The Scottish Parliament
Pàrlamaid na h-Alba

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

AGENDA

29th Meeting, 2017 (Session 5)

Wednesday 29 November 2017

The Committee will meet at 9.45 am in the David Livingstone Room (CR6).

1. **Housing (Amendment) (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   George Walker, Chair, and Michael Cameron, Chief Executive, Scottish Housing Regulator;

   Sally Thomas, Chief Executive, Scottish Federation of Housing Associations;

   David Bookbinder, Director, Glasgow and West of Scotland Forum of Housing Associations;

   Daren Fitzhenry, Scottish Information Commissioner;

   John Marr, Senior Policy Adviser, UK Finance.

2. **Draft Budget Scrutiny 2018-19:** The Committee will take evidence on the Scottish Government's Draft Budget 2018-19 from—

   Ronnie Hinds, Deputy Chair, and Fraser McKinlay, Controller of Audit, Accounts Commission;

   Tim Bridle, Manager, Local Government (Technical), Audit Scotland.

3. **Housing (Amendment) (Scotland) Bill (in private):** The Committee will consider the evidence heard earlier in the meeting.

4. **Draft Budget Scrutiny 2018-19 (in private):** The Committee will consider the evidence heard earlier in the meeting.

LGC/S5/17/29/A

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The papers for this meeting are as follows—

Agenda item 1

Note by the Clerk	LGC/S5/17/29/1
PRIVATE PAPER	LGC/S5/17/29/2 (P)

Agenda item 2

Note by the Clerk	LGC/S5/17/29/3

Local Government and Communities Committee

29th Meeting 2017 (Session 5), Wednesday 29 November 2017

Housing (Amendment) (Scotland) Bill: Note by the Clerk

Purpose

1. This paper provides background information on the Committee's scrutiny of the Housing (Amendment) (Scotland) Bill (the Bill).

Background

2. The Office for National Statistics (ONS), recently held a review of the status of Registered Social Landlords (RSLs) and deemed that, as they are subject to an element of control by the Scottish Housing Regulator and Local authorities, their status should be changed from private sector bodies to public sector bodies in the national accounts. The implications of this being that, when reclassification takes effect, any borrowing undertaken by RSLs would be counted as borrowing by the Scottish Government.

The Bill

3. This Bill aims to remove or limit some of the powers from the Scottish Housing Regulator and Local Authorities that will enable the ONS to reclassify RSLs back into the private sector, but also to make sure that the SHR can continue to protect the interests of tenants and others who use the services of RSLs.

4. The Bill therefore proposes to reduce the powers the SHR has to:
    - Appoint a manager to a RSL;
    - Suspend, remove and appoint officers of a RSL;
    - Exercise control over the disposal (e.g. a sale) of land and housing assets by a RSL (by requiring a RSL to obtain the Regulator's consent to a disposal);
    - Exercise consent over any changes to the constitution of a RSL;
    - Exercise control over voluntary winding-up, dissolution and restructuring of a RSL (mainly by requiring a RSL to obtain the Regulator's consent to these actions).

5. The Bill also gives Scottish Government Ministers the power to bring more legislation to the Scottish Parliament to make further changes to the power of the SHR to control RSLs. The Scottish Government has stated that these will only be used should the current proposed measures not be enough to persuade the ONS to reclassify RSLs as private bodies.

6. The Bill also gives Scottish Government Ministers the power to make further legislation in the Scottish Parliament to limit the influence that a local authority can have over a RSL. Local authority influence over RSLs mainly exists in areas where there has been a wholescale transfer of local authority housing stock to a

RSL. The Scottish Government has confirmed that it will use this power so local authorities may only nominate up to a maximum of 24% of the board members of an RSL, and may not exercise control over RSLs.

7. The ONS has not confirmed at this stage whether the measures will be adequate to fulfil its intended purpose, however, the Scottish Government confirms (in a letter attached in **Annexe A**) that similar measures taken in England and Wales were successful in reclassifying RSLs as private bodies for the purposes of accounting.

8. The Bill (and its accompanying documents) is available on the Parliament's website here:

   http://www.scottish.parliament.uk/parliamentarybusiness/Bills/105852.aspx

Local Government and Communities Committee Consideration

9. The Parliamentary Bureau designated the Local Government and Communities as lead Committee for scrutiny of the bill as it is responsible for scrutiny of housing matters.

10. The Committee issued a call for views on the bill on 8 September 2017 which closed on 26 October 2017. The Committee received 16 responses which are available of the Committee's website here:

    http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/106440.aspx

11. A summary of the Bill is available here:

    http://www.scottish.parliament.uk/S5_Local_Gov/Inquiries/A_guide_to_HABillFINAL.pdf

12. A SPICe briefing on the bill, providing more detailed information and analysis of the submissions received, is available here:

    https://sp-bpr-en-prod-cdnep.azureedge.net/published/2017/11/16/Housing--Amendment---Scotland--Bill/SB%2017-78.pdf

13. The Committee will take oral evidence from the following at its meeting on 29 November 2017:

    - George Walker, Chair, and Michael Cameron, Chief Executive, Scottish Housing Regulator;
    - Sally Thomas, Chief Executive, Scottish Federation of Housing Associations;
    - David Bookbinder, Director, Glasgow and West of Scotland Forum of Housing Associations;
    - Daren Fitzhenry, Scottish Information Commissioner;
    - John Marr, Senior Policy Adviser, UK Finance.

14. Written submissions from those who are providing oral evidence are attached at **Annexe B**.

Other Committee Consideration

15. The Finance and Constitution Committee issued a call for views on the Financial Memorandum of the Bill on 4 September 2017 which ran until 13 October 2017. It received 5 responses and agreed to take no further action. The responses received are available here:

    http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/106009.aspx

16. The Delegated Powers and Reform Committee considered the Bill at its meeting on 8 November 2017 and agreed to ask questions of the Scottish Government in writing on certain powers within the Bill. A copy of the Committee's correspondence is available here:
    http://www.parliament.scot/S5_Local_Gov/Inquiries/20171120_HAB_ScotGovToDPLRCommittee.pdf

17. The Delegated Powers and Reform Committee will consider this response and report on the delegated powers in the bill in due course.

Next Steps

18. Following the evidence session with the stakeholders above, the Committee will next take evidence on the bill from the Minister for Local Government and Housing at its meeting on 13 December.

Annexe A

Correspondence from the Minister for Local Government and Housing to the Convener of 17 November 2017

Dear Bob

HOUSING (AMENDMENT) (SCOTLAND) BILL

As part of its scrutiny of the Housing (Amendment) (Scotland) Bill, your committee will want to note that the Office for National Statistics (ONS) announced on 16 November that it has reclassified English housing associations to the private sector. The announcement can be found here:

https://www.ons.gov.uk/news/statementsandletters/statementonclassificationofenglishhousingassociationsnovember2017

ONS made its decision in light of regulations limiting local authority influence over the associations. The regulations were made earlier this month by DCLG Ministers under the Housing and Planning Act 2016, and were the final step in the process of securing reclassification in England. The other steps where changes to the powers of the regulator in England, and these were made directly through the 2016 Act.

As you know, our Bill is intended to pave the way for the ONS to reclassify registered social landlords in Scotland by making provisions similar to those made for England - including the power for Scottish Ministers to make regulations equivalent to those just made in England to limit local authority influence over RSLs. I am encouraged, therefore, by the ONS decision, which – consistent with the discussions we have had with the ONS – suggests that the provisions of our Bill, if enacted and brought into force in their current form, are likely to achieve their intended purpose.

I look forward to giving evidence on the Bill when I meet the Committee on 13 December.

Kind Regards

KEVIN STEWART

Annexe B

Written Submission from the Scottish Housing Regulator

Dear Bob

Housing (Amendment) (Scotland) Bill

Thank you for meeting with me recently. I very much look forward to meeting with you and the rest of the Committee tomorrow to present our annual report and accounts and to explain more about our work.

I am also looking forward to the separate Committee session we have now arranged for the 29 November 2017 to discuss the Housing (Amendment) (Scotland) Bill. Ahead of this I wanted to give you more information on SHR's position.

We understand the need for the Bill, given the consequences of RSLs being classified to the public sector. We have been consulted by the Scottish Government during the development of the Bill's provisions.

We are a statutory body, and we act in accordance with the legislation that sets our objective, functions, powers and duties. As such, we will continue to act in accordance with any relevant legislation Parliament passes.

Our statutory objective and our functions will be unchanged by the proposals in the Bill. We will continue to work to safeguard and promote the interests of tenants, people who are homeless and others who use social landlords' services. We will use the powers given to us by Parliament to achieve that objective.

The Bill proposes a range of changes to our powers to appoint managers and to appoint and remove officers of registered social landlords. These proposed changes will limit the circumstances in which we can make such appointments. However, our view is that our current practice in relation to appointments and removals will continue to be consistent with the legislation after the amendments are made.

The proposed amendments to the provisions on consents will remove safeguards that can, and have, protected the interests of tenants, people who are homeless and others who use social landlords' services. The removal of consents will result in more risk within the social housing sector and may also result in the loss of advance regulatory intelligence. While we are confident that the vast majority of RSLs will use their new freedoms responsibly, and we will encourage others to continue to strengthen their decision-making, we will consider how we can best use the powers Parliament gives us to help us to keep safeguarding the interests of tenants, people who are homeless and others who use social landlords' services. We will do this through the review of the regulatory framework we started earlier this year.

I hope this is useful in your consideration of the Bill, if you would like to clarify anything prior to the 29 November evidence session, please do get in touch.

Yours sincerely

George Walker
Chair
Scottish Housing Regulator

Written Submission from the Scottish Federation of Housing Associations

1. Who We Are

1.1 The SFHA leads, represents and supports Scotland's housing associations and cooperatives, encompassing a wide and diverse set of organisations in different localities across the country. We want to see a thriving housing association and co-operative sector providing sustainable and affordable homes.

1.2 SFHA members own and manage 80% of the 280,000+ housing association stock across Scotland, providing housing for almost 500.000 people. Housing associations and co-operatives are not-for-profit bodies, and over 90% are charities. They are known as Registered Social Landlords (RSLs) and predominantly regulated by the Scottish Housing Regulator (SHR).

1.3 Housing associations and co-operatives in Scotland are private businesses. Public funding received is used to lever in private finance for the development of new affordable homes. Maintenance of properties and housing management services are met almost entirely through tenants' rents and, in respect of some planned maintenance and major improvements, private finance.

1.4 The SFHA welcomes this opportunity to submit evidence to the Local Government and Communities Committee regarding the Housing (Amendment) (Scotland) Bill 2017.

2. Executive Summary

2.1 The SFHA fully supports the aim of the Bill to reverse the Office of National Statistics (ONS) reclassification of RSLs as public non-financial corporations, so that RSLs once again have the status of private non-financial corporations. Failure to do so would mean the collective borrowing of RSLs – circa £3.5 billion – would be added to the Scottish Government's balance sheet, leading to Scottish Government control over RSL borrowing and greatly limiting RSL's ability to contribute to the 50,000 affordable homes target.

2.2 RSLs are not public bodies, but are private businesses who have voluntary governing bodies and are in most cases are charities. Public funding received is used to attract private finance to enable the development of new affordable homes.

2.3 The SFHA therefore supports the proposed changes to the powers of the Scottish Housing Regulator (SHR) designed to achieve this aim, and is confident that these changes will not have a detrimental impact on the effectiveness of the SHR to regulate, or mean any radical changes to how the sector functions in practice. The forthcoming review of the SHR's Regulatory Framework is a timely opportunity to ensure that the changes have minimal impact.

2.4 Further regulations will be drafted to limit any perceived control that local authorities may have over RSLs. The SFHA is comfortable that these regulations will have minimal impact on RSLs and have no adverse impact on relationships between RSLs and local authorities. The SFHA is keen to feed into the drafting of these regulations.

2.5 The legislation has been drafted to allow further amendments to the powers of the SHR through regulations should the ONS' eventual reconsideration of the status of RSLs not yield the desired result. Whilst the SFHA is uncomfortable that there is still an element of uncertainty about what the ultimate ONS decision will be following the enactment of this legislation, it nonetheless acknowledges that it is not possible to get a definitive answer from ONS at this stage of the process. It is therefore sensible to include this provision.

2.6 We welcome the assurances that SFHA has received from Scottish Government about its commitment to reversing the ONS decision. Scottish Government has indicated (in so far that it can at this stage) that the legislation has been drafted to take account of all of the elements that will have a bearing on the eventual ONS reconsideration of RSLs' status. This is based on Scottish Government's own legal advice and its liaison with ONS.

2.7 SFHA welcomes further assurances from Scottish Government that should the Freedom of Information (Scotland) Act 2002 be extended to RSLs as is currently proposed, this will have no bearing on the ONS decision. We do not wish to see any factor impede the successful attainment of the Bill's overarching goal.

3. ONS Reclassification of RSLs

3.1 The SFHA fully supports the aim of the Bill to reverse the ONS' decision to reclassify RSLs as Public Non-Financial Corporations in September 2016.[1]

[1] Office of National Statistics (Sept 2016) *Statistical classification of registered providers of social*

3.2 It is essential that RSLs are returned to their status as private non-financial corporations as soon as possible, as failure to do so will effectively place the collective borrowing of RSLs in Scotland – circa £3.5 billion[2] – on the Scottish Government balance sheet.

3.3 This would effectively create Scottish Government control over RSL borrowing, greatly removing the independence of the sector and severely damaging its ability to contribute towards the 50,000 affordable homes target. As highlighted by the Scottish Government's Policy Memorandum accompanying the Bill:

"The financial consequences of RSLs continuing to be classified as public sector bodies would have immediate implications for the Scottish Government's commitment to build 50,000 affordable homes. The commitment depends on the Government's planned financial support of over £3 billion for the programme (during financial years 2017/18 to 2020/21) being augmented by the RSL sector undertaking private borrowing of about £300 million a year. If the RSLs' borrowing can no longer be counted as private borrowing, the effective cost to the Scottish Government of delivering on the commitment would, by having to include the RSL borrowing, rise to £4.5 billion."[3]

4. Amendments to the Powers of the Scottish Housing Regulator

4.1 The ONS decision to reclassify RSLs identified a number of aspects of the SHR's powers that collectively shaped its view that RSLs were under the control of the SHR. The legislation seeks to address each of the points specified by ONS in its decision.

4.2 Once the legislation is enacted, RSLs will no longer have to seek consent from the SHR for certain activities, such as disposals of properties or restructuring. This will be replaced with a requirement to notify the SHR upon completion. Current requirements to carry out a tenant ballot when any of these activities lead to a change of landlord for tenants, will be retained.

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housing in Scotland, Wales and Northern Ireland available here

[2] Scottish Housing Regulator (March 2017) *Analysis of the Finances of RSLs Table 12 p17* available here

[3] Scottish Government (Sept 2017) *Housing (Amendment)(Scotland) Bill Policy Memorandum* available here

4.3 The removal of the consents regime will not lead to an increase in any of these activities (such as disposals) across the sector, as these will still be approached on the same terms that they always have; just without the SHR approving them in advance. There will remain a necessity for every RSL to carry out necessary due diligence before undertaking such activities, to ensure that it has assessed any risks and has a clear business case to take forward.

4.4 The requirement to notify the SHR will also provide a means for the SHR to identify potential risks and any necessary further engagement. It is noted from the Finance Memorandum to the Bill[4] that the SHR has requested further resources to engage more closely with RSLs in different ways to make up for the loss of the consents regime. The SFHA look forward to feeding into the SHR's forthcoming review of the Regulatory Framework in order to shape how this might work in practice.

4.5 The legislation will also amend the circumstances in which the SHR can appoint a special manager, appoint members to an RSL's governing body or remove/suspend governing body members and senior staff. These will now only be possible in circumstances where there has been a breach of legislation or regulatory standards.

4.6 In practice, this will have little impact on the ability of the SHR to intervene in the rare circumstances where this is necessary. The SFHA has received assurances from the SHR that, had the terms of the proposed legislation been in place at the time, it would still have been able to intervene in the same way during the few cases where it has had to use any of these powers.

5. Further Regulations & Other Considerations

5.1 The legislation allows for further regulations to be enacted to limit any perceived control that local authorities may have over RSLs. It is noted from the Policy Memorandum of the Bill[5] that Scottish Ministers intend to specify in regulations that local authorities may only nominate a maximum of 24% of the board members of an RSL, and may not exercise control over RSLs, e.g. by vetoing a change in an RSL's constitution.

[4] Scottish Government (Sept 2017) *Housing (Amendment)(Scotland) Bill Financial Memorandum section 14, p3* available here
[5] Scottish Government (September 2017) *Housing (Amendment) (Scotland) Bill Policy Memorandum Section 30, p6* available here

5.2 The SFHA is keen to feed into the drafting of these regulations. Although we are confident that these changes will not have any detrimental consequences for RSLs or their relationships with local authorities, SFHA asks that the few organisations for which these regulations may require some constitutional changes to adopt, are consulted as part of the process.

5.3 The legislation has been drafted to allow further amendments to the powers of the SHR through regulations should the ONS' eventual reconsideration of the status of RSLs not yield the desired result.

5.4 Whilst the SFHA is uncomfortable that there is still an element of uncertainty about what the ultimate ONS decision will be following the enactment of this legislation, it nonetheless acknowledges that it is not possible to get a definitive answer from ONS at this stage of the process.

5.5 It is also proposed by Scottish Government that the Freedom of Information (Scotland) Act 2002 be extended to Scottish RSLs. ONS will not only be reconsidering its reclassification decision in Scotland following the enactment of the Housing (Scotland) (Amendment) Bill, but will also in due course be revisiting similar decisions to reclassify housing associations in England, Wales and Northern Ireland – to whom FOI legislation does not currently apply. SFHA welcomes the assurances that Scottish Government has provided indicating that potential extension of FOI will have no bearing on the final ONS decision in Scotland.

5.6 In its interim report regarding the consultation to potentially extend FOI to RSLs, the Scottish Government stated:

"*Given the clear intention of the Scottish Government to confirm by means of legislation the private status of RSLs we do not consider the proposal to extend Freedom of Information legislation to RSLs to cast any further doubt on the status of RSLs as private bodies".*[6]

[6] Scottish Government (June 2017) Consultation on Extending Coverage of the Freedom of Information (Scotland0 act 2002 to Registered Social Landlords – Interim Report here

Written Submission from Glasgow and West of Scotland Forum of Housing Associations

Summary of GWSF position

GWSF, which represents 66 community controlled housing associations in Glasgow and the west of Scotland, welcomes the Bill. We are clear that the measures in the Bill are necessary in order to prevent all housing association debt being deemed to be public debt. This would need both the UK and Scottish Governments to set aside huge amounts of public money which would otherwise be spent on housing investment.

It is also the case that, as a matter of principle, housing associations – and community controlled housing association in particular – do not want to be classified as public bodies, even if the classification is primarily a statistical one for the purposes of assessing how debt is to be treated.

We have therefore always been clear that we would be supporting the measures as we see them as the only way of achieving an eventual reversal of the reclassification.

There are, however, some practical issues we would want to discuss with the Scottish Government and in particular with the Scottish Housing Regulator about any changes which may be made to the regulatory framework as a response to the Bill's legislative changes, especially around the ending of the consents regime. We comment further on this in our detailed comments later in this submission.

Our submission describes the main measures in the Bill and then provides GWSF's view on each one in turn.

GWSF would be very happy to provide any further information the Committee might find helpful, and we would hope to have the opportunity to appear before the Committee at the appropriate stage of the Bill's passage through Parliament.

Proposed measure – Limiting SHR's powers to appoint special managers and management committee members (Section 1 of the Bill)

The amendments to Sections 57 and 58 of the 2010 Act will mean that a special manager can be appointed only where SHR has evidence that the RSL has actually failed – rather than is merely at risk of failing – to:

- Achieve a Charter standard or outcome
- Meet a performance improvement target
- Implement an agreed improvement plan
- Comply with an enforcement notice
- Comply with a statutory requirement in respect of its financial or other affairs

The power to appoint a manager is limited to situations where SHR believes this is needed to ensure that one or more of these failures identified under 57 is rectified, with the appointment(s) lasting only for the time necessary to secure that rectification.

This will have the effect of (a) narrowing the purposes for which the SHR can appoint a manager to the matters relating to the failure that triggered the appointment, (b) making the appointment temporary, and (c) removing the SHR's ability to appoint a manager indefinitely or for the wider-ranging, general purpose of ensuring that an RSL manages its housing services or other affairs to an appropriate standard.

The amendment to Section 65 of the Act will mean that SHR can appoint a new management committee member only if it believes this is needed to rectify any breach of any legal duty or statutory requirement in respect of its financial or other affairs. SHR would no longer be able to appoint a management committee member for the wider-ranging and more general purpose of achieving "the proper management of the RSL's financial or other affairs."

GWSF comment

GWSF's long-standing position is a wish to see intervention powers which are robust where they need to be, but are used in a proportionate manner. In practice, we believe that the SHR's appointment powers are already used in much narrower circumstances than the 2010 Act provides for. In fact, some observers have expressed surprise at just how widely the 2010 Act powers were drawn, apparently without challenge.

So whilst these changes may seem significant on paper, in practice we believe they will continue to enable SHR to take intervention action involving appointments where there are serious problems, hence continuing to provide tenants, lenders and the sector itself with reassurance that appropriate regulation is in place. It is also worth noting that the changes do not impact on SHR's powers to make enquiries of RSLs.

The measures also provide some comfort to the sector that where intervention involving appointment of managers or management committee members occurs, SHR will be more mindful of the need to for the intervention to have a very specific purpose and be time-limited.

Proposed measure – Limiting SHR's powers to suspend or remove board members (Section 2 of the Bill)

The amendments to Sections 60-62 of the Act will mean that:

- SHR can remove a management committee member (described as an 'officer' in the Bill) only where s/he, through absence or other failure to act, is failing to

ensure that the RSL is being managed in accordance with its statutory duties. SHR will no longer be able to make a removal in response to the wider-ranging and less specific test of "impeding the proper management" of the RSL.

- SHR can suspend a management committee member only if s/he has been responsible for, or facilitated or otherwise contributed to, or been privy to, the RSL breaching any legal duty or requirement under the 2010 Act or any other legislation relating to its financial affairs or housing activities. SHR will no longer be able to suspend by applying the wider-ranging and less specific test of "misconduct in or mismanagement of" an RSL's financial or other affairs.

GWSF comment

GWSF is happy with these limitations. We note that the powers to remove or suspend management committee members have not been used in the current regulatory regime.

Proposed measure – Removal of SHR's powers to consent to the disposal of RSL land and assets (Sections 3 and 4 of the Bill)

Sections 107-109 of the 2010 Act are amended to provide that RSLs may dispose of land and assets without the consent of the SHR, subject only to a duty on RSLs to notify the SHR of any disposals (the notification to be made in advance of the disposal where practicable, and in any event not later than 28 days after the disposal has been made).

Section 110 and Part 10 of the Act are amended to provide for:

- The SHR to issue guidance on the means by which RSLs may consult tenants who would cease to be their tenants as a result of a disposal;
- RSLs to consult – in accordance with the SHR's guidance – all tenants who would be affected by a disposal;
- RSLs to be able to proceed with a disposal only where they have obtained approval of the disposal from a majority of those who respond to a consultation;
- RSLs to notify the SHR of the outcome of a consultation that would lead to it making a disposal.

These arrangements will remove the SHR from the process by which an RSL disposes of land or assets that would result in tenants ceasing to be tenants of the RSL, while ensuring arrangements are in place to enable tenants to continue to be consulted about such disposals.

GWSF comment

In seeing disposal consents go, GWSF's main aim is to see tenant consultation and ballots in stock transfer, merger and group structure changes protected. We recognise that the current provisions for consultation and ballots are inextricably linked to SHR's consent powers and so cannot be maintained in their current form.

The new provision enabling RSLs to proceed with a disposal of tenanted stock only where they have obtained approval from a majority of those affected can only be achieved through a ballot process. This is something that the statutory SHR guidance referred to in the Bill will set down in detail, and GWSF looks forward to detailed discussions with SHR on the content of that guidance.

No consultation or ballot is needed where an association plans to dispose of stock which is *not* tenanted. As with acquisition, disposal of stock from time to time is likely to be part of any association's asset management approach. GWSF believes its members, as community controlled housing associations, will continue to make sensible, appropriate decisions on managing their assets in the best interests of their community.

It is possible, however, that some other housing associations may, over time, seek to make excessive disposals of social housing stock once the consents regime has gone. GWSF will therefore be keen to discuss with SHR what checks and balances can be put in place – short of such measures being deemed to be 'public control' – to minimise the prospects of such sell-offs.

We will also want to urge lenders to avoid making excessive information demands on associations in an attempt to 'compensate' for there no longer being a need to get consent from SHR.

Proposed measure – Removal of SHR's powers to consent to RSL rule changes (Section 5 of the Bill)

Sections 93-95 of the 2010 Act will be repealed altogether, removing SHR from the process by which RSLs make changes to their constitutions, including any change to their articles of association, and leaving these matters entirely to RSLs. [To ensure that the SHR has an up to date register for public inspection, and that it knows which bodies it is regulating, it is proposed to retain the duty on RSLs, at section 92 of the 2010 Act, to inform the SHR of all such changes.]

GWSF comment

GWSF is happy with these changes. Whilst we understand the history of the sector which got us to a position where all rule changes have to be approved by SHR, we believe the system of seeking consent for all but the most routine of changes has become too controlling on SHR's part and onerous for RSLs.

We do not believe the changes will lead to RSLs suddenly deciding to make wholesale changes to their rules etc., as the sector in Scotland will not move away from the key values of supporting people and communities with addressing housing and related issues.

The provisions may, however, make it more straightforward for sensible changes to be made, where these, for example, will help associations prevent potentially disruptive individuals or groups having undue influence or control over an association's affairs.

In conjunction with members and other relevant bodies, GWSF will be happy to consider the merits of producing guidance for associations on dealing with rule changes if this would be helpful to our members,

Proposed measure – Removal of SHR's powers to consent to the voluntary winding–up, dissolution or restructuring of an RSL (Sections 6 and 7 of the Bill)

Sections 96-99 and 100-194 of the 2010 Act are amended to remove all of the SHR's powers of consent over voluntary winding-up, dissolution and restructuring. In doing so, amendments are proposed to protect tenants of an RSL who would become tenants of another RSL as a result of voluntary winding-up, dissolution or restructuring.

As with the changes relating to disposal of stock, the 2010 Act provides for tenants in a winding-up, dissolution or restructuring to be consulted. The Scottish Government's policy is for this right to continue when the SHR loses its powers of consent. Along with the removal of the consent powers, the changes will involve introducing a duty on RSLs to notify the SHR, following any consultation by the RSL of its tenants as required under these sections, when it has taken any of these steps.

Amendments to Section 110 and Part 10 of the Act will provide for:

- SHR to issue guidance on the means by which RSLs may consult tenants who would be affected by a voluntary winding-up, dissolution or restructuring proposal;
- RSLs to consult – in accordance with the SHR's guidance - all tenants who would be affected by any of these steps;
- RSLs to be able to proceed with any of these steps only where they have obtained approval for the disposal from a majority of those who respond to a consultation;
- RSLs to notify the SHR once it had taken any of these steps following a consultation.

These arrangements will remove the SHR from the processes of voluntary winding-up, dissolution or restructuring, while ensuring arrangements are in place to enable tenants who would be affected by any of these steps continue to be consulted before they are taken.

Specifically on subsidiary-related changes, further amendments to Sections 104A and 124A of the 2010 Act (as amended by section 98 of the Housing (Scotland) Act 2014) will provide for:

- SHR to issue guidance on the means by which RSLs may consult tenants in cases where a RSL would become a subsidiary of a body of which it was not already a subsidiary;
- RSLs to consult – in accordance with the SHR's guidance – all tenants who would be affected by RSLs becoming such a subsidiary;
- RSLs to be able to become such a subsidiary only where they have obtained approval of the disposal from a majority of those who respond to a consultation;
- RSLs to notify the SHR once it had become such a subsidiary following a consultation.

These arrangements will remove the SHR from the process by which a RSL becomes a subsidiary of another body of which it is not already a subsidiary, while ensuring arrangements are in place to enable tenants to continue to be consulted before a RSL becomes such a subsidiary.

GWSF comment

GWSF is happy with these changes. Again our main interest has been in seeing tenant consultation and ballots protected where a change of landlord or a group structure move to a parent body is being proposed. And again we look forward to discussions with SHR on the content of the statutory guidance.

Proposed measure – A power to make further changes to the powers of the Scottish Housing Regulator should such changes be necessary, without the need for further primary legislation (Section 8 of the Bill)

GWSF comment

On the face of it, this power is an open-ended one and gives the Scottish Government significant powers to amend SHR's powers without recourse to Parliament. However, GWSF is entirely satisfied that the sole purpose of this measure is to allow for further changes to be made as quickly as possible should the Bill's changes prove insufficient to persuade ONS that the level of 'public control' over RSLs has been adequately reduced. This measure is, therefore, in the interests of all parties, and is in any case subject to consultation.

Proposed measure – A power to make Regulations that will limit a local authority's influence over an RSL, which exists mainly through the right to nominate representatives to the RSL's governing body (Section 9 of the Bill)

GWSF comment

The main aim of these provisions is to ensure that ONS is persuaded that no local authority has undue control or influence over the affairs of any RSL. Any such undue control could be deemed by ONS to be 'public control' and could lead to a failure to reverse the reclassification decision.

Generally, RSLs most likely to be affected by this provision are 'large scale voluntary transfer' RSLs which came into being after the transfer of some or (in six cases) all of a local authority's housing stock to an RSL. Such transfers were usually accompanied by up to a third of the new RSL's management committee members being local authority nominees.

Our understanding is that regulations are likely to stipulate that no more than a quarter of any RSL's management committee members should be local authority appointees. As far as we are aware this does not affect any GWSF member associations, and our understanding is that those associations potentially affected by the proposed measures are relaxed about them.

David Bookbinder
Director

Written Submission from the Scottish Information Commissioner

Dear Convener

Evidence on the Housing (Amendment) (Scotland) Bill

I refer to your call for written views as part of the Local Government and Communities Committee's scrutiny of the Housing (Amendment) (Scotland) Bill (the Bill).

I am aware that this follows the review by the Office for National Statistics (ONS), which led to the reclassification of Registered Social Landlords (RSLs) from the status of private sector bodies to public sector bodies. I am also aware that the principal aim of the Bill is to reduce the Scottish Housing Regulator's (the SHR's) powers of regulation so as to influence the ONS to reclassify RSLs as private sector bodies.

However, I am concerned the Bill, if passed in its current form, may result in the removal of RSLs from the scope of the Environmental Information (Scotland) Regulations 2004 (the EIRs). RSLs are Scottish public authorities for the purposes of the EIRs because they are under the control of the SHR. The proposed reduction in SHR control to meet the policy objectives of the Bill could have the unintended, but highly significant, consequence of weakening further the limited (and variable) public right of access to information about social housing in Scotland:

- Local authority providers of social housing are subject to the Freedom of Information (Scotland) Act 2002 (FOISA). This means they are automatically subject to the EIRs (definition (a)(i) of Scottish public authority in regulation 2(1) the EIRs – see Appendix). This also means there is a public right to request (and to receive) *any* information held by local authorities and the authorities must publish information proactively, particularly when there is a public interest in that information.
- RSLs are subject to the EIRs by virtue of definition (d) of Scottish public authority in regulation 2(1) of the EIRs – see Appendix, but they are not subject to FOISA. This means there is a public right to request (and to receive) the *environmental* information they hold and RSLs must actively disseminate *environmental* information. There is no public right of access to their non-environmental information, or requirement on them to publish it.

To summarise, anyone can ask a local authority landlord for information about any aspect of its social housing e.g., rents, repairs, allocations, service quality, investment plans and disposals. But only environmental information is accessible from RSLs. This constrains participation with a large proportion of social landlords by

e.g., 278,000[7] tenants, their representative bodies and non-governmental organisations working on housing and homelessness.

And this limited right may be threatened by the proposals in the Bill.

Impact of proposed amendments

The Bill, if passed, will amend the Housing (Scotland) Act 2010 (the 2010 Act) to reduce the extent to which the SHR controls RSLs. This is likely to have the effect of removing RSLs from the definition of Scottish public authority under the EIRs.

As noted above, RSLs are Scottish public authorities for the purposes of the EIRs by virtue of definition (d) of "Scottish public authority" in the EIRs. This provision contains a two part test:

- firstly the body must be under the control of a Scottish public authority
- secondly, it must have public responsibilities, public functions, or provide public services relating to the environment.

In 2014, the Scottish Information Commissioner determined that Dunbritton Housing Association, an RSL, is subject to the EIRs. The test applied to public authority control was the extent of SHR's "power to direct, manage, oversee and/or restrict the affairs or business or assets" of the RSL, with specific reference to the 2010 Act. Therefore, although the decision focussed on Dunbritton Housing Association, it affected every RSL.

The Commissioner's Decision Notice[8] details the legal provisions indicating control. These are very similar to those identified by ONS in its deliberations on status of RSLs.

The proposed amendments in the Bill may therefore have a wider and significant consequence beyond its stated policy objectives: it may also remove RSLs from the scope of the EIRs, removing the only enforceable public right of access to the environmental information held by RSLs.

Extension of FOISA to RSLs

At Stage 3 of the passage of the FOISA Bill in 2002, there were concerns about the removal of RSLs from the list of authorities that would be subject to the new

[7] Estimated stock of dwellings by tenure, Scotland, calendar year time year series: 1993 to latest (2015 data provided here); http://www.gov.scot/Topics/Statistics/Browse/Housing-Regeneration/HSfS/KeyInfoTables

[8] Decision 118/2014 Mr X and Dunbritton Housing Association Ltd

legislation. The Scottish Executive made a clear commitment to consult on the issue of coverage of RSLs at the earliest possible opportunity.

Jim Wallace, the then Justice Minister said:

"When RSLs were added to the list of authorities at stage 2, I do not think that there had been any consultation …There will be consultation before any organisation is added. I assure members that we expect the majority of organisations to be covered…Section 5(5), which requires ministers to consult, does not require us to wait for the appointment of the commissioner before doing so. Once the bill has received royal assent, we can begin the consultation process." [9]

Since FOISA came into force in 2005, both Scottish Information Commissioners have repeatedly urged the Scottish Government and its predecessors to conduct the consultation. Respecting that the decision whether to designate bodies as Scottish public authorities is a political decision, i.e. a matter for Ministers, the Commissioners nonetheless expressed concern about loss of rights to information that was once available e.g., as a result of housing stock transfers from local authorities to RSLs) and lack of parity of rights among tenants of social landlords.

They have also drawn the Ministers' attention to the limitations of the access to information provisions in the Social Housing Charter, particularly given that it is neither enforceable nor universal.

In December 2016, following an informal consultation in 2015, the Scottish Government launched a formal consultation[10] on extension of FOISA to RSLs. The consultation document considers several "designation factors" and concludes *"…we consider that RSLs should be brought within the scope of Scotland's Freedom of Information legislation"*. An Interim Report[11] on the consultation was issued in June 2017.

The Ministers' decision is awaited:

- Should the Ministers decide to designate RSLs as Scottish public authorities for the purposes of FOISA, RSLs will automatically be subject to the EIRs (by virtue of definition (a)(ii) of Scottish public authority in regulation 2(1) (see Appendix)). This would resolve the concern about the impact of the reduction in control by the SHR, as proposed by the Bill.

[9] Official Report, Freedom of Information (Scotland) Bill: Stage 3, Wednesday 24 April 2002
[10] Consultation on Extending Coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords
[11] Consultation on Extending Coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords: Interim Report

- However, should Ministers decide not to bring RSLs within the scope of FOISA and the Bill is passed in its current form, there may no longer be any enforceable right of access to environmental information held by an RSL. That would represent a removal of rights.

The right to information held by RSLs is important

A universal right to access information from and about public services is a fundamental pillar of both public engagement and social justice. Without information, the public cannot participate fully in consultation, understand decisions taken on their behalf, or hold bodies to account for their decisions, spending or actions.

The United Kingdom is a signatory to the United Nations' Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice, on which the EIRs are based. The objective of the Convention (Article 1) states:

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention." [12]

David Kaye, Special Rapporteur of the Human Rights Council, said, in August 2017: *"Without freedom to access information of all kinds — in particular when Governments withhold information from the public and its judicial, legislative and media mechanisms — abuses may take place, policies affecting the general welfare may not be tested and improved and overall public engagement and participation diminishes, often by design. By contrast, information-rich environments help promote good decision-making and meaningful public debate, building credibility for public institutions"*. [13]

As the Scottish Government's consultation on extension of FOISA to RSLs makes clear, RSLs deliver functions of a public nature that is underpinned by statute.

Conclusion

As noted above, I am aware of the reasons for the proposed amendments to the 2010 Act and that they are unconnected to the position of RSLs under the EIRs.

[12] https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
[13] http://www.un.org/ga/search/view_doc.asp?symbol=A/72/350

However, I would ask that the Committee take account of the possible unintended consequences of the Bill in taking away an important right to information from RSL tenants in Scotland.

This is something the Committee may also wish to explore with Government as part of its consideration as to whether RSLs should be designated as public authorities under FOISA, given that such designation would automatically make RSLs subject to the EIRs.

Do not hesitate to contact me if I can be of any further assistance.

Yours sincerely

Margaret Keyse
Acting Scottish Information Commissioner

Appendix

Regulation 2 of the Environmental Information (Scotland) Regulations 2004

(1) In these Regulations –

…

"Scottish public authority" means –

(a) any body which, any other person who, or the holder of any office which is –

(i) listed in schedule 1 to [FOISA] (but subject to any qualification in that schedule); or

(ii) designated by order under section 5(1) of [FOISA];

…

(d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and –

(i) has public responsibilities relating to the environment;

(ii) exercises functions of a public nature relating to the environment; or

(iii) provides public services relating to the environment; …

Written Submission from UK Finance

Introduction

UK Finance is a trade association formed in July 2017 to represent the finance and banking industry operating in the UK. It represents around 250 firms in the UK providing credit, banking, markets and payment-related services. The new organisation brings together most of the activities previously carried out by the Asset Based Finance Association, the British Bankers' Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association.

Scope of response and background

In addition to representing residential mortgage lenders, UK Finance members also lend to support the social housing/ RSL sectors across the UK nations, including Scotland. We welcome the opportunity to provide this submission to the call for evidence as part of the Stage 1 scrutiny inquiry by the Scottish Parliament's Local Government and Communities Committee, focusing on the general principles of the Bill.

General comments

As of March 2017, commercial lending and investment to the RSL sector in Scotland amounted to some £4.9 billion (total facilities).

Scottish RSLs are mostly seen by private funders as a sound and stable proposition, presenting low risk and with a track record of no loss.

In addition to its vital work to protect and safeguard the interest of tenants, the Scottish Housing Regulator also provides robust regulation, with a strong focus on governance strength and financial health.

This regulation, founded on a proportionate and risk-based approach, backed with the ability to effectively deploy statutory intervention powers, gives private funders great comfort in the sector's strength; it supports confidence in existing and new private lending and investment on terms that enable Scottish RSLs to maximise their contribution to the delivery of the government's target of 50,000 new affordable homes in the current parliamentary term to 2021.

RSLs are reliant on private finance and government grant to develop new properties. Non-social rental income subsidises further development. It enables RSLs to service existing borrowing and leverage further borrowing capacity.
The ONS decision to classify Scottish RSLs as public bodies means their existing and future debt becomes part of the public balance sheet. Because of the need for government to control public borrowing, it might be necessary for the Scottish

Government to introduce caps on RSL borrowing, thereby limiting their capacity to develop and service existing debt.

Changes such as this will, over time, lead funders to re-evaluate their exposures in the sector and take account of what would be a fundamental shift in risk profile. There could be consequential changes in appetite and pricing for RSL debt, going forward. This would be counter-intuitive to the ambitions and purpose of RSLs and Government for the sector.

Specific comments

UK Finance and lenders have benefitted to date from constructive engagement on ONS classification issues across the UK's devolved nations. In England, we were extensively engaged with the Department for Communities and Local Government as it worked on the development of de-regulatory measures there, that were included in the Housing and Planning Act 2016.

We are encouraged to see that the proposed measures for Scotland are broadly consistent with measures now applying to housing associations in England, while still responding to the particular Scottish context in which, for instance, there are detailed arrangements for tenant consultation and tenant ballots.

In progressing the detail of the legislation, our overarching concern is to see the implementation of measures that are sufficient to enable the ONS to restore the sector's "private" classification, without going any further than is necessary.

Funders' perception of risk in the Scottish RSL sector; their appetite for lending/ investment to it; and the pricing available to Scottish RSLs are inextricably linked to regulation. We are clear that any regulatory changes that could go further than is necessary to address ONS issues would dilute the strength of regulation, and that this would have an impact on risk, appetite and pricing in the sector.

To maintain funder confidence in the sector at a time when there is increasing need for private finance to support the delivery of new development, we are clear that the regulator must still have access to viable statutory intervention powers that can be exercised in a timely and proportionate way to protect not only the interests of tenants but those of the sector's private and public funders.

We have responded to the questions in the call for evidence, below:

The need to restore the RSL sector's "private" classification

We are clear that if RSLs were to remain classified as public bodies, this would represent a fundamental and significant change in the overall profile and type of funding/ investment proposition. Any application of public borrowing caps would impact on business plans, and ability to service existing (and new) debt. Funders

would see changes to risk profile, and the likely response would be a review of exposures, which could lead to changes in appetite and pricing.

The implications could be a reduced ability of RSLs to attract new private investment at a time when more is needed to support delivery of the 50,000 homes target by 2021.

The appropriateness of reclassification measures

Our analysis of the measures to date is that they are broadly consistent with those already in place south of the border and with those that are planned both in Wales and Northern Ireland. This means that, taking a pan-UK view, there is consistency in measures, which is welcome and needed by national and international lenders and investors. On balance, and taking account measures implemented or planned in the other UK nations, we feel the Scottish measures are appropriate.

We have provided comments on the key measures are proposed in the Bill:

Regulatory intervention/ powers to appoint, remove or suspend officers (Sections 1 & 2): Changes to the timeliness of intervention have caused concern for funders, to the extent that an intervention might have to wait until an RSL has failed (which might be too late) rather than when an RSL is failing. Having discussed and analysed the provisions in detail, however, we expect funders could take comfort from a wide definition of failure, and the explicit linking of it to a failure to meet standards set out in the regulatory framework. We suggest that consideration be given to ensuring in the legislation that the failure of an RSL is clearly defined as including a failure to meet regulatory standards. On balance, we feel this should provide sufficient scope for regulatory intervention before an insolvency situation might arise. We expect funders might wish to keep the operation of this new approach, if implemented, under review to ensure there are no unintended consequences that might impact their interests and exposures.

Disposal consents (Sections 3 & 4): The measures are broadly consistent with the position elsewhere in the UK, and this is welcome. Government and RSLs should recognise, however, that the disposal consents regime is a powerful source of regulatory intelligence. Without it, we expect funders to ramp-up their own due diligence on a proposition, which could lead to increased costs for housing associations. In the absence of the consents regime, funders would expect association Boards, themselves, to strengthen their own self-assessment regimes.

Organisational changes (Sections 5, 6 & 7): Again, the measures are broadly consistent with the position elsewhere in the UK. We recognise, however, the different arrangements in Scotland where there are complex provisions in existing legislation in relation to tenant consultation and tenant ballots. While we recognise the rationale for these arrangements, funders would want to see the proposed

legislation constructed and operated in a way which does not delay or prevent the rescue or dissolution of an insolvent RSL.

Power to be taken by the Scottish Minsters to further modify the functions of the regulator (Section 8): While we understand the rationale for such a power, we are concerned that the power as proposed is open-ended. As the intention of the Scottish ministers and the will of Parliament is set on restoring the private classification as soon as practicable, and as the policy memorandum records the advice of ONS officials that the Bill provisions "are likely to be sufficient to remove public sector control", we think it would be reasonable to limit the timeframe for the proposed Section 8 power. We suggest that that Committee might consider a sunset provision for this power, such that it falls away at the end of the current parliamentary term in 2021. Without this, we expect funders (particularly international investors who might be less familiar with the sector) might perceive an open-ended ability of Ministers to change the functions of the regulator as a risk of indefinite uncertainty. This could reduce investor appetite and increase the possibility of reticence among funders when considering Scottish RSLs as funding/ investment propositions within the wider UK and international context.

Changes to local authority representation (Section 9): The measures are broadly consistent and therefore appropriate, in our view.

Alternative means of achieving change

As regulation of the RSL sector is based in statute, and as the ONS has identified specific statutory provisions to be addressed so as to change the balance of control, we do not realistically see that there would be other ways of achieving the required changes with the required degree of certainty of outcome. While factors of influence might be addressed through the operation of softer mechanisms such as guidance and practice, our view is that only legislative amendment could change legislative controls.

John Marr

Local Government and Communities Committee

29th Meeting 2017 (Session 5), Wednesday 29 November 2017

Draft Budget Scrutiny 2018-19: Note by the Clerk

Purpose

1. This paper provides background information on the Committee's scrutiny of the draft Budget 2018-19.

Background

2. On 6 September 2017 the Committee agreed its approach to scrutiny of the Draft Budget 2018-19. As the budget will be published later this year the Committee agreed to undertake pre-budget scrutiny looking back at what has actually been spent in 2016-17 and (to the extent possible) 2017-18.

3. On 14 September 2017 the Committee launched its call for views with a deadline for responses of 23 October 2017. A total of 24 submissions were received.

4. The Scottish Parliament's Information Centre (SPICe) have provided a summary of the written views received.

5. In addition the following briefing has been published on Local Government Finances:

   - Local Government in Scotland: Performance and Challenges 2017 (Accounts Commission report)

Local Government and Communities Committee Consideration

6. The Committee has agreed the witnesses it wishes to hear from. At its meeting on 22 November the Committee heard from Councillor Gail Macgregor, and Vikki Bibby from COSLA and Paul Dowie from the Improvement Service.

   Link to Committee Papers for the meeting on 22 November
   Link to Official Report for the meeting on 22 November

7. At its meeting on 29 November the Committee will take evidence from the Accounts Commission.

Next Steps

8. At its meeting on 6 December 2017 the Committee has invited the following organisations to speak to the Committee:

   a. Association of Local Authority Chief Housing Officers
   b. Scottish Federation of Housing Associations

c. UNISON Scotland
d. Renfrewshire Council
e. Comhairle nan Eilean Siar

9. At its meeting on 20 December 2017 the Committee will take evidence from the Cabinet Secretary for Finance and the Constitution and the Minister for Local Government and Housing.