The Scottish Parliament
Pàrlamaid na h-Alba

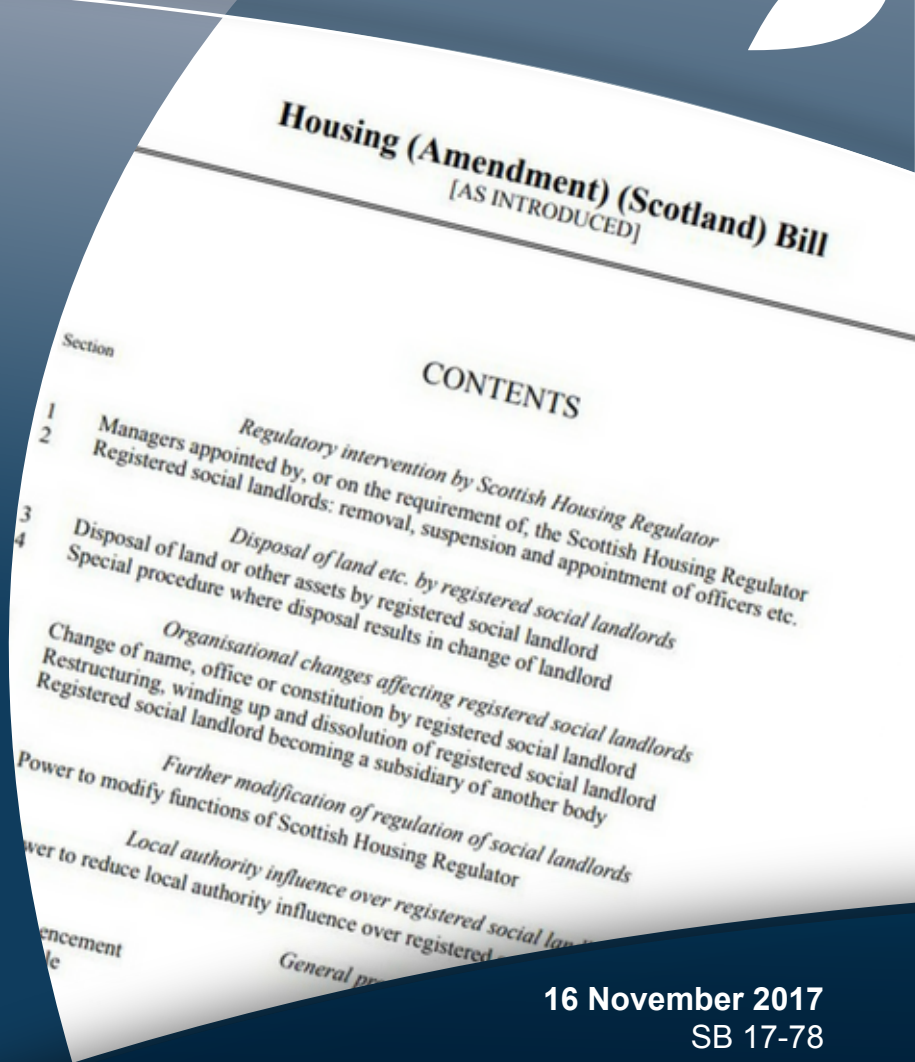
SPICe The Information Centre
An t-Ionad Fiosrachaidh

SPICe Briefing
Pàipear-ullachaidh SPICe

Housing (Amendment) (Scotland) Bill

Kate Berry

This briefing provides an overview of the Housing (Scotland) (Amendment) Bill. It provides background to the introduction of the Bill and an explanation of the Bill's provisions. It also considers the responses to the Local Government and Communities Committee's call for evidence on the Bill.


Housing (Amendment) (Scotland) Bill
[AS INTRODUCED]

Section

CONTENTS

1 *Regulatory intervention by Scottish Housing Regulator*
2 Managers appointed by, or on the requirement of, the Scottish Housing Regulator
Registered social landlords: removal, suspension and appointment of officers etc.
3 *Disposal of land etc. by registered social landlords*
4 Disposal of land or other assets by registered social landlord
Special procedure where disposal results in change of landlord
Organisational changes affecting registered social landlords
Change of name, office or constitution by registered social landlord
Restructuring, winding up and dissolution of registered social landlord
Registered social landlord becoming a subsidiary of another body
Further modification of regulation of social landlords
Power to modify functions of Scottish Housing Regulator
Local authority influence over registered social la
wer to reduce local authority influence over registered
ncement
le
General pr

16 November 2017
SB 17-78

Contents

Executive Summary 3

Background 5

The Role of ONS in classification decisions 5

ONS review of RSL classification 5

The Scottish Housing Regulator 6

Why regulation of RSLs is important 6

Impact of classification of RSLs as public sector bodies 7

The Bill - overview 8

Scottish Government Consultation on the Bill 8

Local Government and Communities Committee call for evidence on the Bill 9

The Bill - detailed provisions 11

Regulatory intervention by Scottish Housing Regulator: Managers appointed by, or on the requirement of, the Scottish Housing Regulator (section 1) 11

Registered Social Landlords: Removal, Suspension and appointment of officers etc (section 2) 12

Disposal of land etc by RSLs (section 3 and 4) 13

Organisational Changes affecting landlords - change of name office or constitution by registered social landlord (section 5) 15

Organisational changes affecting registered social landlords - restructuring, winding up and dissolution of registered social landlords (section 6 and 7) 15

Further modification of RSLs (section 8) 17

Local authority influence over RSLs (section 9) 17

Bibliography 19

Executive Summary

The Housing (Amendment)(Scotland) Bill was introduced in the Parliament on 4 September 2017. Its purpose is to enable the Office for National Statistics (ONS) to reclassify RSLs as private sector bodies for the purposes of the national accounts. It will do this by removing, or reducing, certain powers that the Scottish Housing Regulator ('the Regulator') has over Registered Social Landlords (RSLs). It is a short technical bill comprising 11 sections.

Background

As a result of a recent review by the ONS, the classification of RSLs in Scotland has changed from the status of private sector bodies to public sector bodies.

The ONS makes its classification decisions based on international guidance. In considering whether bodies are public or private, key factors include where control over the body lies, as well as who owns the body and whether or not it is financed from public funds. The decision to reclassify RSLs as public bodies was taken by the ONS because of certain powers the Regulator (which is classed as a public body) has over RSLs.

Impact of classification

This revised status has implications for RSLs' borrowing powers, given that any borrowing by public bodies counts towards the Scottish Government's borrowing limits.

Currently, RSLs decide how much money they need to borrow to build new houses, in addition to any grant they receive from the Scottish Government. However, if their borrowing was to count towards public borrowing limits, the Scottish Government may have to impose controls on RSL's borrowing powers. If RSLs borrowing was restricted there would be a risk that the Scottish Government's target to deliver at least 50,000 affordable homes by 2021 would be adversely affected.

The Bill's proposals

The Bill proposes measures to reduce or remove some of the Regulator's powers which are set out in the Housing (Scotland) Act 2010 . In particular, the Bill proposes to:

- narrow the powers of the Regulator to appoint a manager to an RSL, and to remove, suspend and appoint officers of an RSL;
- remove the need for the Regulator's consent to: the disposal of land and housing assets by an RSL; any changes to the constitution of an RSL; and the voluntary winding-up, dissolution and restructuring of an RSL, while protecting tenant's rights to be consulted about certain changes;
- provide Scottish Ministers with regulation making powers to limit the influence that a local authority has over an RSL.

Reaction to the Bill's proposals.

The Local Government and Communities Committee issued a call for evidence on the Bill. Sixteen responses were received. Respondents were generally supportive of the Bill's

principles. They recognised the potential impact on RSLs' borrowing capacity as a consequence of reclassification as public sector organisations.

In relation to the removal of the Regulator's powers of consent, some respondents recognised that this would result in a loss of 'intelligence' for the Regulator. This would place an increased onus on individual RSLs to govern themselves soundly. The Financial Memorandum to the Bill also indicates that the Regulator identified that it would need to engage more closely with a greater number of RSLs to compensate for the loss of assurance that the consents framework currently provides. The Regulator estimated that, in these new circumstances, 0it might need to employ three additional members of staff.

The Scottish Information Commissioner highlighted a concern that the proposals could potentially result in RSLs falling outwith the scope of the Environmental Information (Scotland) Regulations 2004. These regulations provide a public right to request (and to receive) the environmental information held by RSLs who must actively disseminate this information. RSLs are not subject to Freedom of Information (Scotland) Act 2002 requirements, as local authority landlords currently are. If they were, then they would automatically come within the scope of the Environmental Information (Scotland) Regulations 2004. The Scottish Government has been consulting on whether to extend the FOI legislation to RSLs and has committed to formally responding to the consultation in the autumn.

ONS decision making process

The ONS will make its decisions on whether or not to reclassify RSLs to the private sector when the Act and associated regulations are commenced. In the meantime, HM Treasury has confirmed that it does not expect borrowing by RSLs to be recognised in Scottish Government budgets while legislation is being developed.

Background

The Role of ONS in classification decisions

The Office for National Statistics (ONS) is responsible for preparing the national accounts and other UK economic statistics, including labour market statistics.

To produce the national accounts, the ONS needs to classify the institutional units within the UK economy to an institutional sector (for example, as non-financial corporations or general government units). The transactions between sectors of the economy are also categorised as part of the national accounts framework. As the ONS say:

> " Robust classifications are needed to produce good-quality national accounts that are internally consistent and comparable across the world."
>
> ONS on-line

The national accounts are produced under internationally agreed guidance and rules. The international guidance on classification is set out principally in the European system of accounts 2010 (ESA10)[i], [1] and the accompanying "Manual on Government Deficit and Debt." [2]

Of most importance to RSLs in Scotland is the question of whether they are classified as public or private sector bodies. The ONS said that ESA10 introduced considerable new guidance on delineating the two and that:

> " The fundamental question is "does government exercise significant control over the general corporate policy of the unit?" The international guidance defines control as the ability to determine general corporate policy, and this can be exercised through the appointment of directors, control of over half of the shareholders' voting power, through special legislation, decree, or regulation"
>
> Office for National Statistics, n.d.[3]

The ONS uses a set of "indicators of government control" to determine the answer to this question. For example, if the government has rights to appoint or remove key personnel (or veto appointments/removals) then the unit would be classed as public sector.

ONS review of RSL classification

In June 2016, the ONS announced that it would undertake a review of the statistical classification of RSLs and housing associations in Scotland, Wales and Northern Ireland, following a similar review of English housing associations, concluded in 2015. On 16 November 2017, the ONS announced that it has reclassified English housing associations to the private sector following passage of the Regulation of Social Housing (Influence of Local Authorities) (England) Regulations 2017, made under provisions in the Housing and Planning Act 2016. [4]

---

i ESA 10 is an article of European law

In September 2016, ONS concluded that RSLs in Scotland, Wales and Northern Ireland are public, market producers and, as such, they will be reclassified to the Public Non-Financial Corporations (S.11001) sub-sector for the purpose of national accounts and other ONS economic statistics.

In announcing its decision, the ONS said:

> " We judged that Scottish RSLs should be considered as institutional units as they have the ability to incur liabilities and hold assets on their own accounts, enter into contracts, and exhibit sufficient decision making autonomy. We also concluded that RSLs are subject to public sector control due to, amongst other things: Scottish Housing Regulator (SHR) powers over the management of an RSL, SHR powers over constitutional changes of an RSL, and SHR powers of consent in relation to the disposal of land and housing assets. Consistent with conditions described in ESA 2010, RSLs were also judged to be market producers."
>
> Office for National Statistics, 2016[5]

The Scottish Housing Regulator

The ONS considered that some of the powers the Regulator has over RSLs are indicators of public sector control. The Regulator is the independent regulator of RSLs and local authority housing services in Scotland. The Regulator's objective, functions and powers are set out in the Housing (Scotland) Act 2010 ('the 2010 Act'). Its statutory objective is to:

> " safeguard and promote the interests of current and future tenants of social landlords, people who are or may become homeless, and people who use housing services provided by registered social landlords (RSLs) and local authorities."
>
> Scottish Housing Regulator online

To fulfil this objective, the Regulator undertakes various tasks, including assessing and reporting on how social landlords are performing their housing services and on RSL's financial well-being and standards of governance.

The 2010 Act also provides the Regulator with powers of intervention where it has concerns about an RSL's performance, governance arrangements or financial viability. Details of how the Regulator works is set out in their Regulatory Framework. [6]

Why regulation of RSLs is important

A good regulatory framework is necessary to ensure that the Regulator can fulfil its statutory objective as outlined above. For example, tenants need to be sure that their homes are being well maintained, that their tenancy is secure and that the rent they pay is being used appropriately.

A good regulatory framework also helps to maintain the confidence of funders of social housing. This is important if RSLs are to continue to have access to funds at affordable rates of investment to enable them to provide new housing and to support their businesses. As the Regulatory Framework states:

> “ 2.37 When we talk about maintaining the confidence of funders we mean that public funders and private lenders continue to have confidence in our system of regulation and the reputation and credit-worthiness of social landlords. 2.38. Public funders and private lenders need to carry out due diligence in advance of their investment decisions, and public funders need to evaluate and review the specific use of public funds. We will make it clear where, in our opinion, a social landlord does not represent a suitable investment partner or recipient of public funds. This means that we may decide to share relevant information and analysis on landlords with public and private investors appropriately”
>
> Scottish Housing Regulator, 2012[7]

The Regulator has noted that the competitively priced interest rates that RSLs have been able to borrow at is partly as a result of lender and investor confidence in effective regulation. It has previously estimated that the value of regulation is worth more than £40m each year in terms of savings on interest charges. [8]

If the regulatory framework was to change substantially there could be implications for tenants' interests and funders' confidence in RSLs.

Impact of classification of RSLs as public sector bodies

RSLs receive grant from the Scottish Government to build new houses and this is supplemented by their private borrowing. The Scottish Government has committed around £3bn to fund affordable housing over the lifetime of this parliament. RSLs private borrowing is around £300m a year (around £1.5bn over 5 years). [9]

If RSLs were to continue to be classified as public sector bodies all their new net borrowing would count against the Scottish Government's capital borrowing limits.

The Scottish Government’s capital borrowing limits are set out in the fiscal framework accompanying the Scotland Act 2016. The limit is set at £3 billion in total, equivalent to around £450m a year. The Financial Memorandum notes that, if RSLs borrowing can no longer be counted as private borrowing, the effective costs to the Scottish Government of delivering the commitment would rise to £4.5bn over the life of the Parliament. [9]

In the Policy Memorandum (para 10), the Scottish Government argues that this would be a "significant permanent burden" on the Scottish Government's finances. Furthermore, to stay within their limits, they might have to introduce controls over how much RSLs can borrow (at the moment RSLs decide themselves how much they can borrow). [10]

A key concern of the Scottish Government is the impact of any borrowing controls on the Scottish Government's commitment to build at least 50,000 affordable homes over the 5 year period April 2016- April 2021. The Policy Memorandum (para 12) notes that there would be "immediate implications" for the target, although no further detail is provided as to what specific impact this might have. [10] The 50,000 target includes affordable homes provided by councils and other housing providers in addition to RSLs.

The Bill - overview

The Housing (Amendment) (Scotland) Bill was introduced in the Parliament on 4 September 2017 by Angela Constance MSP, Cabinet Secretary for Communities, Social Security and Equalities.

The policy objective of the Bill is to enable the Office for National Statistics (ONS) to reclassify RSLs as private sector bodies for the purposes of the UK national accounts.

It is a short technical Bill, comprising 11 sections. The Bill proposes to:

- narrow the powers of the Regulator to appoint a manager to an RSL, and to remove, suspend and appoint officers of an RSL;
- remove the need for the Regulator's consent to: the disposal of land and housing assets by an RSL; any changes to the constitution of an RSL; and the voluntary winding-up, dissolution and restructuring of an RSL, while protecting tenant's rights to be consulted about certain changes;
- provide Scottish Ministers with regulation making powers to limit the influence that a local authority has over an RSL.

The following sections provide an overview of the Scottish Government consultation on the Bill's proposals, the Local Government and Communities Committee call for evidence on the Bill and details of the specific provisions in the Bill.

Scottish Government Consultation on the Bill

The Scottish Government did not undertake a public consultation on the Bill. It argued that it would be disproportionate to do so given the narrow focus and technical nature of the proposals. [10]

Instead, it engaged directly with the Regulator and other relevant groups including UK Finance (formerly Council of Mortgage Lenders), Scottish Federation of Housing Associations (SFHA), the Glasgow and West of Scotland Forum of Housing Associations (GWSF) and tenant groups.

The Policy Memorandum (paras 31-40) details the outcome of those discussions. Among these stakeholders, there was broad support for the Bill:

> “ The stakeholder groups recognised that the decision by the ONS to classify RSLs to the public sector posed a large risk to the ability of the Scottish Government to deliver its affordable housing programme.”
>
> para 34Housing (Scotland) (Amendment)Bill (as introduced) Policy Memorandum SP Bill 20-PM, 2017[10]

Whilst there was broad support for the Scottish Government's proposals, there were still some concerns about the likely impact of the Bill. Tenant groups were particularly concerned that the Bill would weaken the ability of the Regulator to safeguard the interests of tenants. The Scottish Government sought to reassure them about this.

Stakeholders recognised that removing the Regulator's powers of consent may result in a loss of "intelligence" for the Regulator and that there would be an increased onus on individual RSLs to govern themselves soundly. UK Finance (who represent nearly 300 firms providing finance, banking, markets and payments-related services in or from the UK) noted that the removal of the Regulator's consent powers could result in lenders having to undertake more intensive due diligence before making new loans to an RSL. [11]

Local Government and Communities Committee call for evidence on the Bill

Following the introduction of the Bill in the Parliament, the Local Government and Communities Committee issued a call for evidence on 8 September, with a closing date of 26 October 2017.

The Committee received sixteen responses to the call for evidence. These are available on the Committee's webpages.

Most of the respondents were supportive of the Bill's principles. They noted the potential impact on the Scottish Government's target to deliver 50,000 affordable homes by 2021, if RSLs were to be classed as public bodies. As UK Housing Finance said:

> " Any application of public borrowing caps would impact on business plans, and ability to service existing (and new) debt. Funders would see changes to risk profile, and the likely response would be a review of exposures, which could lead to changes in appetite and pricing. The implications could be a reduced ability of RSLs to attract new private investment at a time when more is needed to support delivery of the 50,000 homes target by 2021. [11] "

The SFHA and GWSF were supportive of the Bill and argued that the proposals would result in little practical difference. Representative of the Regional Network of Tenants Organisations were also content with the Bill's proposals.

On the other hand, the Scottish Information Commissioner [12] was concerned that the proposed changes could take RSLs outwith the scope of the Environmental Information (Scotland) Regulations 2004 (EIRs). These regulations provide that there is a public right to request (and to receive) the environmental information held by RSLs and that RSLs must actively disseminate environmental information.

RSLs are subject to the EIRs by virtue of definition (d) of Scottish public authority in regulation 2(1). This provision contains a two part test: firstly the body must be under the control of a Scottish public authority; secondly, it must have public responsibilities, public functions, or provide public services relating to the environment. [12] The Scottish Information Commissioner's response offers this explanation:

> “ In 2014, the Scottish Information Commissioner determined that Dunbritton Housing Association, an RSL, is subject to the EIRs. The test applied to public authority control was the extent of SHR’s “power to direct, manage, oversee and/or restrict the affairs or business or assets” of the RSL, with specific reference to the 2010 Act. Therefore, although the decision focussed on Dunbritton Housing Association, it affected every RSL. The Commissioner’s Decision Notice details the legal provisions indicating control. These are very similar to those identified by ONS in its deliberations on status of RSLs.”
>
> Scottish Information Commissioner, 2017[12]

If RSLs were subject to freedom of information legislation they would automatically come within the scope of the EIRs (local authorities who are also social landlords already have to comply with FOI legislation). The Scottish Government has been consulting on whether to extend FOI legislation to RSLs and committed to make an announcement on their decision in the autumn. [13] The Scottish Information Commissioner's response argues that if:

> “ Ministers decide not to bring RSLs within the scope of FOISA and the Bill is passed in its current form, there may no longer be any enforceable right of access to environmental information held by an RSL. That would represent a removal of rights.”
>
> Scottish Information Commissioner, 2017[12]

Further detailed comments provided in the responses to the call for evidence are considered in the relevant sections describing the contents of the Bill.

The Bill - detailed provisions

The following sections provide a description of the main sections of the Bill and how they amend the Housing (Scotland) Act 2010. This description covers the main points. The Explanatory Notes [14] to the Bill provide further detail on individual sections.

Regulatory intervention by Scottish Housing Regulator: Managers appointed by, or on the requirement of, the Scottish Housing Regulator (section 1)

Current position

Section 57 of the 2010 Act gives the Regulator powers to appoint, or require the social landlord to appoint, a manager for housing activities if the landlord is, or is at risk of, failing in its housing activities (e.g. not meeting an outcome in the Scottish Social Housing Standard) and that a person needs to be appointed to ensure that the social landlord provides housing services to an appropriate standard. This power applies to RSLs and local authority landlords. The Regulator has never used this power. [15]

Section 58 of the 2010 Act also allows the Regulator to appoint a manager to an RSL where it considers that this is necessary to ensure the RSL manages its financial or other affairs to an appropriate standard. To date, the Regulator has used this power seven times. These were in relation to the following housing associations; Muirhouse, Wellhouse, Ferguslie Park, Antonine, Arklet and Wishaw and District. [15]

The Bill's proposals

Section 1 of the Bill proposes to amend the 2010 Act to:

- **Narrow the circumstances when a manger can be appointed**: for an appointment of a manger for housing activities, the Regulator will be able to appoint a manager where a social landlord has failed or is failing to achieve standards. They will no longer be able to be appointed where there is a risk of failing to achieve standards. For the 'appointment of a manger for financial or other affairs', this is now limited to situations where the RSL is failing, or has already failed to, comply with a duty required by law or a requirement imposed by the Regulator.

- **Narrow the reasons why a manager can be appointed**: a manager can only be appointed to fix the problem that the Regulator has identified.

- **Introduce a time limit for the manger's appointment:** the limit will be the time necessary to fix the problem identified by the Regulator.

Response to the Bill's proposals

Respondents to the Local Government and Communities Committee call for evidence on the Bill were content with the Bill's proposed amendments to the 2010 Act. For example, the SFHA's response said that:

> “ The SFHA has received assurances from the SHR that, had the terms of the proposed legislation been in place at the time, it would still have been able to intervene in the same way during the few cases where it has had to use any of these powers.”

UK Finance were also generally supportive of the proposals, but suggested that the failure of an RSL should be, "clearly defined as including a failure to meet regulatory standards." They also expected funders to keep the operation of this new approach under review.

Glasgow City Council [16] noted that the proposals would take away the right of the Regulator to intervene at an earlier stage and that:

> “ It is perhaps more important now to emphasis the benefits of other performance monitoring organisations such as the Scottish Housing Network and Housemark Scotland as a way of maintaining standards and identifying early issues without statutory intervention.”

Registered Social Landlords: Removal, Suspension and appointment of officers etc (section 2)

Current position

The 2010 Act provides the Regulator with the following powers:

- Section 60 - power to remove an officer of an RSL. In the case of an RSL that is a company, 'officer' includes a director, manager or secretary of the company. In the case of an RSL that is a registered society, 'officer' includes a treasurer, secretary or management committee member. The section sets out the grounds on which an officer can be removed including a general one related to "impeding the proper management of the RSL because of absence or other failure to act"

- Section 61 - power to suspend a responsible individual. A responsible individual is an officer or agent of the RSL who appears to the Regulator to be responsible for the failures that have occurred or are occurring. The section sets out the general grounds on which an individual can be suspended, including that there has been misconduct or mismanagement in the RSLs affairs.

- Section 62 -power to remove a responsible individual following inquiries. The grounds for removal are the same as those in section 61.

- Section 65 - power to appoint an officer to an RSL

The Regulator has never used its powers under sections 60,61 or 62. In some cases, where the Regulator was about to use section 60 powers, individuals resigned their positions before the Regulator removed them. The Regulator has used its power (in s65 of the 2010 Act) to appoint an officer to a RSL on five occasions, including in four cases where the Regulator also used its power to appoint a manager. [15]

The Bill's proposals

Section 2 of the Bill proposes to narrow the circumstances in which the Regulator can remove or suspend an officer from an RSL. In particular, in sections 60,61 and 62 of the 2010 Act, the more general grounds for removal or suspension are replaced with more specific grounds related to a failure to comply with a statutory duty or a requirement imposed on the landlord by the Regulator.

In a similar manner (under section 65 of the 2010 Act), the Bill also proposes to narrow the purposes for which the officer can be appointed. A time limit for the appointment of a new officer is also introduced. The limit will be the time necessary to fix the problem identified by the Regulator.

Response to the Bill's proposals

Respondents to the Local Government and Communities Committee's call for evidence were generally content with the proposals in relation to section 2 of the Bill. GWSF, for example, argued that the SHR has already used its powers in much narrower circumstances than the 2010 Act currently provides for and that in practice the SHR will be able to continue to intervene where there are serious problems.

Disposal of land etc by RSLs (section 3 and 4)

Current Position

Section 107 of the 2010 Act gives RSLs powers to dispose their land or other assets. For certain types of disposals the Regulator's consent is required. [ii] The types of disposals that require the Regulator's consent can include:

- leases to another organisation;
- sale of tenanted social housing dwellings;
- granting security over land/other assets where the loan relates to on-lending to a subsidiary; and
- sale of untenanted social and non-social housing dwellings, land or other non-residence assets.

An RSL may be required to consult tenants before it disposes of land, and a ballot or other special procedure may be required if a disposal would result in the tenant's landlord changing. Section 110 and Part 10 of the 2010 Act set out the circumstances in which both consultations and ballots, or other special procedures, are to take place.

During 2016/17, the SHR received 129 applications for consents for disposals. During the first half of 2017/18, the Regulator received 63 applications for disposals. Since 2012, the Regulator has only refused two consent for disposal applications. These were from RSLs which were seeking to use land or assets as security in connection with pension deficits. In addition to processing formal consent applications, the SHR will also discuss potential applications with RSLs. Some of these never reach the application for consent stage. [15]

The Bill's proposals.

---

ii The types of disposals where the Regulator's consent is not required are set out in section 108 of the 2010 Act.

The main change that section 3 and 4 of the Bill propose to make is to **remove any requirement for the Regulator's consent to a disposal of land or other asset by a RSL**.

In summary:

- **For a disposal other than a disposal granting security over the land, which does not result in a tenant ceasing to be a tenant of the landlord** - the RSL must consult the tenants of any houses included in the disposal and inform the Regulator of the views expressed by those consulted. There is a new requirement for the Regulator to issue guidance on consultation, and the RSL must have regard to that guidance.
- **For a disposal of land that will result in a tenant ceasing to be a tenant of the RSL** - the RSL must consult with its tenants. The RSL must then obtain a majority agreement of the tenants consulted before a disposal can be made. There is a new requirement for the Regulator to issue guidance on tenant consultation and approval, and the RSL must have regard to this guidance.
- **In both cases, the RSL must notify the Regulator of any disposal within 28 days of it having being made.**

Response to the Bill's proposals

The respondents to the Local Government and Communities Committee call for evidence on the Bill were supportive of the Bill's proposals relating the removal of the Regulator's powers of consent to RSL disposals. However, UK Finance noted that this may lead to the Regulator losing a source of "regulatory intelligence." As such, they said:

> “ we expect funders to ramp-up their own due diligence on a proposition, which could lead to increased costs for housing associations. In the absence of the consents regime, funders would expect association Boards, themselves, to strengthen their own self-assessment regimes. ”

The SFHA and GWSF noted that RSLs would still need to approach any disposals in the way they normally would and carry out necessary due diligence before undertaking any such activities. The GWSF indicated that its members will continue to make appropriate decisions in the best interests of their community. It looked forward to discussing with the Regulator what checks and balances can be put in place to minimise the potential for other housing associations to make excessive disposals of social housing stock once the consents regime has gone.

The GSWF also wanted to, "urge lenders to avoid making excessive information demands on associations in an attempt to ‘compensate’ for there no longer being a need to get consent from SHR." [17]

The Financial Memorandum [9] (paras 17 and 18), indicated that the Regulator accepted that it would need to engage more closely with a greater number of RSLs to compensate for the loss of assurance that the consents framework currently provides. The Regulator estimated that it might need to employ three one additional members of staff at a cost of up to £176k.

Organisational Changes affecting landlords - change of name office or constitution by registered social landlord (section 5)

Current position

Under section 93 of the 2010 Act, RSLs must obtain the Regulator's consent for any change to their constitution, for example, changes to their rules, memorandum or articles. RSLs do not need consent to change their name or registered address, instead they must notify the Regulator within 28 days of the change being made (s92).

The consent process for constitutional changes involves the RSL submitting an application to the Regulator to apply for consent via the Regulator's online portal. If the Regulator is satisfied with the proposed change, they will grant in principle consent, and then, if the change is approved by the RSL's members, they will confirm their formal consent.

As with other consents, SHR will also talk to RSLs about potential constitutional changes which are not then taken forward to a formal application. In 2016/17, the Regulator received 8 applications for constitutional change. In the first half of 2017/18, they received 20 applications for constitutional change. [15]

The Bill's proposals

Section 5 of the Bill proposes to remove the need for an RSL to obtain the Regulator's consent for changes to their constitution. The RSL must notify the Regulator of all such changes within 28 days of the change being made.

Response to the Bill's proposals

Respondents to the Local Government and Communities Committee's call for evidence on the Bill supported these changes. GWSF's response stated [17] ,

> " we believe the system of seeking consent for all but the most routine of changes has become too controlling on SHR's part and onerous for RSLs. We do not believe the changes will lead to RSLs suddenly deciding to make wholesale changes to their rules etc., as the sector in Scotland will not move away from the key values of supporting people and communities with addressing housing and related issues."

Organisational changes affecting registered social landlords - restructuring, winding up and dissolution of registered social landlords (section 6 and 7)

Current position

Part 8 of the 2010 Act makes provisions regarding the restructuring, winding up or dissolution of an RSL. Part 8 of the Act also makes provisions about an RSL that proposes to become a subsidiary of another body.

In some cases, the Regulator's consent is required and the RSL must obtain the agreement of the affected tenants. In other cases, the Regulator's consent is required but the RSL is only required to consult its tenants in relation to the change.

At March 2013, there were 183 RSLs. This number has reduced to 160. For each RSL that is no longer registered, the Regulator has consented to its restructuring, winding up or dissolution. The Regulator has never refused a formal application for consent under this part of the 2010 Act.

As with other consents, the Regulator will speak to RSLs about proposals for potential restructuring etc. In a small number of cases, the RSL has not then taken forward its proposals and has not made a formal application. [15]

The Bill's proposals

Section 6 and 7 of the Bill proposes to amend the 2010 Act to **remove the need for the Regulator to consent to the voluntary winding-up, dissolution or restructuring of an RSL.**

Under the proposals, the RSL would be required to consult with the tenants affected by any of the proposed changes. Where the restructuring would lead to a change of landlord for the tenants or to the landlord becoming a subsidiary of another body, the RSL would need the majority of tenants consulted to agree. The Regulator would be required to prepare guidance on the consultation process and RSLs would need to follow that guidance.

RSLs would have to notify the Regulator of the voluntary winding-up, dissolution or restructuring of an RSL or of the RSL becoming a subsidiary of another landlord, within 28 days of that occurence.

Response to the Bill's proposals

Again, respondents to the Local Government and Communities Committee's call for evidence were supportive of the Bill's proposals regarding the removal of the Regulator's powers of consent to organisational changes affecting RSLs. The points discussed previously regarding the removal of Scottish Government consents and the potential loss of regulatory intelligence also apply to this section.

The measures to protect tenant consultation arrangements were welcomed by GWSF. UK Housing Finance made the point that these arrangements should not delay appropriate action where an RSL was in difficulty:

> “ Again, the measures are broadly consistent with the position elsewhere in the UK. We recognise, however, the different arrangements in Scotland where there are complex provisions in existing legislation in relation to tenant consultation and tenant ballots. While we recognise the rationale for these arrangements, funders would want to see the proposed legislation constructed and operated in a way which does not delay or prevent the rescue or dissolution of an insolvent RSLs”

Further modification of RSLs (section 8)

Section 8 of the Bill proposes that Scottish Ministers have regulation making powers to further modify the functions of the Regulator in relation to social landlords. The Scottish Ministers would be required to consult with the Regulator, and other relevant stakeholders, before making any regulations under this section.

The Scottish Government has proposed this power in case the ONS still considers that further adjustments to the Regulator's powers are necessary for them to classify RSLs as private sector bodies.

Response to the Bill's proposals

Most respondents to the Local Government and Communities Committee's call for evidence made no substantial comment about this provision. However, UK Finance were concerned about its open ended nature and argued that a sunset provision should be included so that it falls away at the end of the current parliamentary term in 2021. Without this, they argue:

> " we expect funders (particularly international investors who might be less familiar with the sector) might perceive an open-ended ability of Ministers to change the functions of the regulator as a risk of indefinite uncertainty. This could reduce investor appetite and increase the possibility of reticence among funders when considering Scottish RSLs as funding/ investment propositions within the wider UK and international context. "

Local authority influence over RSLs (section 9)

Current Position

Some local authorities may have a degree of influence over RSLs, for example, by having the ability to appoint officers of the RSL or by having certain voting rights. This is most likely to be the case where a local authority has transferred its housing stock to an RSL.

As the ONS indicated to the Scottish Government that this could be viewed as a form of public sector control, the Scottish Government is seeking to remove that control.

The Bill's proposals

Section 9 of the Bill proposes to give Scottish Ministers regulation making powers for the purpose of limiting, or removing, the influence that a local authority can exercise over an RSL.

In the Policy Memorandum [10] (paras 29, 30), the Scottish Government states that, in the first instance, the Scottish Ministers intend to specify in regulations that local authorities may only nominate up to a maximum of 24 per cent of the board members of an RSL, and may not exercise control over RSLs, for example, through a power to veto changes in an RSL's constitution.

Response to the Bill's proposals

Most respondents to the Local Government and Communities Committee's call for evidence were content with the proposals to reduce local authority influence over RSLs. As COSLA's response indicated:

> “ We understand the rationale for limits being placed on the ability of local authorities to exercise influence over RSLs and subscribe to the view, alongside ALACHO, that any excessive influence is rare and in practice the regulations that Scottish Ministers make under section 9 of the Bill are unlikely to affect many authorities or RSLs. ”

However, Inverclyde Council considered that the plans to restrict the local authority power of nomination to a maximum of 24 per cent of the board members of an RSL was, "unduly restrictive" and said that this does not "allow for the exercise of local discretion for local circumstances." [18] They argued that:

> “ There is no RSL in Inverclyde where more than 33% of its board members are Councillors and as a result the Council through its individual members cannot exert any overall control. It is understood that this proposal is to prevent Local Authorities blocking any constitutional change in an RSL where a 75% majority of board members is required. The Council considers this likelihood too remote and it outweighs the reduction in influence (which is not control) that individually or collectively Council members provide to help improve their local communities.”

Instead, they argued that local authorities should be, "permitted to negotiate local representation in local circumstances and to ensure compliance with the overall necessity of reclassification that there be always minority representation on RSL boards."

Bibliography

1 Eurostat European Commission. (2013). European system of accounts: ESA 2010. Retrieved from http://ec.europa.eu/eurostat/documents/3859598/5925693/KS-02-13-269-EN.PDF/44cd9d01-bc64-40e5-bd40-d17df0c69334 [accessed 30 October 2017]

2 Eurostat. (2016). Manual on Government Deficit and Debt. Retrieved from http://ec.europa.eu/eurostat/documents/3859598/7203647/KS-GQ-16-001-EN-N.pdf/5cfae6dd-29d8-4487-80ac-37f76cd1f012 [accessed 02 November 2017]

3 Office for National Statistics. (n.d.) UK economic statistics sector and transaction classifications: the classification process. Retrieved from https://www.ons.gov.uk/methodology/classificationsandstandards/economicstatisticsclassifications/ukeconomicstatisticssectorandtransactionclassificationstheclassificationprocess#ons-classification-process [accessed 31 October 2017]

4 Office for National Statistics. (2017, November 16). Statement on classification of English housing associations. Retrieved from https://www.ons.gov.uk/news/statementsandletters/statementonclassificationofenglishhousingassociationsnovember2017 [accessed 16 November 2017]

5 Office for National Statistics. (2016, September 29). Statistical classification of registered providers of social housing in Scotland, Wales and Northern Ireland: September 2016. Retrieved from https://www.ons.gov.uk/economy/nationalaccounts/uksectoraccounts/articles/statisticalclassificationofregisteredprovidersofsocialhousinginscotlandwalesandnorthernireland/september2016 [accessed 21 September 2017]

6 Scottish Housing Regulator. (2012). Regulation of Social Housing in Scotland. Retrieved from https://www.scottishhousingregulator.gov.uk/publications/our-regulatory-framework [accessed 31 October 2017]

7 Scottish Housing Regulator. (2012). Regulation of Social Housing in Scotland: Our Framework. Retrieved from https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Our%20Regulatory%20Framework.pdf [accessed 05 October 2017]

8 Scottish Housing Regulator. (2015, January). Regulator highlights to Holyrood Committee how it adds value. News Release 14 January 2015. Retrieved from https://www.scottishhousingregulator.gov.uk/news/regulator-highlights-holyrood-committee-how-it-adds-value [accessed 05 October 2017]

9 Housing (Amendment)(Scotland)Bill (as introduced) SP Bill 20- FM. (2017, September). Retrieved from http://www.parliament.scot/Housing%20(Amendment)%20(Scotland)%20Bill/SPBill20FMS052017.pdf [accessed 01 November 2017]

10 Housing (Scotland) (Amendment)Bill (as introduced) Policy Memorandum SP Bill 20-PM. (2017, September). [accessed 31 October 2017]

11 UK Finance. (2017, October). Response to the Local Government and Communities Committee call for evidence on the Housing (Scotland) Amendment Bill. Retrieved from http://www.parliament.scot/S5_Local_Gov/Inquiries/20171026_HAB_UKFinance.pdf [accessed 01 November 2017]

12 Scottish Information Commissioner. (2017, October). Response to the Local Government and Communities Committee's call for evidence on the Housing (Scotland) Amendment Bill. Retrieved from http://www.parliament.scot/S5_Local_Gov/Inquiries/20171003_HAB_ScottishIC.pdf [accessed 1 November 2017]

13 Scottish Government. (2017, June 29). Extending coverage of the Freedom of Information Act to Registered Social Landlords: interim report. Retrieved from https://beta.gov.scot/publications/consultation-extending-coverage-freedom-information-scotland-act-2002-registered-social-9781788510783/pages/4/ [accessed 01 November 2017]

14 Housing (Scotland) Bill (as introduced) Explanatory Notes SP Bill 20-EN. (n.d.) Retrieved from http://www.parliament.scot/Housing%20(Amendment)%20(Scotland)%20Bill/SPBill20ENS052017.pdf [accessed 31 October 2017]

15 Personal Communication with the Scottish Housing Regulator. (2017).

16 Glasgow City Council. (2017). Response to the Local Government and Communities Committee's call for evidence on the Housing (Scotland)(Amendment)Bill. Retrieved from http://www.parliament.scot/S5_Local_Gov/Inquiries/20171102_HAB_GlasgowCC.pdf [accessed 09 November 2017]

17 Glasgow and West of Scotland Forum of Housing Associations. (2017, October). Response to the Local Government and Communities Committee call for evidence on the Housing (Scotland)(Amendment)Bill. Retrieved from http://www.parliament.scot/S5_Local_Gov/Inquiries/20171025_HAB_GWSF.pdf [accessed 01 November 2017]

18 Inverclyde Council. (2017). Response to the Local Government and Communities call for evidence on the Housing (Scotland) Amendment Bill. Retrieved from http://www.parliament.scot/S5_Local_Gov/Inquiries/20171101_HAB_InverclydeCouncil.pdf [accessed 09 November 2017]

SPICe The Information Centre
An t-Ionad Fiosrachaidh

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Kate Berry on telephone number 85370 or kate.berry@parliament.scot.

Members of the public or external organisations may comment on this briefing by emailing us at SPICe@parliament.scot. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at sp.info@parliament.scot.

Every effort is made to ensure that the information contained in SPICe briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.