



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

Wednesday 26 November 2014

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INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE
27th Meeting 2014, Session 4

CONVENER

Maureen Watt (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP)

COMMITTEE MEMBERS

Jim Eadie (Edinburgh Southern) (SNP)

*Mary Fee (West Scotland) (Lab)

*Mark Griffin (Central Scotland) (Lab)

*Alex Johnstone (North East Scotland) (Con)

*Gordon MacDonald (Edinburgh Pentlands) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

David Bookbinder (Glasgow and West of Scotland Forum of Housing Associations)

Tony Cain (Association of Local Authority Chief Housing Officers)

Alan Stokes (Scottish Federation of Housing Associations)

CLERK TO THE COMMITTEE

Steve Farrell

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Infrastructure and Capital Investment Committee

Wednesday 26 November 2014

[The Deputy Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Deputy Convener (Adam Ingram): Good morning everyone, and welcome to the 27th meeting in 2014 of the Infrastructure and Capital Investment Committee. Everyone present is reminded to switch off mobile phones as they affect the broadcasting system. However, some committee members may consult tablets during the meeting, as meeting papers are provided in a digital format.

We have apologies this morning from Jim Eadie, who is ill, and from Maureen Watt. Since the previous meeting, Maureen has moved on to pastures new, so I will chair today's meeting as deputy convener. I am sure that all members will join me in congratulating Maureen on her appointment as Minister for Public Health and in thanking her for her convenership of the committee for the past three and a half years.

The first item today is to seek the committee's agreement on taking items 3 and 4 in private. Item 3 is to consider a list of candidates for the post of freight inquiry adviser and item 4 is to consider a draft report to the Finance Committee on the draft budget. Do members agreed to take those items in private?

Members *indicated agreement.*

Scottish Housing Regulator (Annual Report 2013-14)

10:01

The Deputy Convener: At item 2, we will hear evidence from a number of stakeholders on the Scottish Housing Regulator's annual report and the operation of the regulatory regime. I welcome Tony Cain, head of housing and customer service in Stirling Council, who is here representing the Association of Local Authority Chief Housing Officers; David Bookbinder, director of the Glasgow and West of Scotland Forum of Housing Associations; and Alan Stokes, policy manager for the Scottish Federation of Housing Associations.

We will just launch straight into questions, gentlemen. In general, how well do you think that the regulator is performing against its statutory objective to safeguard and promote the interests of current and future tenants, homeless people and other people who use services that are provided by social landlords?

David Bookbinder (Glasgow and West of Scotland Forum of Housing Associations): I will kick off. First of all, strong and robust regulation is critical to the housing association sector. The credibility that it gives us among tenants and people who may become tenants, and among lenders and other funders, is critical. The notion of a robust regulatory regime is never in question, and any criticisms that we may pass in the course of this morning's discussion are not in any way meant to undermine that notion. We must have, and welcome, strong regulation.

We have highlighted in our submission to the committee a number of areas in which things have gone well in a way that has put the regulator above some of the previous regimes. The content and accessibility of some of the corporate communications on the regulator's website and the availability of information—in particular the accessibility of information on the Scottish housing charter—are two such areas.

This autumn, we have seen the first charter information from all housing association and local authority landlords. The information is available to anyone—and most importantly to tenants—through a very accessible comparison tool on the regulator's website. One of the regulator's strengths has been the good consultation that it undertook prior to that stage on how it would measure progress against the charter. It took a very consultative approach that was widely welcomed.

We also welcome the very good intent behind the regulator's efforts to avoid, where it can, going

straight to using statutory and formal inquiry powers where it perceives a problem with an association. Going down that formal route can trigger a great deal of intervention from lenders, for instance, which could have immense financial implications for housing associations. There is good intent behind the wish to avoid that formal route.

The trouble is that we are then left with no ground rules for the more informal engagement. That is a problem, because nobody knows quite what to expect. We have had a lot of worrying feedback from members during the past couple of years on issues such as regulators holding meetings with associations that have no agenda and are not minuted. People are coming out of those meetings unsure of what has been discussed and agreed. Whistleblowing allegations are made, which of course the regulator has to look into, but the association in question never knows what those allegations are because the regulator has not put them in writing.

There is an obsessive preoccupation with insisting on the appointment of—or putting a lot of pressure on associations to appoint—particular consultants that the regulator favours. In other words, we have heard from many members that, where an association has to appoint an independent consultant to see whether there is a problem or to look into a problem that has already been identified, they have come under intense pressure to appoint consultants that are recommended by the regulator. Those consultants are almost always English and almost always cost well in excess of £1,000 a day of tenants' money.

Those issues, which focus on the manner of communication in combination with the fact that there is no right of review or appeal, show that the under-the-radar style of informal engagement leaves us all bereft of ground rules. That is not in the spirit of the Scottish Government's recent consultation on a code of practice for all Scottish regulators, which promotes openness, transparency and, among other things, a right of appeal.

We are currently having good and constructive discussions with the regulator to address some of those issues but, worryingly, the communications style that I am talking about is continuing in some respects.

The Deputy Convener: We will pick up on some of those issues, in particular the issue of transparency, later on in other questions.

Alan Stokes (Scottish Federation of Housing Associations): First, I thank the committee for inviting the SFHA to give evidence today on the Scottish Housing Regulator. Like David Bookbinder, I begin by emphasising how crucial

regulation is for housing associations and co-operatives in Scotland. As such, it is important that the SHR and the sector have a constructive relationship. Regulation provides assurances to tenants, service users, lenders and other stakeholders that high standards of probity are being maintained.

We conducted a survey of our membership as part of our evidence, and we gained some positive feedback about the role that the SHR is playing. However, we also received some constructive criticism on the SHR, with the intention of improving the effectiveness of the regulatory regime.

We would be happy to host a further Chatham House meeting between members of the Infrastructure and Capital Investment Committee and our membership if the committee wishes to hear examples directly from the sector. There is a reluctance among our members to stick their head above the parapet if they are going to be critical of the SHR, so such a meeting might be helpful if the committee is looking for more specific examples.

The SHR needs to be targeted where it is needed the most, but it cannot base its view of the sector on only the most negative examples. The vast majority of registered social landlords are well-run organisations and, as the SHR has such an important role in maintaining the reputation of the sector, it should also play a prominent role in promoting the sector's excellent performance.

Like David Bookbinder, we believe that the introduction of an independent appeal mechanism would be an excellent step forward in improving the transparency and accountability of the regulatory framework.

Specifically on the question about the regulator's statutory objective, I return to the feedback from our survey. We received 30 responses—approximately one quarter of our membership—from a broad base of organisations in rural and urban areas throughout the country, so the survey was quite representative of our membership. About two thirds of respondents felt that the regulator was meeting the statutory objective, but their caveat was that the regulator was taking a heavy-handed approach in going about its work. There is a sense that the regulator sometimes tars the sector with the same brush. Unfortunately a few organisations here and there will not perform at their best and that is what the regulator needs to be targeting, but if it then views the whole sector in the same way, that is not being fair on the sector's performance as a whole.

The Deputy Convener: It is worth saying that we invited tenants' representatives to today's meeting but, unfortunately, none of them could accept the invitation. We have asked them for

written evidence about how they see the regulator performing on the promotion of tenants' rights and so on.

Tony Cain (Association of Local Authority Chief Housing Officers): Our experience is that the regulator is a less obvious presence in the local authority sector. That is not meant to be a criticism of any sort. Its range of engagement with us is narrow and, as a consequence, our range of concerns about what it is likely to be doing is slightly narrower than those of colleagues in the housing association sector, where the regulator has a more comprehensive remit.

Over the piece, I would have scored it seven out of 10. To make things direct and simple, the regulator has gone through a period of considerable change and has had its resources reduced substantially during the past couple of years, which has required a big adjustment in the way in which it does its business.

I agree that there are some issues with the way in which the regulator communicates. Some of the discipline and precision in communication has been lost with the reduction in resources. Some of the discipline around engagement, recording, reporting and publishing and the timescales for publishing reports has become a little less critical to the organisation.

I was asked whether I wanted to declare an interest, as I worked for one of the regulator's predecessors for four years as an inspection manager. When I did so, we were clear that our engagement with the sector was very precise in its timing. When we said that we would do something, we did it. We would issue reports and documents and arrive and do our work at particular times and in a disciplined and structured way. Some of that has gone.

I have a couple of examples. We have seen only one published report in the local authority sector and that was from my own authority, Stirling. There was six or seven months between the on-site activity and the publication of the report. By the time we reported to members that we had actioned all the actions, members were retrospectively approving a completed action plan rather than getting a chance to scrutinise the report. That delay was problematic for us.

The other example is the length of time that it took to get the housing options thematic published. That was a really important report and an excellent piece of work. It added substantially to the debate about where we are going with housing options and services to homeless people in general. However, it took some time to get that published and that weakened some of the conversations and engagement around the report.

On the whole, as I say, I would give the regulator seven out of 10. It is working hard. It has adjusted its position during the past couple of years. The work that has been done on the charter has been particularly important. Now that we have the first charter report and the comparative reports, we will see a little bit more targeting and engagement around the local authority sector based on that information.

The Deputy Convener: I ask the witnesses to focus on tenants, homeless people and other service users. Can you identify any future risks to tenants, homeless people and other service users from the way in which the regulator currently performs its functions?

Tony Cain: In the local authority sector in particular, because the regulator is necessarily engaging with a range of other inspection and regulation organisations, the quality of that engagement will be critical to its ability to develop the position and defend the interests of tenants and other service users. There are still some issues around the delivery of services to the homeless, particularly around engagement with mental health services and social care services, where there are gaps in the provision and service users who suffer as a consequence.

It has been quite difficult for the regulator to get underneath that gap and to tease that conversation out, because it requires to do that in conjunction with the Care Inspectorate and the social work regulator. That has proved to be more difficult. As providers, local authorities have been a little bit slower, perhaps, than we ought to have been in examining some of the harder-edged issues that impact on the most vulnerable of service users in the homelessness system.

10:15

David Bookbinder: It is a question of balance. It would not be in tenants' interests if the housing association was in serious financial trouble or had serious governance issues. In that sense, we understand the regulator when it says that it is protecting tenants' interests by doing what it can to make sure that housing associations achieve better health.

There is a balance to be sought there. There have been cases in which, in our members' view, the treatment of the association has not been proportionate. That runs the risk that the association could end up spending thousands of pounds—potentially hundreds of thousands of pounds—on looking into an issue, appointing consultants and so on, and that has a direct cost for tenants. It is only tenants who are paying for that. That means that it is important for the regulator to get it right and to be proportionate, or

it is in danger of acting against tenants' interests. It is a balance and sometimes it has not been achieved.

Alan Stokes: I back up what David Bookbinder said. If the regulator is getting bogged down in less strategic matters, there is a risk of it missing something more important elsewhere, and that would not be in the interests of tenants. The main thing is that the cost of regulation is ultimately paid by the tenants, because that is where their rent money would go.

The Deputy Convener: My understanding from some of the written evidence is that the housing regulator was particularly concerned with governance during this first period. According to some of that evidence, it might have put an overemphasis on governance. We can follow that up with the regulator when it comes to the committee.

In the regulator's annual report, in the chapter entitled "Emerging issues and our priorities for 2014/15", the first bullet point says that the regulator thinks that it is

"important that social landlords keep rents affordable for tenants, and we are asking those with business plans based on above inflation rent rises to consider whether this is sustainable given the financial challenges tenants face".

We know all about the welfare reform issues that people are facing. That seems to be a particularly relevant priority for the regulator. Do you agree?

David Bookbinder: Yes. The regulator's statement in March this year about the need for associations and local authorities to be confident that their rents were affordable came out of the blue. The rent increases in some housing associations—I will let Tony Cain speak for the local authorities—were based on a formula that was based on above-inflation increases for, in some cases, up to 30 years. It was perfectly reasonable for the regulator to ask what it did and it is equally right that associations should look at themselves and ask whether they are happy that that is sustainable for their tenants and those who will become their tenants in the longer term.

There is a risk that, in raising the issue, the regulator has chapped the door and run away in the sense that this is a big and complex issue. It has been raised, but where is it going? We might expect the regulator to say more about what is an affordable rent and the criteria that an association should look at. We are quite accepting of the regulator raising the issue, but there is a sense that it has thrown something into the fire and then stood aside.

Tony Cain: To an extent, that is fair comment. At the Chartered Institute of Housing in Scotland conference this year, Michael Cameron, the chief executive of the SHR, introduced in his

presentation the very simple proposition that housing associations and landlords should move away from the inflation-plus formula and focus on developing rent proposals based on costs and service proposals. That is an important point and it was perfectly legitimate to make it in that forum. Interestingly, from my point of view, it reflected exactly the conversation that we had in Stirling and the approach to rents that we agreed before March.

However, since the chief executive raised that issue, there has been very little follow-up on it and no further conversation about it. We have not seen any new guidance on that or any engagement across the sector more generally on it. The issue plays differently in the local authority sector because our rent-setting processes are slightly different from our financial arrangements, and the oversight of our financial arrangements is rather different. However, there is probably some benefit for the regulator in getting a better handle on financial planning in local authorities and the extent to which the business planning disciplines that were pioneered in the housing association sector are now being used. They are not universally used in the local authority sector but they probably should be.

The Scottish Government's recently published guidance on transparency in the management of local authority housing revenue accounts is a fairly critical piece of guidance. The regulator ought to be in a position to understand what it means and how it plays through in financial decision making in local authorities, even if that is not an area in which the regulator has any particular involvement. The regulator certainly has a concern about transparency in reporting to tenants, and the guidance requires local authorities to report to tenants on how the money is being used. The regulator certainly has an interest in overseeing the extent to which we are complying with that requirement, but I do not know that he currently has enough detail around those processes to exercise that function fully and effectively.

The Deputy Convener: When the chief executive of the regulator comes in, we can challenge him on his chap-the-door-and-run approach.

Tony Cain: It was entirely fair, though, that he raised the rents issue when he did; it was not inappropriate but very apposite and timely.

Alan Stokes: It is entirely appropriate for the regulator to focus on that issue, which I think is in line with our statutory objective. It is important that a balance is found between what is affordable for tenants and what will maintain the financial viability of the organisation. The issue now is what guidance the regulator issues and how it engages with the sector after that.

The Deputy Convener: I want to explore the notion of proportionality that you all mentioned. Alan Stokes indicated that some of the issues that the regulator is focusing on are trivial. Can you provide examples of that? Are there any views on how a more proportionate approach could be achieved?

Alan Stokes: There is a challenge in providing examples, because people are understandably reluctant to be critical or to make out that there is a problem with the regulator in case their card is marked or whatever. I do not think that that is a fair perception, but it shows that an issue exists with the relationship between the sector and the regulator and how he is perceived.

Our survey found that 57 per cent of respondents did not think that the regulator was

“performing its functions in a proportionate ... manner.”

A more general example is perhaps the one that David Bookbinder gave earlier. We have often found that the regulator will engage with a management committee but refuse to allow staff to be present or any minute of the meeting to be taken. There is therefore no transparency about what was said, and that practice is not exactly an example of promoting good governance.

The Deputy Convener: Okay. David, do you want to comment?

David Bookbinder: Yes. I have a couple of comments, one of which is a broader one. The regulator often makes quite a lot of having saved or rescued some associations from insolvency, which perhaps leads to an association joining the group structure of another association. I think that the forum would feel comfortable about being reassured by the regulator that it has learned from some of the more difficult cases of the past few years. There is a sense in the sector that perhaps the regulator did not spot things as soon as it might have done. Although the regulator might have been in there at the end, there is a sense that proportionality is an issue because the regulator sometimes dealt with trivia and missed something much bigger that was going on somewhere else. We would feel comforted to know that the regulator had learned some lessons along the lines of asking how it could have seen something earlier where there were difficulties.

I agree with Alan Stokes that some of the sense of a lack of proportionality is not so much about what is being investigated. It is often reasonable to suppose that, when the regulator is engaged with an association, there might be an issue that needs to be examined. The issue might or might not become serious, but the point is the manner of the communication. It is ironic that the style and accessibility of the regulator's corporate information—the stuff that it produces in

newsletters and on its website—are generally regarded as high quality but its communication style when it engages with a particular association seems disproportionate in many cases.

Whistleblowing is an example. We might or might not come to that later. Associations sometimes feel that they are guilty until proven innocent. The issue is the regulator's manner, approach, style and language, which sometimes seem disproportionate to our members when all that is happening is that an inquiry is being made—something is being looked into. There is a feeling among our members that an assumption is made that something is wrong.

The Deputy Convener: What about local authorities? Do they have a similar perspective?

Tony Cain: No, not at all. I have no sense of a feeling of disproportionate engagement by the regulator across the local authorities. The annual report says that the regulator has visited or engaged with 15 of the local authorities during the year. That is nearly half the sector. Nothing is coming back from my colleagues to say that they feel as though they are being pestered or that the engagement is inappropriate or unbalanced.

Engagement with the local authorities within the regulatory framework that is agreed through the local arrangements is always proportionate. We always know that the regulator is coming. It was in Stirling twice last year and we were well warned in advance. We were perfectly clear what it was coming to do and it did what it came to do. There were some issues in its communication during the on-site and post on-site periods, but I have no feel for concerns about proportionality in what it was examining. However, to be fair, the regulator engages with us on a much narrower range of issues.

Mary Fee (West Scotland) (Lab): I will explore transparency in a bit more detail. The Housing (Scotland) Act 2010 requires the regulator to carry out its functions in a transparent manner. There has been some criticism of the way in which it carries out those functions, specifically from David Bookbinder's organisation, which said that the regulator lacks transparency and frequently acts under the radar, leaving housing associations uncertain of what to expect and about how they should behave. The lack of a review mechanism for situations in which an issue is disputed is also a problem.

I ask David Bookbinder to explain in a bit more detail the forum's concerns on transparency. I will then move on to the other witnesses.

David Bookbinder: When the 2010 act was introduced, it focused—as you would expect of any legislation—on formal statutory mechanisms for initially examining an issue and then

intervening and taking action if that was deemed to be necessary. However, the regulator has evolved an effort to use formal statutory mechanisms as a last resort because they trigger all kinds of interventions from lenders. In the current climate, it could sound the death knell for some associations if all their loans and covenants were renegotiated and repriced.

There is genuine good intent on the regulator's part in that, but there is a lack of guidelines or rules of engagement on the alternatives for how it acts and engages with associations if it does not go down the formal routes. In recent meetings that we have had with the regulator, it has recognised that there is a huge appetite in the sector for some more ground rules and guidance, so we are making progress on that.

10:30

The lack of a review or appeals mechanism is something that we all agree should be put right. It is strange that we all allowed an act to be passed without that formal mechanism. We are probably all looking back and wondering how we managed that.

I have been talking about transparency in how the system works. When we go down to a micro level—the level of individual engagement—there are worrying aspects that we want to put right.

In some of its engagement with individual associations, the regulator almost seems to have a mantra about putting nothing in writing. I realise that we might often be dealing with sensitive issues about associations, such as issues that concern particular staff or committee members' financial issues. Of course there will be delicate issues but, nonetheless, for the committee of an association to be drawn into a meeting with the regulator that will not be minuted in any way is problematic. It is not in anyone's interest not to be sure about such matters.

Whistleblowing allegations are a perfectly reasonable part of the system that we work in nowadays and we would expect people to be able to make such allegations and for them to be investigated. If somebody makes a whistleblowing allegation, it is surely appropriate for the association to know what it is, even in some paraphrased or summarised way—the regulator obviously cannot give away the identity of the person making the allegation. We have heard from a number of associations that have not had the benefit of that. That means that, as they go through the investigation, they are never quite sure which are the original allegations and what has come along since. That is simply a lack of transparency that would be helped by having a summary of the allegations.

Mary Fee: That is helpful.

Alan Stokes: One of the key findings of the survey that we did was that there is a real appetite for an independent appeals mechanism. Two thirds of respondents felt that way. However, they urged caution because, although an appeals mechanism is crucial and needs to be based on a clear rationale, it cannot add extra bureaucracy and extra cost; it needs to be efficient.

One of the best examples that currently exists is in the Office of the Scottish Charity Regulator. It has an independent appeals mechanism that could be adapted to fit with the SHR.

Tony Cain: I am happy to agree that some kind of review or appeals process on regulatory decision making is entirely appropriate. It seems odd that the system was set up without it. I do not imagine that it requires legislation for the regulator to operate the review process—maybe it does; I do not know—but I agree that it is a gap.

I also agree that there is a risk that review mechanisms become bureaucratic, get bogged down and become expensive. The sector should take responsibility for the issues that it chooses to contest and how it chooses to contest them. In my previous life, I saw landlords turning up with expensive lawyers to contest minor aspects of reports on operational issues. That is not a proportionate response from the sector.

However, the core principle is whether there should be a review mechanism. Absolutely, there should be.

Mary Fee: The Scottish Housing Regulator's communications research found that stakeholders valued the informal dialogue that they had. My question follows on from the point that David Bookbinder made about associations attending meetings of which no note was taken. Tenants groups and stakeholders have emphasised the need to undertake more meaningful engagement and communication with tenants. However, there is a balance to be struck between keeping things on an informal footing and making them more regulated. Is there a conflict between efforts to improve transparency and attempts to keep the benefits of informal dialogue, or does everything need to be put on a more regulated footing?

David Bookbinder: An achievable outcome would be the formation of ground rules that enhance the current regulatory framework document and give us a bit more sense of how some of the less formal mechanisms of engagement might work—I was going to say "non-statutory mechanisms", but obviously everything that the regulator does falls within its statutory powers—without necessarily thinking that the answer is to say, "Let's just do away with the informal approach and make sure that everything

we do goes through formal inquiry routes.” Such a layer of guidance could be added so that we knew what to expect.

However, I will make one distinction. My reading of the stakeholder research on communications was that there was more of a focus on how the regulator communicated more generally with the sector through its annual information and reports rather than on what happened at an individual level when it went in, as it were, and looked at something. I can understand why it had good feedback about its corporate communications; as I said, it generally has a very consultative approach to things.

Mary Fee: I suppose that even when the regulator goes in, there is still a balance to be struck between keeping things informal and making them more official, if you like. However, different organisations and individuals value a different approach, and it will be quite a challenge to get a one-size-fits-all approach for everyone. After all, some organisations might value a more informal approach, while others might want something a bit more formal.

David Bookbinder: It is all about looking at the more obvious outcomes to aim for. You would think that, whatever an individual association’s preference for a certain style of communication, an organisation at the receiving end of whistleblowing allegations could at least know what those allegations are. There are some easy wins that we can all aim for that will not upset the apple cart in any disproportionate way.

Mary Fee: So by being more specific we could improve transparency.

David Bookbinder: Transparency will certainly be improved by having some rules of engagement.

Alan Stokes: I agree. Some guidance on engagement that sets out the ground rules on whether the regulator takes an informal approach or is more specific about how it engages will be important in adding transparency.

Tony Cain: We need to be clear about what has been recorded for the purposes of information and assessment as a consequence of any particular engagement. Things can be managed by consent between the organisations or, in the event of a statutory intervention, imposed by the regulator; however it is done, landlords need to be clear about what the regulator has taken out of that engagement, what has been recorded and what will be used as the basis for future assessments.

We had our regulatory visit earlier this year, and we were not advised in writing of any of the conclusions that were drawn or any other outcome. As a result, I am unaware of what the regulator is taking into its conversations with other

regulators. We must have that detail at the very least to ensure that no matter whether we are talking about an informal conversation, a low-key intervention or something that does not amount to a formal inspection we know what the regulator has learned, what it has recorded in its own files and what it will take forward in its broader assessment of the organisation. We need to be clear about that.

Mary Fee: Would guidance or changing the code of practice be enough to bring about the change that you think would be beneficial, or do we need legislative change?

Tony Cain: I do not know whether I am fully equipped to answer that question, but this is partly about style and culture, and I suspect that this could be done without putting things on a statutory footing or even making a change to the guidance.

David Bookbinder: The regulator says that chapters 6 and 7 of its 2012 regulatory framework contain its codes of practice on, respectively, inquiries and intervention, although you would not know that from reading them. Primary legislation would not have to be amended; instead, that guidance could be amended to ensure that it covered some of the more informal mechanisms of engagement and made it much clearer that those chapters of the regulatory framework are, indeed, the statutory codes of practice.

Alan Stokes: As part of the Regulatory Reform (Scotland) Act 2014, a code of practice is being developed for regulators and these considerations could be fed into that. A statutory independent appeals mechanism for all regulators in Scotland is also being considered, and that could be a way of doing this.

The Deputy Convener: Alex Johnstone has some more questions about communications.

Alex Johnstone (North East Scotland) (Con): Indeed. I was going to ask about communications, but we seem to have spoken about little else since we began. However, there are a couple of points that it would be interesting to develop.

First of all, the regulator’s communications research highlighted the fact that tenants groups and strategic stakeholders feel that the Scottish Housing Regulator needs to undertake more meaningful engagement and communication with tenants, and to provide them with simple and concise information about its role and the charter. What specifically does it need to do to improve its communication with tenants?

Alan Stokes: The regulator has set up a national panel of tenants and service users, which is a good start. However, there are tenants whom the regulator always engages with—

Alex Johnstone: The usual suspects.

Alan Stokes: Indeed, and I think that that comes down to the fact that some tenants are more willing to engage than others. That is just the way it is, but we need to find some way of engaging the harder-to-reach groups who are not so engaged. I do not think that tenants in Scotland have a great awareness of the Scottish Housing Regulator; indeed, I do not think that Joe Bloggs knows what it is or that tenants, for example, can report significant performance failures directly through it. Some of the guidance in that respect is a little perplexing for tenants to understand exactly, and they need terms such as “significant performance failure” to be explained in a way that they can understand. I think that that is the area that needs to be looked at with regard to engaging with tenants and reaching groups outwith the people whom the regulator normally contacts.

David Bookbinder: In the past year—in fact, the past few months—we have seen a real step forward for tenants with the publication under the charter of not only information on individual tenants’ landlords but cross-sector information. Tenants are now on the journey of becoming more aware of what the regulator does and are realising that, for example, it looks at how their landlord performs. Some of that information will be a lot more visible and meaningful to tenants than information on governance or financial issues. I am not saying that those issues are not important, but they are less visible or obvious to tenants in their everyday lives. As far as the broader engagement with the whole body of tenants is concerned, there is probably greater awareness now than there was even three or four months ago, before the charter information came out. That is a step forward, and it should raise the regulator’s profile among tenants in general.

That said, as part of a body that represents landlords, I am nervous about speaking on behalf of tenants. I know that you have tried to get tenants’ interests involved in this look at the annual report, so I hesitate to offer an answer on their behalf.

Alex Johnstone: Certainly, my experience out in the field talking to tenants in a fairly formal setting is that there are a few individuals with very strong opinions. The question that I am left with in my mind is whether they represent tenants as a whole or simply their own opinions. I think that we have a lot to learn on both sides about how we consult at that level.

10:45

On a slightly different subject, it was mentioned a few moments ago that there is a draft regulators’ code of practice. The draft code says:

“Regulators must communicate effectively with those they regulate, to build relationships and mutual understanding which helps avoid or mitigate disputes”.

To what extent does the Scottish Housing Regulator currently operate with that principle in mind? Would changes need to be made in order to make that requirement fit?

David Bookbinder: I will give what I honestly think is a balanced answer, with some positive points and some less positive ones. The regulator sought to publish a series of “Governance Matters” publications, in which it looks at anonymous specific cases in which it has intervened, and identifies issues that have had to be addressed. The regulator is looking at the wider lessons of those cases. That is a very direct and constructive way of getting stuff out there and enabling everyone to look at it to see what lessons can be learned.

Some of those “Governance Matters” publications have perhaps leaned slightly towards the learning points that come from the cases. Many of the points are very useful, but there has sometimes been a sense that they are addressing committee members and saying, “Are you sure you’re not being shafted by the senior officer?” Of course, committees and chairs need to have the right governance relationship with senior staff, but there may sometimes have been an undercurrent that portrays the whole sector as being one in which senior staff are trying to keep things from their committees. Sometimes the right tone has not been achieved, but promotion of sharing of information and practice has been good, certainly within publications such as the “Governance Matters” series.

Alan Stokes: There has been an improvement. Initially, when the regulator became independent of Government in April 2012, there was a sense that it was trying to flex its muscles and show who it was. However, there is more positive communication coming from the regulator now. Perhaps it has recognised that there needed to be a shift. For instance, chapter 2 of the housing regulator annual report is titled,

“RSLs are well governed and in good financial health”,

so the regulator is at least making an effort to promote the fact that the sector is, on the whole, well managed.

The best example of negative communication that has come from the regulator is the “Governance Matters” publications that David Bookbinder referenced. Perhaps if there was more of a focus on good practice in the sector to balance things out, it would help the tone.

Alex Johnstone: I will make an observation and give you the opportunity to comment on it if you wish. I get the impression that the broad issue

is probably one of trust, but if I read anything from your comments, it is that the situation is improving rather than deteriorating over time. Is that fair?

David Bookbinder: Our members report a mixed picture. We have heard of examples that suggest some awareness among regulatory staff of the concerns that have been expressed within the sector. In terms of our meetings with the regulator, there has definitely been a recognition that there is an appetite for more information about what the rules of engagement should be.

Nonetheless, it is worrying that we are still getting examples that give us cause for concern—including in the past few days—regarding direct engagement at housing association level with the regulator. We would be much more reassured if we were getting less of that type of feedback, which I referred to earlier. For instance, in almost all cases, it is the housing association that appoints an independent investigator when that has been deemed necessary. However, associations have been coming under intense pressure to choose the investigator that the regulator wants them to choose. We have had instances of that happening right up until very recently.

It would be nice to come back in six months and be able to say that we are hearing less about such pressure tactics. I am not yet in a position to say that the situation is improving.

Alan Stokes: I would echo what David Bookbinder said, given that in the survey that we conducted, 57 per cent of respondents still did not feel that the regulator was performing in a proportionate manner. That percentage would need to be a lot lower before we could really say that things were moving completely in the right direction.

As I said earlier, people are reluctant to raise their heads above the parapet. Alex Johnstone mentioned the issue of mistrust—that is definitely there. In our survey, a third of respondents wanted to remain anonymous, even in responding to us, when talking about the regulator. That shows the type of culture that has developed.

That is why I think that it might be helpful—if the committee was so minded—for us to set up a meeting conducted under Chatham house rules to hear specific examples from the sector in a safer environment.

Tony Cain: I have some comments on a range of issues that were raised. First, on the issue of the extent to which the regulator is communicating directly with tenants and how aware tenants are of the existence of the regulator, there is a simple issue of proportionality and cost. There are half a million tenants in Scotland and half of them at least do not have regular access to the internet—

they certainly do not have fixed internet access in their homes. Traditional ways of communicating, that in other sectors work very well with service users, are not going to work so well in this situation. Landlords need to take some responsibility and have a conversation with the regulator about how to make the regulator more visible. We probably need to have a bit more of a structured approach to that and, if there is a lack of visibility, we have to accept some responsibility as well.

On building relationships, funnily enough, one thing that is most likely to build a relationship is informal contact. Issues have already been raised about informal contact, but being able to pick up the phone and talk to somebody leaves people feeling that they can begin to trust them. That is not necessarily the easiest thing in the world to do, but a change in approach in that area might make a difference.

As far as the local authority sector is concerned, the extent to which the regulator is trusted has improved significantly in the past couple of years. Our experience around the housing options thematic inquiry was very positive and the outcome was excellent; notwithstanding some of the delays, the overall engagement was very positive. It left a much better feeling across the sector when people saw the report and had those conversations than perhaps had been the case previously. That has helped significantly.

The issue of trust is one that sits on both sides. Regulation and inspection in particular are essentially underpinned all the time by conflict. The regulator is there to do something that is not necessarily to the benefit of the regulated organisation. We have to accept and acknowledge the nature of that relationship as we start to understand the extent to which we trust, and the way in which we respond to, the regulator.

I do not have a problem with how the regulator does its business. I do not have a problem with the personnel in that organisation or with the way in which they engage with me or the local authority sector. The regulator has a particular job to do. It is not always going to be something that we want to hear, so we just need to deal with that. In the end, there is always going to be that risk and there will always be that element of conflict underlying the relationship. We need to acknowledge and accept that.

David Bookbinder: I will add one thing about trust. It is very telling that a number of members have said to the forum that in the past, if they were dealing with an issue—it could have been a financial issue, a development issue to do with a piece of land or something that they wanted to do—they might have picked up the phone and had a discussion with the regulator about the issue. A

number of members have said to us that they would now think twice about doing that. That says something about a changing relationship, which perhaps was once seen as being a more supportive relationship than it is now.

Alan Stokes: It is fair to say that the SFHA has had a lot of contact from members who have said exactly what David Bookbinder has just outlined.

Gordon MacDonald (Edinburgh Pentlands) (SNP): I was going to ask about the “Governance Matters” publications. We have touched on that topic already, but I have a specific question for David Bookbinder. You have commented a couple of times on the tone of communications, which you suggest in your written evidence creates a perception

“that senior officers should not be trusted and that they may not be sharing sufficient information with the committee.”

How would you envisage the guidance and tone changing so that such a perception was not created?

David Bookbinder: One way relates to the aspect that Alan Stokes has just mentioned. The “Governance Matters” publications could perhaps, over time, include a greater focus on good practice. The regulator may say that it does not need to go in where there is good practice, as in a sense that is not its concern, and one could argue that good practice is implicit in the lessons to be learned from poorer practice. Again, however, there is a need for a greater recognition that, fundamentally, the sector is healthy. That is evident in the SHR’s annual report, but our members did not feel that it came out in the tone and language of some of the “Governance Matters” publications.

So many brownie points could be scored just by giving us more about what we can expect and what some of the rules of engagement are. Guidance can never cover every situation—we do not expect it to do that. However, such an approach would help associations, in their engagement with the regulator, to feel less threatened and defensive, and less uncertain about what to expect. In a sense, there is such a major gain—a big win—to be made in improving overall communications and trust if we all understand better what we can expect when engagement comes.

Gordon MacDonald: How widespread are the concerns about the tone? If I understand correctly, the regulator held a number of “Governance Matters” events that were attended by members of approximately 113 organisations. Of those attendees, 81 per cent took part in the feedback exercise, and the response on best practice, training, support and so on was overwhelmingly positive.

David Bookbinder: Again, there is a distinction to be made there. We also got excellent feedback from members who attended those sessions on how good they were and what the event helped them to understand as housing association committee members. However, that is different from feedback on individual engagement where there is an issue. The feedback on the events concerned the quality of the training that was received. The events obviously went down very well, but that is quite different from what is happening at the individual engagement level.

Gordon MacDonald: Do the other panel members have any concerns about the “Governance Matters” publications?

Alan Stokes: As I said, there is definitely a place for learning from others’ mistakes, and that is what the publications have focused on. However, because the examples that are given are consistently negative, the publications present a perception of the sector that we would seek to avoid. Perhaps a bit more focus on best practice examples would be helpful in changing the tone, as people could learn from what others are doing well and borrow those approaches.

Tony Cain: I can offer an external observation if you like, as the local authority sector is not necessarily involved in the conversations around governance that go on between the regulator and RSLs.

In the local authority sector, we feel the presence of our elected members on a daily basis. The scrutiny that they offer and the challenge that they bring is a critical part of everything that we do. Senior officers think about that regularly throughout the day—it is part of what we do.

My impression, which is strengthened by conversations with senior officers in the housing association movement, is that governors on housing association boards do not play a similar function and are not present as a challenge to decisions, behaviours and outcomes in the way that local authority elected members are. To the extent that the regulator must either get board members to a place where they can be that presence or be that presence itself, it seems to me that it is doing a useful job.

Gordon MacDonald: Thank you.

11:00

The Deputy Convener: We will wrap up with some questions on a series of issues that we have not touched on yet.

Mark Griffin (Central Scotland) (Lab): You have all stated that an appeals mechanism should be brought in. Will you say briefly how the lack of

an appeals mechanism has impacted on social landlords and tenants?

David Bookbinder: It just goes against natural justice. When landlords make decisions about tenants, applicants or homeless people, they expect those decisions to be challenged from time to time through a range of mechanisms up to and including the court. It leaves associations in an incredibly exasperating position when their formal level of engagement is changed from low to medium or medium to high. Such a change has big implications for their finances and relationships with lenders, and if they cannot seek a review and ultimately appeal it, it is incredibly dispiriting. It is the opposite of empowerment; it is a vulnerable position to be in for any association that strongly believes that, in effect, there has been a miscarriage of justice.

As I said, the lack of an appeals system just goes against all principles of natural justice.

Mark Griffin: Your organisation in particular has criticised the regulator's requirement that an RSL's future be considered when a senior member of staff moves or retires. Will you explain in more detail why you have those concerns?

David Bookbinder: Our concern is that the requirement applies across the board. In the vast majority of cases where a senior officer departs or retires, a requirement to carry out an options appraisal is triggered, and the guidance on notifiable events explicitly requires the appraisal to include options for marrying up with another association in some kind of structural relationship. That is especially threatening to smaller, community-based associations that prize their independence.

In the past few weeks, we have been encouraged by indications from the regulator that it sees fit to review the guidance, such that, as we have argued for a long time, if an association is in good health and can prove that it is well run, with a good business plan and good finances in place, the mere act of the senior officer leaving should not trigger anything.

We would completely accept that something more in-depth should be triggered if there were real problems within an association and the senior officer left, but where it can be proved to the regulator's satisfaction that things are running fine, there should be no need for an options appraisal and indeed no reference to the potential for structural partnerships.

As I said, we are reassured that the regulator is minded to review the guidance and change it shortly.

Mark Griffin: You said that the reference to a structural review potentially threatens smaller

housing associations, but do you see any benefits in the requirement for an options appraisal process when there is turnover of senior staff?

David Bookbinder: When a senior member of staff leaves, we would expect any association to look at the staff complement and ask whether any change in staff roles might be needed or what the job description for an incoming director should be. When staff leave a post in the top or senior tiers, we would expect any organisation to do such good housekeeping. However, that does not need to threaten in any way—or even refer to—the organisation's independence.

Mark Griffin: All three of you have expressed a number of concerns about the regulator. What discussion has there been about those concerns? If there have been any discussions, what was the outcome? Has there been any movement on the part of the regulator towards allaying any of those concerns?

Tony Cain: Conversations that have been going on between the Association of Local Authority Chief Housing Officers, the Scottish Housing Best Value Network and the regulator have been fairly positive. The meetings take place regularly and we feel that progress is being made on the strength of that relationship and the sector's trust in the regulator.

If you will forgive me, convener, I want to go back to the point about guidance around options appraisal in the event of the departure of a senior officer. The SHR regulates housing associations; it does not regulate the sector. That is the elephant in the room and the gap at which the guidance is pointing. The regulator is asking organisations to think about their position in the wider sector and the extent to which that position is efficient, effective and in the best interests of tenants. The difficulty is that it is asking individual organisations to do that, and there is no mechanism for looking at the sector more generally.

To put it crudely, why are there 52 directors of housing in Glasgow? There is a question to be asked about the structure of the sector. That does not necessarily mean that the structure is good or bad, but the way in which the sector is currently organised brings with it costs, and there is no way of debating the issue. In the guidance, the regulator is pointing to that conversation, but it has no power and no locus to drive that debate any further. There is a need for that debate to be held. I hope that once the current constitutional conversations have settled down and we get a chance to move on to the necessary reorganisation of public services, which presumably will take place at some point, there will also be a conversation about the provision of public housing and balance in the RSL and local authority sectors.

David Bookbinder: I have to respond to a couple of the points that Tony Cain has made. I will not take too long over that before I come back to the question about discourse with the regulator.

Why are there 50 associations or co-operatives in Glasgow? Look at what has happened on the ground and the way in which communities have changed. Individual communities can be quite different from communities up the road.

We have to be careful not to get too paranoid about this but, as a forum, we hear this stuff from larger associations, the local authority sector and sometimes politicians or civil servants. There is a notion that somehow there are simply too many associations.

Six or eight weeks ago, we published a report that showed how our members were performing against the charter. We came higher than larger housing associations and 26 local authority landlords on every single one of the main indicators, and our rents were somewhat lower than in other associations in Scotland. We therefore think that we are doing something right. Our members are providing responsive services and being the community anchor bodies that make other things happen in the community. That is what has been gained from having individual associations, some of which are very small. My honest view is that the local authority sector needs to spend less time worrying about the size of small housing associations and more time looking at how long it takes to carry out emergency repairs for some of its tenants.

Tony Cain suggested that the governance balance is wrong throughout the sector. The regulator has identified cases in which it believes that there is too much power with the staff and not enough power with the committee, but that should not mean tarring the whole sector with the same brush. There is a challenging relationship, and committees do challenge senior staff. I am not saying that there is no scope for more of that to happen in certain cases, but I have to argue against the statement that the sector is characterised by staff ruling their committees and not being challenged.

I have talked far too much, so I will finish by saying that we are very encouraged by our discourse with the regulator in recent months. We have met three times now and will meet again tomorrow. We certainly feel that there is an open dialogue, and we hope to make progress on the issues that we have outlined.

Alan Stokes: On options appraisals, it is important to note that this is not a one-size-fits-all sector. Any process that the regulator undertakes needs to be proportionate to the size of the organisation. We have come across cases in

which the regulator has dictated which consultant an organisation has to use. That is not really appropriate; it should be up to the organisation itself to decide who to select.

The SFHA and the SHR have regular meetings. Our chief executives meet regularly and we also have regular board-to-board meetings. There is a dialogue and regular communication.

The Deputy Convener: Thank you, gentlemen, for your evidence—it has even been entertaining, at times.

11:12

Meeting continued in private until 11:42.

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e-format first available
ISBN 978-1-78534-397-1

Revised e-format available
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