LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

AGENDA

3rd Meeting, 2019 (Session 5)

Wednesday 23 January 2019

The Committee will meet at 9.45 am in the James Clerk Maxwell Room (CR4).

1. **Decision on taking business in private**: The Committee will decide whether to take items 5, 6 and 7 in private.

2. **Scottish Public Services Ombudsman Annual Report and Accounts 2017-18**: The Committee will take evidence from—
   Rosemary Agnew, Ombudsman, Niki Maclean, Director, and John Stevenson, Head of Improvement, Standards and Engagement, Scottish Public Services Ombudsman.

3. **Subordinate legislation**: The Committee will consider the following negative instrument—

4. **Fuel Poverty (Target, Definition and Strategy) (Scotland) Bill (in private)**: The Committee will further consider a draft Stage 1 report.

5. **Budget Scrutiny 2019-20**: The Committee will consider a draft letter to the Scottish Government.

6. **Scottish Public Services Ombudsman Annual Report and Accounts 2017-18**: The Committee will consider the evidence heard earlier in the meeting.

7. **Work programme**: The Committee will consider its work programme.
The papers for this meeting are as follows—

**Agenda item 2**

Note by the Clerk  
PRIVATE PAPER  
LGC/S5/19/3/1

**Agenda item 3**

Note by the Clerk  
LGC/S5/19/3/3

**Agenda item 4**

PRIVATE PAPER  
LGC/S5/19/3/4 (P)

**Agenda item 5**

PRIVATE PAPER  
LGC/S5/19/3/5 (P)

**Agenda item 7**

PRIVATE PAPER  
LGC/S5/19/3/6 (P)
Local Government and Communities Committee

3rd Meeting (Session 5), Wednesday 23 January 2019

Scottish Public Services Ombudsman

Purpose

1. This paper provides background information for the Committee’s evidence session with the Scottish Public Services Ombudsman (SPSO). Since May 2017, the SPSO has been Rosemary Agnew. She will be accompanied for the session by senior colleagues from her office.

2. The evidence session provides the Committee with an opportunity to scrutinise the SPSO’s Annual Report and Accounts 2017/18. The session follows a precedent set earlier in this session for this Committee to take evidence from the SPSO annually.

3. The SPSO is funded and appointed by the Scottish Parliament Corporate Body but is statutorily independent, with discretion to exercise her complaints handling and decision-making powers as she considers appropriate.

Background

4. The Scottish Public Services Ombudsman Act sets out the SPSO’s powers and duties which cover three distinct areas of statutory functions1—

   - The final stage for complaints about most devolved public services in Scotland including councils, the health service, prisons, water and sewerage providers, Scottish Government, universities and colleges;

   - Specific powers and responsibilities to publish complaints handling procedures, and to monitor and support best practice in complaints handling and;

   - Independent Review Service for the Scottish Welfare Fund with the power to overturn and substitute decisions made by councils on Community Care and Crisis Grant applications.

Annual Reporting

5. The 2002 Act states that the SPSO must report annually to the Scottish Parliament on the exercise of his or her functions.

6. The Committee last heard evidence from the SPSO on her Annual Report 2016-17 at its meeting on 31 January 20182. In a follow-up from that meeting, the

---

1 More information about the role and responsibilities of the SPSO can be found here.
2 The Official Report for this meeting can be found here.
Committee met informally with the SPSO’s senior management team on 19 December 2018 to discuss their new strategic plan.

7. The SPSO’s most recent Annual Report and Accounts 2017/18 was published on 19 September 2018. In previous years, this information was published as two separate documents. For the reporting period 2017/18, this information has been combined into one document following changes to the Public Services Finance Manual\(^3\).

8. The Annual Report and Accounts 2017/18 reports on the SPSO’s performance and activities during the reporting year and highlights key issues and risks for the organisation. The document also identifies future work for the SPSO including new powers it will take responsibility for during 2019 as the Independent National Whistleblowing Officer for the NHS.

Written submissions

9. The SPSO have provided a written submission in advance of the evidence session and it is attached at Annexe A. The submission summarises the information contained in its Annual Report and Accounts 2017/18 and provides an overview of its work to date during 2018/19.

10. The Committee have also received a written submission from Mr Peter Stewart-Blacker on behalf of Accountability Scotland, which is attached at Annexe B.

Next Steps

11. The 23 January evidence session is an opportunity for the Committee to question the SPSO and her team on their performance over the last year and on particular challenges they anticipate in coming months, and will stand on the public record. The Committee will have the opportunity to consider any further action it may wish to take immediately following the evidence session and in future work programme discussions.

\(^3\) The Scottish Public Finance Manual (SPFM) is issued by the Scottish Ministers to provide guidance on the proper handling and reporting of public funds.
Annexe A

Written Submission from the Scottish Public Services Ombudsman of 16 January 2019

Introduction

1. This briefing note provides supplementary information to the Local Government and Communities Committee to inform its consideration of the Scottish Public Services Ombudsman’s 2017/18 Annual Report and Accounts. It also provides an update for the first nine months of 2018/19.

2017-18

Annual Report 2017/18

The document

2. The 2017/18 Annual Report covered my first year as Scottish Public Services Ombudsman. The document to which this note refers is the full Annual Report and Accounts 2017-18. This document is available on this web page https://www.spso.org.uk/news-and-media/spso-annual-report-2017-18 but please note: the document to download is under related reading at the foot of the page, “download the full Annual Report and Accounts.

3. Traditionally, the SPSO has laid two documents before Parliament: Annual Report (Annual Report), and Annual Report and Accounts which is audited (Accounts). Changes to the Public Services Finance Manual has resulted in increasing overlap between the “performance” elements of the Accounts and the “Annual Report”, so this year they have been combined into one document.

Statutory duties

4. I have three distinct areas of statutory functions/powers:

   4.1. the final stage for complaints about most devolved public services in Scotland
   4.2. specific powers and responsibilities to publish complaints handling procedures and promote, monitor and support best practice in complaints handling
4.3. Independent Review Service for the Scottish Welfare Fund with the power to overturn and substitute decisions made by councils on community care and crisis grant applications.

Complaints and enquiries 2017/18

5. In 2017/18 SPSO

- Received 4,125 complaints (compared to 4,182 in 16/17, a change of -1%)
- Closed 4,226 complaints (compared to 4,104 in 16/17, a change of 3%)
- Upheld 58.8% of complaints in full or part (compared to 52% in 16/17, a change of 6%)
- Made 1,192 recommendations;
  - 448 individual remedy for an aggrieved person
  - 635 learning and improvement
  - 109 to improve complaints handling performance of public bodies.
- Closed 97.1% of complaints within 260 days against a target of 95% (compared to 96.1% in 16/17, a change of 1%)

6. More information about enquiries can be found on page 7 of the Annual report and Accounts.

7. More information about complaints: how they were handled, a breakdown by sector, outcomes and findings can be found on pages 8—11.

Learning and improvement

8. Learning from complaints sits at the heart of the SPSO’s work as it adds value to the delivery of public services across Scotland. In 2017/18 the SPSO

8.1. Issued a thematic report Making Complaints Work For Everyone and participated in a related conference. This report looked at the impact of being complained about on both individuals and on the efficiency and effectiveness of the organisations for whom they work.

8.2. Improved the way we made recommendations to ensure our casework promotes improvement by improving outcomes and enabling more effective tracking of performance.

8.3. Continued to engage with individual organisations to support improvement.

Complaints Standards

9. The Model Complaints Handling Procedure (adopted by each local authority (LA) in Scotland) requires LAs to report their complaints handling performance annually in line with SPSO requirements. In partnership with the Local Authority

---

4 Key performance indicators were in the annual report. We also published additional welfare fund information was published in the Scottish Welfare Fund Annual Report here: https://www.spso.org.uk/scottishwelfarefund/statistics

5 http://www.valuingcomplaints.org.uk/spso-thematic-reports
Complaints Handlers Network, we produced a suite of performance indicators against which to assess and report this performance. Local authorities publish this information online in an annual complaints report.

10. This approach helps to ensure transparency to the public on how councils handle and learn from complaints. It also helps councils to understand their complaints handling performance in more detail and ensure that they are capturing consistent and directly comparable information to enhance their benchmarking of complaints performance against their peers within the Complaints Handlers Network.

11. On 1 April 2017, the NHS and social work model complaints handling procedures came into operation. We also developed a template for Integrated Joint Boards. To support this work we:

   11.1. Conducted 87 compliance checks to ensure that these were operational.
   11.2. Developed a training course aimed at staff at HSCPs
   11.3. Delivered complaints workshops with the NHS

12. In accordance with the NHS Complaints Directions, relevant NHS bodies also have a responsibility to gather and review information on a quarterly basis in relation to complaints. Data required for these quarterly reports is outlined in the new complaints procedure (the NHS Complaints Performance Indicators). Reporting performance against these indicators will help to demonstrate the improvements resulting from complaints and show that complaints can shape service delivery. It also helps ensure transparency in the complaints handling service and shows people using the services that the NHS values their complaints.

Scottish Welfare Fund Independent Review Service

13. 17/18 was the second year of this service, the SPSO:

   • Received 748 applications for review (compared to 768 in 2016/17, a change of -2%)
   • Reviewed 606 decisions (compared to 437 in 16/17, a change of 38%)
   • Changed the decision in 52% of Community Care Grants (compared to 43% in 16/17)
   • Changed the decision in 35% of Crisis Grants (compared to 32% in 16/17)

14. We shared learning from our work to support and inform the decisions being made at local authority level. We:

   14.1. Held an engagement event attended by 61 delegates who had an interest in SWF including local authority staff and third sector representatives and
   14.2. Jointly delivered with the Scottish Government workshops for decision makers focusing on improving the quality of information that local authorities provide to applicants about their decisions.
Budget

15. My budget for 2017–18 was £4.3 million.

15.1. Expenditure was within -1.4% of the approved budget.
15.2. We generated modest revenue of £72,000 through our training unit.

16. I publish information on my website on specific expenditure areas, as required under the Public Services Reform (Scotland) Act 2010.

17. £3,414, (79%) of the SPSO budget was spent on staffing

18. Staff numbers

- Actual people, 71: 56 full time and 15 part time
- Full time equivalent (FTE), 59

19. The biggest concern in relation to resources remains that linked to investigation capacity as complaints are increasing in complexity and, taking longer. They, therefore require more investigation resource. Paragraph 20 explains this in more detail.

2018/19 data

Complaints

Received in the first 9 months of 18/19 (April—December)

<table>
<thead>
<tr>
<th></th>
<th>Apr-Dec 2018</th>
<th>Apr-Dec 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Received</td>
<td>3,164</td>
<td>3,102</td>
</tr>
<tr>
<td>Brought forward from previous year</td>
<td>598</td>
<td>702</td>
</tr>
<tr>
<td><strong>Total work in hand</strong></td>
<td><strong>3,762</strong></td>
<td><strong>3,804</strong></td>
</tr>
</tbody>
</table>

---

6 www.spso.org.uk/finance
Complaints closed in the first 9 months of 18/19

<table>
<thead>
<tr>
<th>Total cases closed</th>
<th>Apr-Dec 2018</th>
<th>Apr-Dec 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Closed at assessment</td>
<td><strong>Total closed at assessment</strong></td>
<td>3,011</td>
</tr>
<tr>
<td>• Out of jurisdiction (legally I could not investigate)</td>
<td>2,463</td>
<td>2,626</td>
</tr>
<tr>
<td>• Premature (sent to us too early)</td>
<td>578</td>
<td>779</td>
</tr>
<tr>
<td>• Not progressed beyond preliminary stages/assessment⁷</td>
<td>1,609</td>
<td>1,439</td>
</tr>
<tr>
<td>Closed at investigation</td>
<td><strong>Total closed at investigation</strong></td>
<td>548</td>
</tr>
<tr>
<td>• In-depth investigations</td>
<td>536</td>
<td>541</td>
</tr>
<tr>
<td>• % where all or some upheld</td>
<td>60%</td>
<td>54%</td>
</tr>
<tr>
<td>• Total recommendations made</td>
<td>987</td>
<td>883</td>
</tr>
<tr>
<td>Carried forward</td>
<td><strong>Cases ongoing at 1 January</strong></td>
<td>747</td>
</tr>
</tbody>
</table>

Complaint handling KPIs and increasing complexity

<table>
<thead>
<tr>
<th>Key performance indicators</th>
<th>18/19 Apr-Dec</th>
<th>17/18 Apr-Dec</th>
<th>17/18 full yr</th>
</tr>
</thead>
<tbody>
<tr>
<td>KPI1: complete initial assessment within 10 working days: 95%</td>
<td>99.8%</td>
<td>99.6%</td>
<td>99.5%</td>
</tr>
<tr>
<td>KPI2: close or move to investigation in 70 working days: 95%</td>
<td>90.7%</td>
<td>85.7%</td>
<td>85.3%</td>
</tr>
<tr>
<td>KPI3: complete investigations within 12 months 95%</td>
<td>96.2%</td>
<td>98.3%</td>
<td>97.1%</td>
</tr>
</tbody>
</table>

20. While figures appear relatively consistent, the underlying cases are more complex and place a greater demand on resources as they require more investigation, and these cases take longer.

<table>
<thead>
<tr>
<th>Complaints received</th>
<th>Apr-Dec 2018</th>
<th>Apr-Dec 2017</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complaints received</td>
<td>3,164</td>
<td>3,102</td>
<td>+62</td>
</tr>
<tr>
<td>Cases where we can make a decision quickly and without significant additional information. Usually closed within 10 working days.</td>
<td>1,135</td>
<td>1,295</td>
<td>-160</td>
</tr>
<tr>
<td>Cases requiring more detailed assessment and some investigation, but which do not progress to more detailed investigation</td>
<td>1,505</td>
<td>1,372</td>
<td>+133</td>
</tr>
<tr>
<td>Cases requiring detailed investigation (and so more resource)</td>
<td>524</td>
<td>435</td>
<td>+89 (20%)</td>
</tr>
</tbody>
</table>

⁷ e.g. public body responded appropriately and there was nothing more we could achieve; time bar or alternative remedy; complainant didn’t respond to us or withdrew complaint; complaint resolved.
Scottish Welfare Fund Reviews

April 2018—December 2018, 561 (compared to 588 in 2017) applications received

<table>
<thead>
<tr>
<th>Total closed reviews</th>
<th>Apr – Dec 2018</th>
<th>Apr– Dec 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Closed prior to review</td>
<td>551</td>
<td>595</td>
</tr>
<tr>
<td>• Crisis Grants</td>
<td>73</td>
<td>65</td>
</tr>
<tr>
<td>• Community Care grants</td>
<td>23</td>
<td>70</td>
</tr>
<tr>
<td>Closed at review</td>
<td>455</td>
<td>460(^8)</td>
</tr>
<tr>
<td>• Crisis Grants reviewed</td>
<td>283</td>
<td>210</td>
</tr>
<tr>
<td>• Community Care grants reviewed</td>
<td>172</td>
<td>250</td>
</tr>
<tr>
<td>• Crisis Grant % changed</td>
<td>30%</td>
<td>36%</td>
</tr>
<tr>
<td>• Community Care Grant % changed</td>
<td>45%</td>
<td>50%</td>
</tr>
</tbody>
</table>

SWF KPIs

21. We continue to meet the challenging KPIs of making decisions on Crisis Grants within 1 working day\(^9\) and within 21 working days for community Care Grants in 95% cases.

22. This has been made more challenging by the increase of 36% (from 208 to 283) in the number of Crisis Grants reviews which must be processed in the shortest of those timescales.

23. We have only managed to maintain performance because of an impressive increase in productivity by staff and a decrease in community care grants reviews received but I am aware staff are working under increased pressure to meet the very tight targets and any further increase in the number of crisis grants may make that unsustainable.

2018/19 other duties

Supporting learning and improvement

24. In 2018/19 I continued to take steps to promote learning and improvement. For example:

24.1. Developing a support and intervention policy which sets out how and when we will offer support and/or take intervention action in relation to an organisation under our jurisdiction, in order to fulfil our statutory functions

24.2. Begun the first planned revision of the model complaints handling procedures since their launch in 2011

---

\(^8\) A small number of cases (4) were withdrawn at this stage so do not form part of the number reviewed.

\(^9\) These targets are all taken from the date we have enough information to make a decision.
24.3. Participated regularly in the Sharing Healthcare Intelligence Group chaired by Healthcare Improvement Scotland

24.4. Discussed the Northern Ireland human rights approach and Scottish developments in this area with the Scottish Human Rights Commission.

Strategic plan

25. I am required under legislation to publish a new/updated strategic plan every four years. In early 2018 I chose to publish an updated strategic plan covering the final two years of the current four year cycle which ends in March 2020.

26. 18/19 (current year) performance will be tested against this in our annual report.

27. In line with the four year cycle I will consult on and publish a new four-year plan in 2020. Work on this will start in the current, 2018/19 year.

Need for legislative changes

28. Last year, I informed the committee of three areas where I was seeking change to our legislation to ensure that Scotland has a modern Ombudsman service, with powers fit for purpose, both in terms of current duties and extension to powers. I have continued to discuss these with the Scottish Government, but am concerned about the lack of progress.

29. While discussions with the Scottish Government are ongoing, I have not yet had a definitive or final response.

30. Some of the changes are technical amendments to give greater clarity to existing provisions (not covered here in detail).

31. The two main areas where amendment or extension is being sought concern Public Value (own initiative) Investigation powers and accessibility.

Public Value Investigations

32. Public Value Investigations are those instigated by the Ombudsman’s own initiative, and do not have to be about a specific complaint.

33. This is a significant gap in my powers when compared to other Ombudsman schemes. It is available as standard to many Ombudsmen across Europe, particularly those jurisdictions most like Scotland’s.

34. Ombudsman schemes that have these powers tend to use them sparingly. The main point about the approach is that the investigations demonstrate public value and highlight issues that might not, through the normal course of a complaint, come to light. In other jurisdictions (such as Ireland) they have shown to be very effective at raising issues faced by vulnerable groups - a voice for the voiceless.

35. I would suggest an appropriate funding model would be one where I approached the Parliament for specific funding when I identified the need to conduct such an
investigation. This is not intended as a measure for Parliament to direct the SPSO’s work, but as a mechanism to scrutinise the commitment of public money, outwith the consolidated budget.

36. I have not yet had a final view from the Scottish Government, but it seems likely that changes to primary legislation are required.

37. In 2019-20 work plan, I intend to lay a report before Parliament with proposals for legislative change.

Accessibility

38. The SPSO Act was put in place before use of digital (and telephone) services were common place. Currently it requires complaints to be in writing. I can waive this in exceptional circumstances, but that puts the onus on a complainer demonstrating why their circumstances are exceptional.

39. Put simply, I am seeking the powers to take complaints in any format. Having these powers would enable us to design our business to be more accessible, remove communication barriers and assist greatly in delivering one of our core values: we are people focussed.

40. This change is widely supported among stakeholders to whom we have spoken about it.
Here are some issues we would like raised at the meeting with the Ombudsman on 23 January.

We find that some relate to items in her Briefing Notes, in which case these are quoted first, in italics.

We applaud and support the fresh approach of the report.

*******

Accessibility

38. The SPSO Act was put in place before use of digital (and telephone) services were common place. Currently it requires complaints to be in writing. I can waive this in exceptional circumstances, but that puts the onus on a complainer demonstrating why their circumstances are exceptional.

39. Put simply, I am seeking the powers to take complaints in any format. Having these powers would enable us to design our business to be more accessible, remove communication barriers and assist greatly in delivering one of our core values: we are people focussed.

40. This change is widely supported among stakeholders to whom we have spoken about it.

A. Some individuals have much more difficulty than most of us realise dealing with officialdom, telephones and questionnaires, and generally expressing their complaints. Sometimes this is a matter of education and experience, but there is a particular problem with people with ADHD. The chairman of Accountability Scotland has discussed this issue with the latter, individually and in a group, and is clear that SPSO investigators need to make allowance for their problems in this context. Some people have these difficulties without realising that they have a level of ADHD that is to blame. Also relevant here are people with learning difficulties and also some on the autistic spectrum.

Questions: To what extent are SPSO investigators trained to deal with this problem and so investigate adequately and effectively? Are complainants offered face-to-face discussions?

*******

B. Some complainants tell us that they have not been allowed to see important communications between SPSO and BUJs\textsuperscript{10} and between SPSO and advisers. Without sight of what the BUJ has said, it is impossible for a complainant to question

\textsuperscript{10} Bodies under Jurisdiction
or correct what is being said about them and about the subject of the complaint. The complainant lacks the luxury of having the full (perhaps false) evidence that the SPSO has.

**Question:** What is the SPSO’s attitude to such a lack of transparency?

******

“19. The biggest concern in relation to resources remains that linked to investigation capacity as complaints are increasing in complexity and, taking longer. They, therefore require more investigation resource”.

“23. We have only managed to maintain performance because of an impressive increase in productivity by staff and a decrease in community care grants reviews received but I am aware staff are working under increased pressure to meet the very tight targets and any further increase in the number of crisis grants may make that unsustainable. “

C. The report notes that “for some months we had exceptionally high personal workloads. the resources we have are sufficient only for as long as there is no increase in complaints coming in. if complaint volumes rise by more than a few percent, our resources are no longer sufficient to maintain current levels of performance.” The most recent survey of staff satisfaction (before the change of ombudsman), showed this to have then been very poor, partly due to pressure of work. That could well be responsible for some of the complainant dissatisfaction. Even now there are complainants indignant at the treatment of themselves and their evidence. Therefore, regardless of the rightness of SPSO decisions, time should be given to ensuring complainants understand that the SPSO has investigated fully, adequately, effectively and sympathetically as far as is consistent with statutory powers.

**Question:** Should not SPSO financial resources therefore be increased, despite the above statement of the SPSO, to allow an increase in the number of investigators?

******

D. Despite the fact that 58.8% of complaints were upheld in full or part, too many people still lack faith in the ability of the SPSO to deliver justice. There has never been an independent review of the adequacy, effectiveness and quality of the SPSO’s decisions since its inception.

**Question:** In what ways might an independent review be inappropriate or unworkable?

******

31. The two main areas where amendment or extension is being sought concern Public Value (own initiative) Investigation powers and accessibility.

Public Value Investigations
32. *Public Value Investigations* are those instigated by the Ombudsman’s own initiative, and do not have to be about a specific complaint.

E. Sometimes the experiences of an individual complainant point to the existence of a more general problem affecting other members of the public.

**Question:** Do you think that the SPSO legislation should be modified to allow the SPSO to widen the scope of investigations?

******

F. We are very aware of complainants who, believing they have been denied justice, have suffered long term psychological damage, unable to put matters to rest, this may become understandably burdensome to the SPSO and relevant BUJs. Labelling complainants as ‘vexatious’ appears to be just a way of shutting them out.

**Question:** Can you see a compassionate solution to this problem?
Local Government and Communities Committee

3rd Meeting, 2019 (Session 5), Wednesday 23 January 2019

Subordinate Legislation

Overview of instruments

1. The following instrument, subject to negative procedure, is being considered at today’s meeting:


Background

2. This Order provides that section 11(2) of the Land Tenure Reform (Scotland) Act 1974 will not apply to the heritable securities granted in pursuance of the schemes mentioned in articles 2 and 3. The effect is that the debtor will not be entitled to redeem the security after 20 years have passed since it was executed, under the terms provided by section 11 of that Act. The policy note for the instrument is attached at Annexe A.

3. An electronic copy of the instrument is available at:
   

4. No motion to annul this instrument has been lodged.

Delegated Powers and Law Reform Committee consideration

5. The Delegated Powers and Law Reform Committee (DPLRC) considered this instrument at its meeting on 8 January 2019 and determined that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

Committee Consideration

6. The Committee is not required to report on negative instruments, but should it wish to do so, the deadline for reporting on the instrument is 7 February 2019.

Procedure

7. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
8. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

9. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

10. Each negative instrument appears on the Local Government and Communities Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not always possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

11. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.
POLLICY NOTE

THE REDEMPTION OF HERITABLE SECURITIES (EXCLUDED SECURITIES) (SCOTLAND) ORDER 2018

SSI 2018/376

The above instrument was made in exercise of the powers conferred by Section 93 of The Housing (Scotland) Act 2014. The instrument is subject to negative procedure.

Policy Objectives

1. The Heritable Securities (Excluded Securities) (Scotland) Order 2018 exempts the securities described in articles 2 and 3 from section 11 of the 1974 Act. The right to redeem at year 20 is removed from the securities granted under the named schemes in paragraph 2(2) both before and after the Order comes into force. This right is removed from securities granted under the named schemes in paragraph 3(2) after the Order comes into force only.

2. The Scottish Government operates a number of shared equity schemes that make loans to borrowers which are linked to the property’s value. These loans are secured by way of a standard security. In the early 1970s, finance for home ownership centred around traditional repayment or interest only mortgages. Section 11 of The Land Reform (Scotland) Act 1974 (‘the 1974 Act’) gives borrowers the right to redeem their security when the 20 year point in the loan term has been reached. From this point onwards borrowers are able to redeem their securities on repayment of the loan balance together with any interest and fees due. This is commonly known as ‘the 20 year security rule’. One of the main purposes of the 1974 Act was to prohibit the creation of new feuduties (a fixed annual payment granting the owner of the property the right to use the land that the property was situated on). The 20 year security rule was introduced to ensure that landowners could not seek alternative sources of income through the introduction of ground rents or interest paid on long-term standard securities.

3. The provisions of section 11 of the 1974 Act do not fit well with modern financing arrangements for home ownership on a shared equity basis. This is because the 20 year security rule overrides any contractual provisions put in place as part of the shared equity agreement. Prior to the introduction of the Help to Buy (Scotland) Scheme shared equity agreements for the Open Market Shared Equity Scheme and the New Supply Shared Equity Scheme operated by the Scottish Government were arranged with a break clause at year 19. This ensured that the Government was not exposed to the financial risk that borrowers would be able to redeem their security at year 20, at the value of their original equity loan, rather than the market value of the equity stake at the date of redemption. Scottish Ministers had intended replicating this approach for the Help to Buy (Scotland) Scheme in 2013. However, changes to the Financial Conduct Authority guidance around affordability tests and mortgage duration made the Council of Lenders and some members unwilling to participate in the scheme with the break clause in place.
4. To ensure lender participation continued across all of the Scottish Government’s shared equity schemes the break clause was removed on 1 April 2014. Help to Buy (Scotland) was launched on 27 September 2013 with no break clause in the legal documentation. We understand that the right to redeem a security at year 20 could be viewed as a possession at for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights (ECHR). Scottish Ministers have therefore informed all shared equity purchasers, from the 1 April 2014 onwards, of their intention to bring forward legislation to exclude their shared equity schemes from the effects of ‘the 20 year security rule’ which would remove purchasers right to redeem at year 20.

Consultation

5. Since October 2014, Scottish Ministers have undertaken a number of public consultations on the proposal to exempt certain heritable securities from ‘the 20 year security rule’. The first consultation, which ended in February 2015, enabled organisations and individuals to express their views and opinions on the broad principles of the proposed approach and to highlight any local shared equity schemes which should be considered. 14 responses were received and all agreed with the principle of bringing forward legislation to mitigate the financial impact of ‘the 20 year security rule’. A further consultation was undertaken with those respondents who submitted schemes for inclusion in the Order.

6. As the formal consultation was completed several years ago and the Order could not be pursued at this time, Scottish Ministers have undertaken a further informal consultation with Local Authorities and Registered Social Landlords. This further consultation period at the start of 2018 gave respondents the opportunity to submit any new schemes for consideration and to ensure that any previously notified schemes were still relevant. These responses have informed our decisions on the local shared equity schemes which are included in the Order.

Impact Assessments

7. A partial Equality Impact Assessment (EQIA) was undertaken in 2014 which built upon the findings from the EQIA which was undertaken on the Housing (Scotland) Bill 2013. This partial EQIA was included in the consultation (which closed in January 2015) to ascertain views on the equalities impact of the proposed approach to exempt certain heritable securities from the effects of ‘the 20 year security rule’. We concluded that there are no equality issues which arise as a result of the proposed approach.

Financial effects

8. A full Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. Dis-applying the 20 year rule ensures that the bodies operating the shared equity schemes named in the Order receive an adequate return on their shared equity stakes over time. The majority of organisations affected are Registered Social Landlords and they are likely to use any resulting receipts to re-invest in affordable housing. Detailed information on the potential scale of the lost receipts is contained in the BRIA.
9. The Scottish Government plans to review the Order every 5 years to ensure the necessary schemes are included.

Scottish Government
Directorate for Housing and Social Justice
December 2018