities Act 2011 or to get consent for the disposal from the Charity Commission. So long as s9 consent (or section 133 of the Housing Act 1988 applying to LSVT stock) remains in effect, the provisions in the Charities Act do not ‘bite’ in respect of RSLs that are registered charities.

However, with the proposed repeal of the s9 (and s133), there is an argument that registered charities will now need to comply with the Charities Act provisions (or ensure their disposal falls within another exemption).

In England, the HCA and the Charity Commission have taken the view that the ending of the s172 (and s133) consent regime has had this effect. The Charity Commission in England has already published guidance for affected bodies<sup>1</sup>

<sup>1</sup><https://www.gov.uk/government/news/commission-reminds-housing-associations-of-changes-to-the-land-disposal-framework>

### **End of the Disposal Proceeds Fund:**

The Welsh Government has suggested abolishing the requirement for RSLs to keep a separate account for the disposal proceeds fund (being the receipts from the sale of RTB and grant-funded properties).

It also plans to dispense with directions for the allocation and use of these funds, although there will be transitional provisions (including time limits) affecting the use of funds received by RSLs before de-regulation takes effect. These may allow some opportunity or flexibility on provision during the transition period.

Although this will give RSLs greater flexibility in allocating and using receipts after deregulation, it is likely to have a more limited impact than the comparable change in England, where a far wider range of disposal receipts were directed into the fund especially as RTB is being wound down in Wales.

### **Removal of the constitutional consents regime:**

RSLs would no longer need the consent of the Welsh Government to merge, transfer engagements, convert from a co-operative or community benefit society to a company (or vice versa); or for restructuring, winding up or dissolution. Instead, RSLs would be obliged to notify the Government and the RSL would have to certify to any other regulator or registrar (e.g. the FCA) that they had correctly carried out this notification.

RSLs would no longer need the Welsh Government's consent to change their rules (or articles) but, again, would need to notify them. The requirement that notice must be given of any change to the RSL's name or registered office would also continue.

Currently, the Welsh Government may present a winding up petition where an RSL is failing properly to carry out its purposes or objects. The Consultation Document proposes amending this power, but has not specified how it would be changed.

As with the disposals regime, the Welsh Government proposes to create directions governing the contents or circumstances of these notices. Again, we can expect the Government to consult on the new notification provisions before they are brought into effect.

In practice, these changes may not be as fundamental as they might first appear. Under the new Welsh Government regulatory regime it would be a brave RSL who would proceed with a merger without knowing that broadly a proposal was acceptable to the Department and no downgrade would ensue.

And, lender consent will still be required; together meaning that preparation and appropriate approval of the business case requirement will remain a significant milestone.

### **Reduction in local authority influence over RSLs:**

The Welsh Government proposes to introduce powers to:

- limit reserved places for local authority appointees on any Welsh RSL Board to a maximum of 24% of the total number of Board members at any time
- remove local authority appointees before the end of their term and allow any necessary constitutional changes to be made (it is unclear who it is proposed will have that power and the circumstances in which this power may be invoked);
- remove any control of voting or any other rights of consent which local authority appointees currently have including as Board members or shareholders;
- remove any requirement for local authority appointees to be present to achieve a quorate meeting; and
- remove any requirement for any other specific local authority consent separate to any voting rights;

As currently drafted, it is unclear whether the cap on local authority appointees will be an absolute cap, or whether RSLs could have further Board members who were local authority persons, but who had not been nominated by them.

These powers are intended to override any existing rights granted to local authorities under the RSL's constitutional documents.

Although we await the corresponding regulations in England, these proposals appear, on the face of it, to go further than those being drawn up in England; particularly the ability to compel the removal of local authority representatives even where they only comprise less than a quarter of the membership of the Board.

### **What will the new deregulated world look like?**

Assuming the proposals are implemented, Welsh Government will no longer have the power to 'veto' disposals and constitutional changes by RSLs. Instead, the Government will only be able to use its regulatory powers to influence decisions taken by RSL. That may be through dialogue with the RSL before relevant decisions are taken or after the event. There will, therefore be greater emphasis placed on the regulatory regime, both in terms of standards and powers. This may explain why the Welsh Government is considering reducing the threshold as to when they can take enforcement action against an RSL.

Currently, they may only take specified enforcement actions (for example, transferring management functions, or requiring amalgamation with another RSL) if there is “misconduct or mismanagement”, or if it is necessary for their “proper management”. Instead, the trigger proposed is where the RSL has failed to comply with their statutory duties (which would include the notification requirements to be introduced), or if enforcement action is necessary to meet a regulatory requirement set out by the Government. This is somewhat broader in scope.

### Will there be an effect on funders?

Private sector lenders and investors currently take comfort from knowing RSLs are heavily regulated. If lenders detect a diminution in active regulation this may cause some concern; and ultimately if the changes are materially adverse, the sector could be exposed to a claim that this represents a “material adverse change” which entitles a lender to call a default. It is hoped that funders will see that the Welsh Government continues to regulate, notwithstanding the removal of various statutory vetoes. However, given the significance of their participation we hope that funders are consulted as the process continues and their responses are taken seriously.

### How can I express my views?

The Consultation Document is available on the Welsh Government’s website at:

[https://consultations.gov.wales/sites/default/files/consultation\\_doc\\_files/170508\\_consultation\\_regulatoryreformrsls\\_en.pdf](https://consultations.gov.wales/sites/default/files/consultation_doc_files/170508_consultation_regulatoryreformrsls_en.pdf)

Stakeholders are invited to express their views and you may wish to flag some of the uncertainties raised by the Consultation Document.

The deadline for responses is 3 July 2017.



**Andrew Cowan**

Partner

020 7880 4350

andrew.cowan@devonshires.co.uk



**Jonathan Jarvis**

Partner

020 7065 1810

jonathan.jarvis@devonshires.co.uk



**David Emery**

Trainee Solicitor

020 7065 1808

david.emery@devonshires.co.uk

Devonshires has taken all reasonable precautions to ensure that information contained in this document is materially accurate however this document is not intended to be legally comprehensive and therefore no action should be taken on matters covered in this document without taking full legal advice.