

GLASGOW AND WEST OF SCOTLAND FORUM OF HOUSING ASSOCIATIONS (GWSF)

WRITTEN SUBMISSION

Introduction

GWSF represents 68 community-controlled housing associations and co-operatives (CCHAs) in 9 local authority areas in west central Scotland. CCHAs provide housing for 75,000 households in the region and own around 28% of all RSL housing in Scotland. This submission sets out our views on the Housing (Scotland) Bill, based on the questions the Infrastructure and Capital Investment Committee has asked in its call for views. We would draw the Committee's particular attention to our response to question 17. This suggests that amendments to the Housing (Scotland) Act 2010 should be considered in relation to various housing regulation matters, including tenant consent for RSL restructuring through group structures.

Part 1: Right to Buy

Q1. What are your views on the provisions which abolish the right to buy for social housing tenants?

1. GWSF supports the measures set out in the Bill to abolish the right to buy (RTB). When consulting our members in 2012, almost 90% of GWSF members told us they preferred abolition of the RTB to the alternative policy option of retaining the right to buy and making further changes to discounts and eligibility. We warmly welcome the Scottish Government's proposals, and support the rationale for the legislative changes as set out in the Policy Memorandum accompanying the Bill.

Q2. Do you have any views on the proposed 3 year timetable before these provisions come into force?

2. We do not support the proposed 3-year lead-in period for abolishing the RTB. It means that tenants would be able to exercise their RTB throughout that period under the myriad entitlement/discount schemes that currently exist. In responding to the Government's pre-legislative consultation in 2012, GWSF made the case for a shorter 1-year lead-in period. This would give fair notice of the end of the RTB while minimising further reductions in housing stock.
3. The introduction of the Bedroom Tax in 2013 has underlined the need to abolish the RTB at the earliest opportunity. Social landlords and tenants affected by the Bedroom Tax need every support in retaining one- and two-bedroom properties. We are also concerned that companies canvassing tenants to buy their homes are likely to exploit a longer lead-in period to abolition.
4. The Policy Memorandum for the Bill states that abolishing the right to

buy could be challenged under the European Convention of Human Rights if tenants are not afforded “reasonable opportunity” to exercise existing RTB entitlements. However, it does not explain why a 3-year notice period is preferable to a shorter notice period. The overwhelming majority of responses to the Government’s 2012 RTB consultation favoured a notice period of 2 years or less. The rationale for the Government’s 3-year proposal is therefore a key area for scrutiny.

5. The Policy Memorandum also states that abolishing the RTB would keep 15,500 additional houses available for social renting over a 10-year period. We suggest the Committee should seek information about how those estimates would change if a shorter notice period of 1 year or 2 years were adopted.
6. If a 3-year notice period is retained, this will undoubtedly lead to calls for exclusions, exemptions and restrictions at Stage 2 of the Bill, for example in relation to:
 - Abolishing the RTB immediately or on a shorter timescale for smaller properties (as a result of the Bedroom Tax) and in pressured areas;
 - Regulating the activities of companies that promote the RTB to tenants.
7. The Bill does not make any proposals for simplifying the administration of RTB during the 3-year notice period. RTB administration is complex and time-consuming for social landlords, and our members have raised the question about whether they would still be required to give notice to new tenants about RTB entitlements during the lead-in period to abolition. This could be avoided by ensuring that RTB entitlements are safeguarded only for those tenants with an existing RTB at the date on which the Bill receives Stage 1 approval (i.e. RTB would not apply at all to tenancies created after that date).

Part 2: Social Housing

Q4. In your view, will the provisions which are proposed to increase the flexibility that landlords have when allocating housing, allow them to make best use of social housing?

8. The primary purpose of community controlled housing associations and co-operatives is to respond to housing needs in their local neighbourhoods and communities. Accordingly, we welcome the principles of greater local flexibility that underpin this part of the Bill and many of the detailed provisions. We have a number of comments on the specific provisions in the Bill, set out in the paragraphs below.
9. Section 3 of the Bill defines **unmet housing needs** as needs that are “not capable of being met by housing options which are available”. We do not think the meaning of this is clear. We also have some concerns that the proposed definition could allow some landlords to screen out

certain types of applicants (e.g. working households) on the basis that their needs might be met in the private rented sector, even if they have a positive preference for more secure and more affordable housing from a social landlord and in some areas social housing is the predominant tenure. GWSF members wish to frame their allocations policies in a way that balances the wider range of needs within their communities – including those of working households - and achieving sustainable tenancies. We would not wish the Bill to undermine such approaches.

10. The proposals on **consulting on allocations policy priorities and publishing consultation results** (section 4 of the Bill) match existing good practice. Our members will wish the non-prescriptive approach proposed in the Bill to be respected by the Scottish Housing Regulator.
11. The new requirement (section 4 of the Bill) for landlords to have regard to **local housing strategies** is important, particularly in relation to partnership working with local authorities on ensuring access to suitable housing for homeless people. Equally, our members will want local authorities to respect their role in meeting housing needs in their local neighbourhoods, and the involvement of tenants and housing applicants in endorsing local allocations priorities.
12. It is essential that community controlled housing associations should be able to set priorities that are relevant to their own neighbourhoods, as well as taking account of local housing strategies which apply across wider local authority areas. In that regard, we seek assurance that the terms of the Bill will not enable local authorities to impose blanket requirements on RSLs through local housing strategies, for example fixed quotas for lets to homeless households or other types of housing applicants.
13. The proposed additional **flexibility to consider applicants' ages when letting housing** (section 5 of the Bill) is very welcome. The new provision would help social landlords to make greater use of sensitive lettings and to promote greater tenancy sustainability, for example in letting certain properties to older housing applicants.
14. The Bill would reverse the current prohibition on **taking ownership of property into account** (section 6 of the Bill). The proposals in the Bill are permissive rather than compulsory. This will help landlords to strike a balance between excluding applicants who quite simply don't need social housing, without resorting to blanket exclusions of people who may own property but who may also still have a legitimate need for social housing. We would welcome greater clarity about the meaning of heritable property (e.g. does it include property owned outside the UK?) and of the term "a person who normally resides with the applicant" (we are assuming that this does not extend to people using "care of" addresses).
15. The provisions on **suspending housing applications** (section 7), and

those on the **use of short Scottish Secure Tenancies** build on existing practice relating to letting suspensions. GWSF agrees that landlords should have additional flexibility in these areas, to support their efforts to address antisocial behaviour.

16. In relation to section 7 of the Bill, some key aspects of the proposed new arrangements are not fully clear. For example:
 - The Bill does not address basic questions such as how long ago antisocial behaviour occurred, or how long suspensions can last for. An early indication of intentions on these matters would be helpful for social landlords.
 - It is not clear whether restrictions as a result of past antisocial behaviour would apply equally to households referred under homelessness legislation, as to all other types of housing applicants. We suggest that there should be a level playing field, i.e. similar criteria relating to past antisocial behaviour should apply in local authority decisions about whether a household is intentionally homeless and therefore eligible to be provided with settled accommodation.
 - There is no obvious rationale for proposing that abandonment or damage to property must relate only to tenancies in Scotland, particularly when the Bill proposes that provisions on recovery of possession of a tenancy will apply to previous tenancies anywhere in the UK.
 - The provisions in the Bill about “using a house for immoral or illegal purposes” should in our view be limited to illegal purposes, since that sets an objective test. A test of “immoral purposes” would be subjective (and somewhat outdated).
17. The Bill does not propose any changes regarding the **maintenance of housing lists**. Many GWSF members are concerned about the substantial costs associated with maintaining housing lists, where they have large numbers of applicants on their lists who have very limited prospects of ever being rehoused. In our view, the Bill should introduce new flexibilities for landlords to set needs thresholds that they can apply when maintaining housing lists (i.e. they are able to exclude from subsequent reviews housing applicants with no realistic prospects of ever being rehoused, which each landlord would determine itself by setting a cut-off point).

Q5. Will the proposals which will adjust the operation of short Scottish secure tenancies and Scottish secure tenancies provide landlords with tools that will assist them in tackling antisocial behaviour in an appropriate and proportionate manner?

18. GWSF supports the principle that social landlords should have greater flexibility to use short SSTs in cases involving antisocial behaviour. However, the proposals in the Bill must be set within a realistic

understanding of the respective responsibilities of social landlords, the Police and other agencies in addressing different types of antisocial behaviour. In scrutinising the Bill, Parliament should have realistic expectations about the likely impact of the changes proposed.

19. The Bill is not sufficiently clear about some of the issues that may arise in implementing the proposals relating to short Scottish secure tenancies. While these are perhaps matters for Stage 2 of the Bill, we highlight the following as examples of the types of issues that need to be addressed:
 - Whether the criteria for use of short SSTs as set out in the Bill would apply equally to lets made directly by an RSL and to homeless households referred under section 5 of the Housing (Scotland) Act 2001;
 - What action landlords can take during the period of a short SST, if problems occur;
 - How the potentially greater requirement for housing support services could be met (given that the provision of such support is often reliant on external funding and/or provision of support services by other agencies);
 - Ensuring greater clarity about who is responsible for providing tenancy support and what recourse social landlords have if tenants do not engage with the support provided;
 - How many times conversion to a short SST can occur;
 - How repossession proceedings would operate.

Q6. Will this part of the Bill meet the Scottish Government's objective of providing further protection for tenants, particularly tenants with short SSTs, by strengthening their rights?

20. The Bill proposes new measures that would enhance the rights of tenants who have short SSTs. These parts of the Bill have been developed in direct response to recent court judgements. Landlords will have a particular interest in the proposal that possession proceedings for short SSTs will be subject to a legal right to request a review, and in the detailed proposals (still to be brought forward) about the procedure for such reviews.
21. The Bill proposes a number of measures relating to assignation, sublet and joint tenancy arrangements, and succession to a Scottish Secure Tenancy. We support these measures provided that landlords remain able to exercise flexibility in individual cases. For example, while the Bill would require a 12-month qualifying period before a person can qualify for succession, it is important that landlords are able to respond sympathetically to circumstances such as the death of a tenant in deciding whether that requirement should always be applied.

Part 3: Private Rented Housing

Introductory comments

22. The Bill proposes a number of improvements relating to the private rented sector (PRS). While the proposed changes impact primarily on local authorities, they are also of significant interest to housing associations because of the difficulties poor private landlord practice creates within mixed tenure neighbourhoods.
23. Overall, the PRS proposals in the Housing Bill are very much around the margins and the Bill will not address more fundamental issues, such as:
 - The need for appropriate and legally-enforceable standards of management in the PRS;
 - The need for an overall framework of standards, enforcement levers and financial resources to address existing property disrepair and improve housing quality and energy efficiency in the PRS;
 - The need for more proactive regulation of the PRS and the severe resource pressures many local authorities are under in seeking to enforce standards;
 - The overwhelming disparity between regulation and standards for social housing and those for the PRS.
24. In our view, the scope of the Bill is disappointingly narrow:
 - Scottish Government policy is promoting an expanded role for the PRS in meeting housing needs in Scotland, despite poor housing quality and management standards in parts of the PRS (particularly at the lower end of the market). There has been a rapid and uncontrolled increase in housing benefit subsidies for the PRS in Scotland (estimated by SFHA to be a 153% increase for the PRS in the last decade, compared with a 21% increase for social landlords).¹
 - The physical quality and energy efficiency of housing in Scotland are substantially better in the social housing sector than the private sector. Improvements in the social sector have been driven by detailed standards set by the Scottish Government and enforced through scrutiny by the Scottish Housing Regulator. By contrast, house conditions and energy efficiency standards in the PRS are substantially poorer. Private landlords must only comply with a basic Repairing Standard (enforced only in response to tenant complaints) and minimum statutory standards on property disrepair (enforced on a much more limited basis than would be desirable, because of limited local authority financial resources relative to the levels of housing disrepair that exist).

¹ Housing Benefit Spending: Busting the Myths, Scottish Federation of Housing Associations (October 2012)

- The Scottish Housing Regulator has extensive statutory powers to enforce management and property standards in the social sector. Standards in the PRS are enforced by local authorities which have far more limited regulatory powers and operate under severe financial pressures.

Q7. Do you have any comments on the proposals for transferring certain private rented sector cases from the sheriff courts to the new First-tier Tribunal?

25. We support the proposals in the Bill to consolidate responsibility for private rented sector civil cases in a new tribunal. However, the impact and effectiveness of these changes is subject to the bigger question of how tenancy rights in the private rented sector can be improved. This is not addressed in the Bill and the Scottish Government has instead stated a more generalised intention to “consult with all stakeholders to examine the suitability and effectiveness of the current private rented sector tenancy regime, considering legislative change where required.”²

Q8. Do you have any views on the adjustments to private rented housing legislation, which are intended to enhance local authorities’ discretionary powers to tackle poor conditions in the private rented sector?

26. Any measures to improve local authorities’ ability to tackle poor conditions and standards in the PRS are to be welcomed. However, the scope of the Bill means that change will be piecemeal rather than transformational.
27. The Bill proposes minor administrative changes to the private landlord registration system, by introducing statutory timescales for completing consideration of applications for registration. Otherwise, the Bill does not do anything to strengthen the statutory scope or “teeth” of the private landlord registration system.
28. The proposed measures on third party applications relating to the Repairing Standard recognise that tenants – especially vulnerable tenants, or people housed by unscrupulous private landlords - may be reluctant or unable to complain about a landlord’s failure to carry out repairs. However, the Bill does not address the substantive question of the Repairing Standard itself. The present Repairing Standard is extremely basic and the means for enforcing it are reactive.
29. The Policy Memorandum for the Bill states that local authorities “would also be able to make an application based on evidence from others with an interest in ensuring that minimum standards of property condition are maintained (for example neighbours, owners of property in communal buildings, or fire and rescue services)”. This is consistent with what is

² Housing (Scotland) Bill, Policy Memorandum, para 108

already happening in Glasgow, where the City Council is seeking to work in partnership with local housing associations to tackle problems created by poor private landlords. However, the Bill does not create any obligations that would encourage all local authorities to adopt such proactive approaches. This creates a weakness in cases where local authorities may be less willing (or less able, due to resource pressures) to act on problems reported by housing associations, as owners of neighbouring properties or as property factors.

30. The Policy Memorandum suggests some different attitudes on the part of local authorities. Glasgow City Council is said to be particularly keen to have statutory third party reporting powers, to help address poor private housing conditions and poor management standards for tenants. The views of other local authorities appear to be more equivocal, with the Government emphasising in the Policy Memorandum that the third party reporting provision in the Bill “does not place any new mandatory duties on local authorities. The discretionary power means that decisions on whether to make an application, or defend any subsequent appeal against a decision of a private rented housing committee, can take into account existing budgets and local priorities”. This reduces confidence in what practical impact the Bill may have unless local authorities (as in the case of Glasgow) decide to make tackling poor management or standards in the private rented sector a priority.

Q9. Do you have any comments on the Scottish Government’s intention to bring forward provisions at Stage 2 to provide additional discretionary powers for local authorities to target enforcement action at an area characterised by poor conditions in the private rented sector?

31. The principle of powers to promote area-based approaches is welcome although it is difficult to comment on the proposals for Enhanced Enforcement Areas until more substantive information is available. While the proposal may have been conceived with particular areas such as Govanhill in Glasgow in mind, we are interested to learn more about what wider application such approaches could have and how they could support partnership working in areas where poor private housing is present on a significant scale.
32. However, this brings us back to the question of resources. As with all other aspects of private rented sector regulation, enhanced area-based statutory powers will only be effective if there are adequate resources available to support the delivery of local enforcement strategies. The risk of displacement effects must also be managed effectively. Intensive action to stamp out the worst effects of private landlordism in areas with a high concentration of problems is important, but the end result should not be that the same private landlords simply move their operations to other neighbourhoods.

Part 4: Letting Agents

Q10. Do you have any comments on the proposal to create a mandatory register of letting agents in Scotland, and the introduction of statutory provisions regarding letting agents' practice?

33. Letting agents are not regulated at all at present and poor practice by some agents is a major contributor to the serious problems the private rented sector is creating in some communities. We therefore support the principle of a statutory registration scheme and a code of conduct with statutory force.
34. The Bill does not include any proposals to strengthen the private landlord registration scheme or how private landlords themselves are regulated. This will limit the effectiveness of the measures proposed on letting agents. Much will also depend on the terms of the proposed Code of Practice for letting agents, to be developed separately from the Bill. It is important that the Scottish Government acts on the available evidence about poor practice by some letting agents and the resulting negative impact on housing and environmental conditions in local communities.
35. As in the case of property factors, it appears that the registration of letting agents would be undertaken by the Scottish Government rather than by local authorities. The Policy Memorandum suggests that some local authorities do not wish to be responsible for the registration scheme. In our view, letting agent and property factoring registration schemes administered by local authorities would provide a much better means for effective enforcement.
36. The Bill makes no provision for third parties to report concerns about letting agents' activities. The Bill provides for this in relation to enforcement of the Repairing Standard. It seems illogical that there should not be equivalent arrangements in relation to concerns about letting agents' activities. The Bill suggests that only private landlords and tenants would be able to refer concerns about a letting agent to the tribunal and there appears to be no role for local authorities to do the same.
- 37.

Part 6: Private Housing Conditions

Q14. Do you have any comments on the various provisions which relate to local authority enforcement powers for tackling poor maintenance, safety and security work, particularly in tenemental properties?

38. The Bill makes relatively minor administrative provisions. Glasgow City Council has already used missing shares funding and maintenance plans on a targeted basis, so we are unsure what substantive changes the Bill would actually introduce. The bigger issue for local authorities will be one of financial capacity to use their powers on the scale that is

needed.

39. The Policy Memorandum for the Bill suggests that concerns held by some local authorities have been a major factor in the Government's reluctance to propose more significant changes. This raises important issues for further scrutiny by the Committee, whether as part of its consideration of the Bill or more generally. There are substantial, unresolved political and financial obstacles to tackling disrepair and improving standards in private housing in Scotland. Despite the measures proposed in the Housing Bill, the bottom line is that:
- No legislative solutions are being proposed to address poor private property condition to a significant degree;
 - Legislation, policy and regulation are all being used to drive energy efficiency improvements in the social rented sector (where such standards are already higher). There is no such leverage for the private rented and owner-occupied sectors, aside from funding incentives to owners and private landlords to improve their properties on a voluntary basis.
40. The Government's Sustainable Housing Strategy published earlier in 2013 states that it will work with stakeholders to develop options for setting minimum energy efficiency standards in private sector housing, ahead of public consultation on draft regulations in 2015. This suggests we are still a long way away from having the robust framework of standards, enforcement and financial resources that will be necessary to make the necessary improvements in the energy efficiency of private housing, particularly those that are hard to treat.

Part 7: Miscellaneous

Q16. Do you have any comments relation to the range of miscellaneous housing provisions set out in this part of the Bill?

41. GWSF's main interest relates to the proposed changes to the powers of the Scottish Housing Regulator (SHR), as described in section 79 of the Bill. We are content with the general principle behind the section 79 proposals which is to ensure that SHR can respond effectively to exceptional circumstances where an RSL may be in serious financial jeopardy.
42. The section 79 proposals should be seen as a backstop for worst-case scenarios. In practice, it is far more important to prevent the proposed powers having to be exercised at all. A key issue is how SHR uses its existing statutory powers to ensure early detection and an effective response to serious financial problems. SHR has spoken publicly on a number of occasions (including in its recent evidence to the ICI Committee in December 2013) about its role in "managing three RSLs out of near insolvency" during 2012. In our view, the financial crises that occurred in these cases were not the product of SHR lacking appropriate

statutory powers:

- SHR had long-standing and serious concerns in each case (for one of the three RSLs, SHR was closely involved from 2008 onwards);
 - SHR made limited use of its formal statutory intervention powers and relied instead on non-statutory methods of engagement;
 - For whatever reason, regulatory intervention failed to avert or provide early warning of the financial problems that crystallised in 2012.
43. On the specific measures now proposed in section 79 of the Bill:
- It is reasonable that SHR should have powers to act decisively in cases where an RSL is in serious financial jeopardy and this may lead to insolvency, as proposed in section 79 (a) of the Bill
 - We do not support section 79 (b) of the Bill. This would repeal the Regulator's general obligation to base a directed transfer of an RSL's assets on an independent valuation. Directed transfers are extremely unusual (the last one occurred more than 10 years ago) and we do not see the purpose of removing the general requirement for independent valuations.
 - Instead, it would be more appropriate to retain as the norm the current requirement for independent valuations set out in section 67 (6) of the Housing (Scotland) 2010, and to amend section 67 (6) so that the obligation to obtain an independent valuation can be set aside in the highly exceptional circumstances where emergency action is needed. In other words, the obligation to obtain an independent valuation would remain, but would be set aside where the four specific conditions relating to financial jeopardy narrated in section 79 of the Bill are met.
 - There should be transparency and accountability for exceptional regulatory action that results in a directed transfer of an RSL's assets, including SHR's own role in matters. This could be achieved by requiring SHR to publish information about inquiries that result in a direction to transfer an RSL's assets.
44. While supporting the general principle underpinning section 79(a), we are unsure what practical impact the proposed legislative changes will have. None of the 3 recent cases involving RSLs in financial jeopardy involved a transfer of assets directed by SHR. Instead, the mechanism used in these cases was for the RSLs in financial difficulty to join a group structure. The arrangements proposed in section 79 would not have applied, since none of the cases involved a directed transfer of assets.

Other Issues

Q17. Are there any other comments you would like to make on the Bill's

policy objectives or specific provisions?

45. The proposed changes set out in section 79 of the Bill are designed to make changes to the housing regulation framework in response to issues that were not foreseen when the Housing (Scotland) Act 2010 was enacted.
46. GWSF believes that the same principle should be applied to other aspects of housing regulation. In this regard, we have identified three key areas for legislative change, described below. While we have wider concerns about other aspects of housing regulation, we believe that these could be addressed by changes to current regulatory practice by SHR within the existing scope of the 2010 Act and by enhanced parliamentary scrutiny of how the 2010 Act housing regulation framework is operating in practice.

Tenant consent for RSL restructuring

47. GWSF has recently published a detailed analysis of RSL group structure activity in Scotland. We have made our briefing report available to members of the Committee in light of the Committee's role in scrutinising housing and regulation issues and its previous interest in the restructuring taking place within the Scottish housing association sector.
48. Our briefing report makes a number of proposals for policy and regulatory changes that can be introduced within existing legislation, to respond to the rapid growth of RSL group structure activity in Scotland. Legislative change is also needed, to provide for tenant consultation and ballots, where an RSL is seeking to join a group structure as the subsidiary of another RSL. The current Bill provides an opportunity to address this, to ensure proper protection for the interests of tenants.
49. The Housing (Scotland) Act 2010 requires tenant consultation and ballots to take place where RSLs decide to restructure through mergers or transfers of engagements that result in a change of landlord. The 2010 Act does not make equivalent provision for tenant consultation and ballots where an RSL intends to join a group structure. This is now a serious omission and there is a strong case for making statutory changes that would bring group structures within the statutory definition of restructuring set out in the 2010 Act, with a resulting extension of tenant ballot provisions.
50. The main reasons in support of statutory changes relating to RSL group structures are as follows:
 - Restructuring via group structures is happening on a substantial scale in the Scottish RSL sector and has a significant impact on the future interests of many thousands of tenants and service users (almost 90,000 tenants are now housed by an RSL that is part of a group structure comprising two or more RSLs). It is unacceptable

that tenants have no legal rights to be consulted or to give their consent to such significant changes, as would be the case if a restructuring proposal resulted in a change of landlord.

- When an RSL joins a group structure, it relinquishes sovereignty and ultimate control over its affairs to a third party in return for whatever benefits the group structure arrangement is intended to provide. This has long-term consequences for tenants, because a parent RSL will have direct influence (and potentially, ultimate control) over a such matters as a subsidiary RSL's business plan, rent policy, housing investment policy, funding costs and service delivery structures and locations.
- An RSL seeking to join a group structure needs only to obtain the agreement of its shareholding members, not its tenants and rent-payers. This produces a substantial democratic deficit. For example, the decision to create The Wheatley Group and for Glasgow Housing Association to become a subsidiary of Wheatley was made by GHA's board (under GHA's constitution, its board are the only shareholding members). More than 40,000 GHA tenants had no say in the decision, nor will Wheatley's Board be directly accountable to GHA tenants for its current plans to expand the Group's activities, even though the Group's main assets are tenants' homes. While the democratic deficit is particularly pronounced in the case of The Wheatley Group, the same deficit applies in all other cases – there is no formal requirement for tenant consent.
- Very large RSLs, including The Wheatley Group and a number of UK-based RSLs, are actively pursuing business growth strategies which involve absorbing smaller Scottish RSLs into their group structures. The long-established and distinctively Scottish policy of promoting greater localism in housing service delivery and accountability now appears to be in reverse, more as a result of a vacuum in housing policy thinking rather than any explicit desire on the part of government to promote a policy of big being better. Many Scottish housing associations are increasingly concerned that they are becoming sitting targets for takeovers by very large RSLs and that the current statutory and regulatory framework offers no safeguards against this happening. In making statutory provision for tenant consent to mergers and transfers of engagements during the passage of the Housing (Scotland) Act 2010, the Minister for Housing and Communities told Parliament that “...**Such a safeguard is important not only for tenants but for landlords as the need to secure tenant support will make it much harder for another landlord to contemplate a hostile takeover bid.** (Col 3491)”.³ The same thinking and statutory safeguards now need to be applied to restructuring through group structures.

³ SPICe Briefing: Housing (Scotland) Bill as amended at Stage 2 (October 2010)

51. We have set out at Appendix 1 details of the current statutory provisions for RSL restructuring and their limitations. We suggest that the current Housing (Scotland) Bill should make provision for the protection of tenants' interests and that this could be achieved by:
- Amending Parts 8 and 10 of the Housing (Scotland) Act 2010, to expand the statutory definition of restructuring to include the formation or joining of a group structure involving more than one RSL;
 - Extending the tenant authorisation provisions in Part 10 of the 2010 Act (including the provisions for tenant ballots) to all restructuring cases falling within the expanded definition, regardless of whether the restructuring proposal would result in a change of landlord.
52. If adopted, our proposal for tenant ballots would involve the same exceptions as already apply to other types of RSL restructuring. For example, tenant ballots are not required in cases where the Scottish Housing Regulator directs an RSL to transfer its assets following a statutory inquiry, and section 79 of the Bill proposes that tenant consultation requirements would be waived in directed transfers where an RSL is at risk of imminent insolvency. These are highly exceptional circumstances and it is appropriate that the same arrangements should be applied in all cases. Therefore, we suggest that tenant consultation and ballots should be the norm for all types of restructuring including group structure proposals, but would not be required where an RSL was potentially insolvent and a statutory inquiry by SHR resulted in emergency action to avert the potential insolvency.

Regulatory interventions and the need for statutory mechanisms for reviews and appeals

53. The 2010 Act requires SHR to publish, following consultation, statutory codes of practice on its powers to carry out inquiries and to seek information (section 51 of the 2010 Act) and to exercise statutory intervention powers (section 54 of the 2010 Act).
54. These aspects of the current legislation are not operating satisfactorily:
- SHR has not published the codes of regulatory practice referred to in the 2010 Act, beyond high level information contained in its April 2012 Regulatory Framework.
 - A number of housing associations have expressed strong concerns to representative bodies about the scope and proportionality of regulatory interventions in their organisations. GWSF offers no view on the merits of individual cases, but we are concerned that there is such a high level of dissatisfaction with SHR's activities and approach. The root cause in our view is a lack of transparency and of sufficiently clear ground rules for the kind of intervention approach typically being used by SHR.

- That intervention approach involves “behind the scenes”, non statutory methods rather than the more transparent and accountable processes set out in the 2010 Act (e.g. published inquiry reports for named organisations and use of the formal statutory intervention powers described in Part 5 of the 2010 Act). To date, SHR has not made any use of those formal intervention powers and it has published only one inquiry report for a named RSL.
 - SHR’s Regulatory Framework provides for a review process in the case of published inspection reports, but there are no review processes for other types of regulatory action. Moreover, there is no appeals process available to RSLs who believe that regulatory actions are disproportionate or inappropriate.
55. We believe that these issues need to be addressed in the current Housing Bill. We propose that the Bill should:
- Establish a requirement for SHR to publish, following consultation, a consolidated code of regulatory practice that addresses all of its methods for intervening in the affairs of social landlords (i.e. including interventions that are not publicly reported and those that do not involve the use of statutory intervention powers);
 - Provide a statutory right for social landlords to request a review by the SHR Board of regulatory decisions or actions;
 - Establish a formal external appeals process, which allows social landlords to challenge SHR’s regulatory decisions or actions.
56. In putting forward these proposals, it is not our intention to constrain SHR’s ability to take effective regulatory action. The introduction of a review process would enhance SHR’s ability to perform its functions in a fair and transparent manner and would improve confidence in the regulatory system. That confidence is being put at risk by the way in which the regulatory system currently operates, i.e. overwhelming reliance on “offline” non statutory interventions, limited public reporting, and no opportunities for social landlords to question or challenge regulatory action that is often perceived – rightly or wrongly - to be inappropriate, disproportionate or excessive.
57. In the absence of an appeals system, the only mechanism currently available to RSLs who have serious concerns about regulatory action is to seek judicial review. This is not in our view in the interests of SHR, social landlords or tenants.
58. Instead, we suggest that the Housing Bill should make provision for an external appeals process, independent of SHR. This would be consistent with statutory arrangements for the charity sector. The Charities and Trustee Investment (Scotland) Act 2005 makes statutory provision for both reviews of decisions made by the Office of the Scottish Charity Regulator (OSCR) and for independent consideration of appeals

against OSCR decisions by a Scottish Charities Appeal Panel. Members of the Panel are appointed by Scottish Ministers and are independent of OSCR.

Consultation and Involvement Requirements

59. The Housing (Scotland) Act 2010 places SHR under an obligation to consult with social landlords and their representative bodies on a range of specific matters. These arrangements are not operating effectively at present in terms of consultation on regulatory guidance, discussion of the operation of the overall regulatory framework, or how SHR and the sector can work together more effectively to promote good practice for the benefit of RSLs and their tenants.
60. The prospects for achieving more constructive and productive relationships between SHR and the housing sector would in our view be enhanced by making amendments to section 5 of the Housing (Scotland) Act 2010. This requires SHR to consult and involve representative bodies in discussions about the performance of its functions. We suggest that section 5 of the 2010 Act should be amended, to add bodies representing social landlords to the list of representative bodies that SHR is required to consult and involve. This would encourage a more proactive approach by SHR to working with the housing association sector and would provide a platform for greater partnership working and co-operation on how RSLs can improve standards and meet regulatory expectations.

Q18. Are there any other issues that the Scottish Government consulted on that you think should be in the Bill?

61. As noted in the recent SPICe briefing on the Bill, GWSF and SFHA both argued during the pre-legislative consultation process for clearer, more permissive provisions on how social landlords can incorporate local connection provisions in their allocations policies. This is not reflected in the Bill as introduced and is in our view a significant gap. While Scottish Ministers have in the past made helpful statements about the use of local connection provisions, this does not have any statutory expression beyond the “negative” provisions in existing legislation⁴. These only cover circumstances where residence in a landlord’s area of operation **cannot** be taken into account. Clearer, enabling statutory provisions on local connection would be extremely helpful.

⁴ Housing (Scotland) Act 1987, section 20

Appendix 1

Current Legislation and Regulatory Guidance relating to RSL Restructuring

1. Current Provisions on RSL Restructuring: Housing (Scotland) Act 2010

Part 8 of the 2010 Act, sections 96 to 104 sets out statutory requirements for regulatory consents where an RSL is seeking to restructure:

- “Restructure” in this context includes transfers of engagements, amalgamations and voluntary winding up/dissolution.
- Section 96(3) says SHR shall not give consent to restructuring proposals “... unless satisfied that (the RSL) has consulted its tenants about the matter for which consent is needed”.
- Section 97 confirms that transfers of engagements, amalgamations etc require the RSL seeking to restructure to pass a special resolution (in practice, an affirmative vote by its shareholding members) and to have this approved by SHR and registered by the Financial Conduct Authority.
- The RSL seeking to restructure needs to show it has consulted with tenants in order to obtain SHR consent. If a restructuring proposal would result in a **change of landlord**, Part 10 of the 2010 Act applies (“Special procedure for disposals and restructuring resulting in change of landlord”)

The main features of the special procedure set out in Part 10 of the 2010 Act are that:

- There is a statutory requirement for enhanced tenant consultation, with a range of specific requirements set out in section 115 of the Act (e.g. issue of a formal notice by the RSL, provision of information about the consequences of the change proposed, opportunities for tenants to make representations about the changes proposed).
- SHR’s consent to the disposal is subject to “tenant authorisation”. Tenant authorisation (i.e. consent) may take the form of a tenant ballot (section 118 of the Act) or the written agreement of the tenants affected (section 119).

Part 8 Sections 96 to 104 of the 2010 Act and the special procedure for tenant authorisation set out in Part 10 of the Act **do not apply** to circumstances where an RSL is seeking SHR approval to join a group structure as the subsidiary of another RSL.

Instead:

- **Part 8, section 93 of the 2010 Act** requires only that SHR should give its consent to material changes to an RSL’s constitution (becoming a subsidiary of another RSL would require this).

There are **no provisions in the 2010 Act** that require tenant consent if an RSL is seeking to become the subsidiary of another RSL.

2. Regulatory Policy and Procedures

Regulatory policy and procedures about RSL restructuring proposals are set out in the following documents published by SHR:

- SHR Regulatory Framework: [Consent to constitutional and organisational change and disposals](#) (March 2012)
- SHR Regulatory Guidance: [Organisational Changes](#) (April 2012)
- SHR Regulatory Guidance: [Group Structures and Constitutional Partnerships](#) (April 2012)
- SHR Regulatory Guidance: [Requirements for Tenant Ballot or Written Authorisation](#)

Where a change of landlord would be involved, the Regulatory Framework states that a tenant ballot will normally be required, unless a landlord makes a convincing case for why another form of written consent by tenants should be sought.

The separate SHR guidance on organisational change proposals and group structure proposals replicate the 2010 Act in applying **different thresholds for tenants' rights and tenant consent**, depending on whether restructuring proposals will result in a change of landlord.

If there is no change of landlord, SHR's guidance on Group Structures and Constitutional Partnerships confirms that there will be a **lower threshold in terms of tenant information and consent**:

"If the proposal does not involve a change of landlord we will expect tenants to be consulted about the proposal. We will wish to see a description of action taken to inform and consult tenants and any Registered Tenants Organisations about the proposals, and consultation outcomes. We may require the RSL to ensure tenants have access to independent advice funded by the RSL. RSLs should have a clear communications/ consultation strategy that allows sufficient time for meaningful tenant consultation on the RSL's proposals". **Regulatory Guidance on Group Structures and Constitutional Partnerships, Appendix 1**

**Glasgow and West of Scotland Forum of Housing Associations
27 February 2014**



Glasgow and West of Scotland
Forum of Housing Associations

GWSF Briefing: Housing Regulation in Scotland

February 2014

1. Introduction

- 1.1 The Housing (Scotland) Act 2010 established new arrangements for regulating registered social landlords and local authority housing and homelessness services, and a new Scottish Housing Regulator (SHR) which took up its role in April 2012.
- 1.2 SHR is accountable to the Scottish Parliament and has recently given evidence to the parliamentary Infrastructure and Capital Investment Committee about its activities, based on its Annual Report for 2012/13.¹
- 1.3 Our Briefing identifies a number of areas where GWSF is concerned about how the regulation framework is operating. Our starting-point is that housing regulation serves an important purpose and that effective regulatory intervention is essential in individual cases where there may be a serious and material risk to tenants' interests or to an RSL's assets. However, we do not think the current system of housing regulation is fully meeting the requirements for proportionality, transparency and accountability set out in the 2010 Act. We also wish to see much better dialogue between SHR and the housing association sector about how the regulatory system is operating, the impact it is having on RSLs, and how SHR and the sector can work together to improve matters.
- 1.4 We have sent a copy of our Briefing to the Scottish Housing Regulator and to members of the Scottish Parliament's Infrastructure and Capital Investment Committee, the parliamentary committee to which SHR is accountable. We have also sent our Briefing to Scottish Ministers and MSPs, so that they can consider our proposals for improving the statutory framework for housing regulation through the current Housing (Scotland) Bill.

How the regulatory system is working in practice

2. SHR's purpose and the focus of its activities

- 2.1 SHR's statutory purpose is to protect the interests of tenants and those seeking to use social landlords' services. The regulatory approach SHR has developed does not always provide a direct line of sight to that objective or to the specific policy intentions stated by the Scottish Government when it introduced the 2010 Act to the Scottish Parliament²:

"In bringing forward provisions to modernise regulation, the Scottish Government has two aims: to place current and future tenants, homeless people and other service users at the heart of the new regime; and, consistent with its wider approach to scrutiny reform, to create a proportionate and risk based regime that encourages and supports social landlords to improve their performance."

- 2.2 In practice, SHR's regulatory approach for RSLs has focused much less on the outcomes they deliver for their tenants and service users than on governance and organisational/financial management issues. GWSF's analysis of RSL Regulation Plans³ for 2013/14 shows that:

¹ Meeting of the Infrastructure and Capital Investment Committee, 4 December 2014

² Housing (Scotland) Bill 2010, Policy Memorandum

³ Regulation Plans are published for RSLs with which SHR intends to have increased levels of engagement, based on its assessment of risks. 62 Regulation Plans proposing medium or high levels of SHR engagement have been published for 2013/14 (covering around 40% of RSLs).

- 50% of SHR's reasons for engagement with RSLs relate to financial or risk management issues;
- 33% of reasons for engagement relate to RSL governance and organisational management issues;
- Only 13% of reasons for engagement are directly related to services to tenants and others.

2.3 SHR's regulatory focus for local authority landlords is quite different. Audit Scotland's 2013/14 Assurance and Improvement Plans⁴ show that SHR's planned engagement with local authority landlords relates overwhelmingly to two issues, both with a direct impact on tenants and those seeking to use services:

- The performance of homelessness services (60% of the reasons for SHR engagement with local authorities stated in the published Plans);
- Performance in meeting the Scottish Housing Quality Standard by 2015 (26% of the reasons for SHR engagement stated in the published Plans).

2.4 Scrutiny of RSLs' governance and financial performance greatly exceeds scrutiny of these matters in other sectors and is disproportionate to the scale and organisational resources of many RSLs. SHR's approach does not appear to be justified in terms of the primary purpose of scrutiny, which the 2007 Crerar Report described as being "to provide an independent assurance that public money is being used properly and that services are well managed, safe and fit for purpose".⁵ In the same report, Crerar set out the need for scrutiny activity to have a clear public focus: "The needs and priorities of service users and the public must be the prime consideration in all external scrutiny. The public is the ultimate beneficiary of external scrutiny".

2.5 SHR has suggested that its scrutiny of RSLs' governance and financial management is needed to promote good service quality and outcomes, but there is little evidence to suggest that service failures by RSLs are widespread or significant:

- SHR recently reported to Parliament that it carried out 22 performance inquiries in 2012/13 on service quality or performance issues in RSLs and local authorities. SHR told Parliament that "Nothing has come out of those inquiries has been so significant that we have had to consider using our statutory powers."⁶ To date, SHR has not published a single inquiry report relating to service performance in individual RSLs.
- Our analysis of SHR's Regulation Plans for 2013/14 indicates that levels of regulatory engagement on service quality issues are relatively low for RSLs. This is illustrated in the following table:

⁴ Assurance and Improvement Plans are published by Audit Scotland and incorporate planned engagement by other scrutiny bodies, including SHR. Any proposed engagement or scrutiny relating to governance or financial management issues is led by Audit Scotland.

⁵ Report of the Independent review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland, 2007

⁶ SHR evidence to meeting of Infrastructure and Capital Investment Committee, 4 December 2013

Area for engagement stated in SHR Regulation Plans 2013/14	No. RSL Regulation Plans	% of all RSLs in Scotland
Submission/ review of SHQS information and/or Asset Management Strategy	15	9.2
Concerns about performance in carrying out repairs	11	6.7
Concerns about performance in sustaining new tenancies	9	5.5
Concerns about level of new lets being made to homeless people	6	3.7
Discussion of results of SHR on site inquiry on service quality performance, and monitoring of the RSL's post-inquiry action plan	2	1.2
Concerns about performance in carrying out gas safety inspections to tenanted houses	2	1.2
Submission/ review of information about review of rents and service charges	2	1.2
Concerns about overall quality of services provided	1	0.6

2.6 The statutory system for reporting on the Scottish Social Housing Charter is due to take full effect during 2014. We suggest that this should trigger a change in SHR's regulatory focus, so that its activities and use of resources are better aligned with the original policy intention of placing tenant interests at the heart of the housing regulation system.

3. SHR analysis and reporting of RSL governance

3.1 There is widespread concern among housing associations that SHR's recent methods of reporting on RSL governance are damaging the reputation of the sector.

3.2 SHR published five "Governance Matters" reports during 2013. These set out (in the form of anonymised case studies) reported governance failures in a number of individual RSLs, along with action points that SHR suggests are relevant to all RSLs. These reports have created an unjustified impression of widespread, systemic weaknesses in the governance of RSLs in Scotland:

- In SHR's recent evidence to Parliament, a member of the Infrastructure and Capital Investment Committee asked SHR whether the Governance Matters publications "... suggest that there is a weakness in RSLs as far as governance is concerned that must be addressed". SHR agreed with that statement, telling the Committee "... it would be fair to say that there is".⁷
- GWSF members have told us recently that funders are now citing concerns flowing from the Governance Matters reports in discussions about future funding for their organisations. The availability and terms of funding are already highly challenging. It is essential that SHR does not compound these difficulties by making generalised statements that are rooted in opinion rather than hard evidence or more transparent public reporting.

3.3 The Governance Matters reports provide evidence of governance problems in specific organisations in specific circumstances. But the impression that they may

⁷ Infrastructure and Capital Investment Committee, 4 December 2013 (col 2328)

be illustrative of widespread, systemic weaknesses throughout the sector must be challenged:

- Some of the material in the case studies reported on date back to the early 2000s, but this is not clear from the reports.
- The reports set out SHR's perspective, with little or no opportunity for the organisations reported on to comment on factual accuracy or interpretation. In that respect they differ substantially from public reporting for named organisations, where a scrutiny body would be accountable for ensuring factual accuracy and for meeting the Crerar principle on accountability, that "assessments and findings must be fair and capable of being defended".
- SHR's reliance on anonymised reporting and limited public reporting for named organisations mean that there is a gap in accountability and transparency. The Governance Matters series appears to be a substitute for public reporting on named organisations, rather than something that complements it. SHR published only one governance inquiry report for a named RSL in 2012 and it published no such reports in 2013. Moreover, SHR's Regulation Plans for 2013/14 indicate that it will engage with 12 RSLs (7% of all RSLs in Scotland) on specific governance concerns. This does not support the suggestion that serious governance weaknesses are commonplace.

3.4 Drawing on the Governance Matters case studies, SHR has published a series of action points for all RSLs to consider. There are 98 such action points to date, in addition to all of the other guidance SHR publishes on RSL governance, financial management and notifiable events. While SHR intends the action points to be helpful, their practical value is limited by their number and in some cases by their content. We suggest that joint working by SHR with housing associations and representative bodies would be beneficial, as a way of co-producing practical tools that will help RSLs of different types and sizes to address any general issues SHR is seeking to raise through the Governance Matters reports and action points.

4. Regulatory engagement and interventions

4.1 Regulatory engagement and interventions have been a cause of tension between SHR and some individual RSLs. SHR has expressed concerns in its Governance Matters reports about a perceived lack of co-operation on the part of some RSLs. Equally, some housing associations subject to regulatory engagement and interventions have expressed concerns to us (and to SFHA) about SHR's approach.

4.2 The main issues housing associations have raised with GWSF have included:

- SHR's reasons for intervention action;
- The proportionality of action taken;
- SHR's manner of communicating with RSL governing bodies and senior officers;
- A perceived reluctance on the part of SHR to provide clear, written information about regulatory concerns, requirements and actions;
- The suggestion that regulatory involvement has in some cases slowed down or impaired efforts to tackle problem issues in a decisive manner; and
- The absence of any means to raise and resolve differences of view.

Underpinning all of this is a sense of uncertainty about SHR's role and powers in cases where it is not using formal statutory inquiry or intervention powers.

- 4.3 GWSF has no wish (or basis for) second-guessing SHR's judgements in individual cases. Instead, our concerns relate to:
- The processes in place and how these are managed;
 - The apparent absence of clear ground rules for the kind of engagement and intervention approach typically being used by SHR; and
 - The absence of review or appeals processes available to RSLs if they believe that regulatory actions are disproportionate or inappropriate.
- 4.4 The key to understanding these issues lies in the fact that SHR relies heavily on "behind the scenes" methods of engagement and intervention rather than the more transparent and accountable processes set out in the 2010 Act (for example, published inquiry reports for named organisations and the formal statutory intervention powers described in Part 5 of the 2010 Act). Since April 2012, SHR has not made any use of its formal intervention powers and it has published only one inquiry report for a named RSL. Despite this, SHR is intervening to a significant degree in the management of many RSLs, through its support and intervention team.
- 4.5 If regulatory engagement and intervention continue to rely on non-statutory methods, a more transparent and accountable framework is even more essential. This should describe more clearly triggers for regulatory engagement; how engagement will be managed and communicated; the respective roles and responsibilities of SHR and RSLs; how SHR will report on regulatory engagement; and how housing associations can seek redress if they have concerns about the reasons for non-statutory regulatory engagement or how it is being managed.
- 4.6 While some RSLs have expressed concerns about regulatory action being too heavy-handed, SHR's effectiveness in identifying and acting upon serious problems in some RSLs is also an important issue.
- 4.7 For example, SHR has spoken publicly on a number of occasions about its role in managing three unnamed RSLs out of near insolvency during 2012. Information about these cases has focused on what the RSLs did wrong, but consideration of regulatory action is equally important. SHR had a long-standing involvement with the three RSLs concerned (in one case, for 4 years from 2008 to 2012; in another case, for two years from 2010 to 2012). It would appear that regulatory interventions did not – for whatever reason - avert or provide early warning of the financial crises that subsequently occurred. SHR's reliance on behind the scenes intervention methods rather than formal statutory powers means that there is little transparency about its regulatory interventions in such cases, and there is a resulting lack of accountability for ensuring that serious problem cases are identified and acted upon in a manner that is timely, effective and decisive.

5. Statutory checks and balances

- 5.1 The Housing (Scotland) Act sets a number of statutory requirements which we do not think are fully reflected in SHR's regulatory practice since 2012. These include the following obligations placed on SHR by the 2010 Act:
- To perform its functions in a way that is proportionate, accountable and transparent and which is targeted only where action is needed (section 3 of the 2010 Act);

- To perform its functions in a manner that takes account of the different types of social landlord it regulates, based on legal status and governance arrangements, property owned or managed, annual turnover and number of employees (section 4 of the Act);
 - To consult stakeholder groups, including social landlords and their representative bodies, on codes of practice relating to SHR's powers to carry out inquiries (section 51 of the 2010 Act) and to exercise statutory intervention powers (section 54 of the 54 of the Act).
- 5.2 In relation to the requirement for proportionality described in the 2010 Act, we have already articulated concerns about SHR's general focus on RSL organisational management issues rather than service quality and outcomes for tenants. Based on comments from our members, there appears to be significant dissatisfaction about the proportionality of SHR's regulatory engagement with individual RSLs on specific issues. Some Housing Associations have told us they are reluctant to speak publicly about these issues or to raise them directly with SHR. This stems from the fact that SHR does not operate any review or appeals processes, and from the perception that raising concerns with SHR will be interpreted as a failure to engage or co-operate. This is an unhealthy situation.
- 5.3 SHR's statutory remit is to regulate individual social landlords rather than the sector as a whole. However, SHR's published outputs relate overwhelmingly to sector-wide issues rather than to the performance of individual landlords. Since April 2012, SHR has published only three performance reports relating to named individual organisations (two inquiry reports relating to local authority housing services, and one inquiry report relating to governance concerns about an RSL). This diminishes accountability and transparency.
- 5.4 SHR generally has higher levels of engagement with large RSLs categorised as being of systemic importance. It has not adjusted regulatory requirements or processes for smaller landlords, which we think is the clear intent of sections 3 and 4 of the 2010 Act. This is a significant issue for many GWSF members, because of their scale and organisational resources. The median number of office-based staff employed by RSLs in Scotland is 20, and a quarter of Scottish RSLs employ fewer than 10 office-based staff. Tailoring regulatory requirements for smaller landlords is essential, to prevent scarce organisational resources being diverted or overloaded in small housing associations with lean staffing structures.
- 5.5 SHR has not published the regulatory codes of conduct required by sections 51 and 54 of the 2010 Act. Instead, there are high-level descriptions in the SHR Regulatory Framework of SHR's general approach to carrying out inquiries and using statutory intervention powers. Since SHR makes virtually no use of formal inquiry procedures or statutory intervention powers to address concerns about governance or other organisational matters within RSLs, there is a resulting lack of transparency. This could be addressed by SHR developing a consolidated code of regulatory practice, to establish clearer procedures for non-statutory engagement and intervention, as well as the statutory inquiry and intervention powers described in the 2010 Act.

6. Consulting and involving housing associations

- 6.1 The Housing (Scotland) Act 2010 places SHR under an obligation to consult with social landlords and their representative bodies on a range of specific matters. These matters include regulatory guidance on the Scottish Social Housing Charter and on RSL governance and financial management; and the codes of regulatory

guidance on inquiries and interventions described in sections 51 and 54 of the 2010 Act.

- 6.2 These arrangements are not operating effectively at present. Consultation with housing associations and representative bodies has been limited on regulatory guidance and publications that impact directly on the sector, with the notable exception of the framework for reporting on the Charter. Where SFHA undertook to develop a model code of conduct for RSL governing bodies, the process became protracted due to SHR effectively demanding rights of approval and editorial control over a code produced by the sector. In addition there is no structured framework for discussing how the overall regulatory framework is operating, or how SHR and the sector can work together more effectively to promote good practice for the benefit of RSLs and their tenants.
- 6.3 Formal structures to promote meaningful involvement, consultation and joint working are in our view badly needed, with clear terms of reference and protocols on how consultation and involvement arrangements should operate.

7. Proposals for change and improvement

Non-legislative solutions

- 7.1 There is considerable scope to improve how the housing regulation system is working within the existing statutory framework set by the 2010 Act, although this will depend on SHR's willingness to make the kind of changes housing associations want to see.
- 7.2 We suggest that improvements can be made in the following areas:
- SHR should review the scope and focus of its current regulatory approach for RSLs, to better reflect its core purpose (proportionate regulation of individual social landlords, focused on outcomes for service users and risks that impact directly on tenants' interests). This should also reflect SHR's specific obligations under section 3 of the Housing (Scotland) Act 2010: the requirement that the performance of SHR's functions should be proportionate, transparent and accountable and targeted only where action is needed.
 - SHR should tailor its regulatory requirements and processes for different types and sizes of RSLs, to better reflect the diverse nature of Scottish RSLs and its obligations under section 4 of the 2010 Act.
 - SHR should review its approach to reporting on RSL governance issues. This should include more public reporting for named RSLs; correcting any impression that problems in individual RSLs are indicative of sector-wide weaknesses; and more co-operation and joint working between SHR and the sector to promote good practice.
 - SHR should create more formal structures and protocols for consultation and involvement by RSLs and their representative bodies.
 - SHR should meet its statutory duty to publish, following consultation, the codes of regulatory practice specified in sections 51 and 54 of the 2010 Act. Beyond this, SHR should consider producing a consolidated code of regulatory practice that addresses all aspects of its regulatory practice, to include non-statutory engagement and interventions as well as use of its inquiry and statutory intervention powers.
 - SHR should introduce formal mechanisms enabling RSLs to seek reviews of its decisions or regulatory actions.

- SHR and the RSL sector should work together more closely on issues that relate to the sector as a whole (as distinct from SHR's regulatory engagement with individual RSLs). SHR and the sector have a strong shared interest in developing and promoting practical tools that will help RSLs to improve standards and manage risks. We suggest that work on sector-wide good practice issues is best addressed on the basis of co-production and partnership working.

Accountability to Parliament

- 7.3 SHR's accountability to Parliament is a key part of the Housing (Scotland) Act 2010. It is inevitable that SHR's views about the housing sector as a whole will feature prominently in its evidence to the Infrastructure and Capital Investment Committee, but there is a risk in such circumstances that this will deflect from what we believe should be the key focus of the SHR's accountability to Parliament, namely holding SHR to account for the performance of its regulatory functions and for its performance in meeting its statutory obligations under the 2010 Act.
- 7.4 In the immediate future we believe that the issues set out in this paper are worthy of further scrutiny, namely:
- Whether SHR's current regulatory approach is sufficiently focused on service quality and outcomes for tenants and service users
 - The evidence underpinning the views SHR has expressed to the Committee about general weaknesses in RSL governance and the impact those views are having on the RSL sector
 - The limited extent of public reporting by SHR in relation to individual, named organisations, in carrying out its functions
 - The transparency and accountability of SHR's non-statutory methods of engagement and intervention in the management of RSLs, and the effectiveness of its interventions in serious problem cases
 - The effectiveness of SHR's current methods for consulting and involving RSLs on regulatory guidance and the overall operation of the housing regulation framework.

Improvements to the statutory framework for housing regulation, through the current Housing (Scotland) Bill

- 7.5 Most of the improvements GWSF wishes to see can be achieved within the existing statutory framework set out in the Housing (Scotland) Act 2010, subject to the willingness of the Scottish Housing Regulator to adjust its current approach. We also believe that statutory changes are required in some areas, and that these should be considered in the context of the current Housing (Scotland) Bill. Our proposals in this regard involve selective enhancements to the 2010 Act rather than a fundamental review of it.
- 7.6 Our proposals for legislative change are set out in GWSF's response to the call for views on the Housing Bill issued by the Infrastructure and Capital Investment Committee. These proposals, as they relate to regulation, may be summarised as follows:
- **The Bill should establish a requirement for SHR to publish, following consultation, a consolidated code of regulatory practice that addresses all of its methods for intervening in the affairs of social landlords (i.e. including regulatory engagement and interventions that are not publicly**

reported and those that do not involve the use of statutory intervention powers).

Our proposal recognises that non-statutory engagement and intervention methods (rather than published inquiry reports and use of statutory intervention powers) have become established as SHR's main way of working since its creation in 2012. We do not think this was envisaged during the passage of the 2010 Act.

- **The Bill should establish a statutory right for social landlords to request a review by the SHR Board of regulatory decisions or actions. It should also establish a statutory appeals process, which allows social landlords to challenge SHR's regulatory decisions or actions.**

Our proposal is based on the fact that the Housing (Scotland) Act 2010 makes no provision for reviews or appeals and the only redress available to social landlords is to seek judicial review. This is a significant weakness in the existing legislation.

- **The Bill should amend section 5 of the Housing (Scotland) Act 2010 by adding RSL representative bodies to the list of bodies that SHR is required to consult and involve in performing its functions.**

Our proposal reflects the fact that SHR's current arrangements for consultation and involvement are not operating satisfactorily. Statutory provision would provide a platform for making the changes that are needed.



Glasgow and West of Scotland
Forum of Housing Associations

**GWSF Briefing: Registered Social Landlord Group Structures in
Scotland**

February 2014

Summary

Since 2010, there has been rapid growth of group structures consisting of two or more RSLs. Group structure registered social landlords (RSLs) now house almost one-third of all RSL tenants in Scotland, with further group structure proposals in the pipeline. These changes have huge significance for tenants, the RSL sector and the Scottish economy.

Key Concerns

- Expansion by very large RSLs north and south of the border is running unchecked.
- Tenants affected by group structure proposals have no rights of consent through tenant ballots, unlike in stock transfers and other landlord restructuring scenarios.
- Local and specialist housing associations are increasingly becoming takeover targets. Some RSL group structure arrangements are taking financial resources and jobs out of fragile local economies and the Scottish economy as a whole.
- Regulatory guidance and practice on group structures need to be strengthened, to ensure that the Scottish Housing Regulator (SHR) is able to meet its core purpose of safeguarding tenants' interest and so that public reporting of group structure proposals is improved.

Legislative changes needed, through the current Housing (Scotland) Bill

- Tenant authorisation/ballot requirements should be extended to group structure proposals.

Non-legislative changes needed

- The Scottish Government's housing and regeneration policies should champion the role of locally focused and accountable social landlords, such as local authorities and place-based housing associations and co-operatives. The Government should prioritise the role these organisations play in the delivery of its policies and programmes, to maximise the economic benefits for local communities and economies.
- Increased parliamentary scrutiny of RSL restructuring activities is desirable, due to the scale of change taking place and the high impact on large numbers of tenants in Scotland.
- SHR should strengthen its regulatory guidance to ensure that RSLs are required to act transparently when entering into group structures and that they are accountable to tenants about group structure proposals and their future operation.
- SHR should strengthen its approach to assessing group structure proposals, by giving full consideration to the prospective group parent as well as to the RSL seeking to become a subsidiary.
- SHR's Board should assume responsibility for approving statutory consents for group structure proposals. SHR should also improve public reporting, by publishing assessments of how restructuring proposals will benefit tenants and service users, and by reporting publicly on the achievement of these benefits after group structure changes take effect.
- SHR should meet its existing statutory obligation to consult on and publish a code of practice on regulatory intervention. This should address SHR's role in decisions about group structure partners, in cases where it is already intervening in the affairs of an RSL, either through the use of statutory powers or non-statutory engagement and intervention.

Introduction

- 1) Since 2010, there has been a rapid growth of RSL group structures that consist of a parent RSL and one or more subsidiary RSLs. This raises major issues for tenants and for the future of housing associations and co-operatives in Scotland, but there is currently very little information in the public domain to explain or analyse the changes that are taking place.
- 2) This GWSF Briefing seeks to address that gap. The Briefing includes a series of recommendations about how housing legislation, policy and regulation all need to be strengthened in response to the growth of group structures.

Restructuring within the RSL sector in Scotland

- 3) Restructuring in the RSL sector is not new, but the current scale of restructuring activity is unprecedented.
 - 16% of Scottish RSLs (owning around **90,000 houses** and housing around **one third of all RSL tenants in Scotland**) are now part of, or are in the process of joining, a group structure containing more than one RSL;
 - An increasing number of Scottish RSLs are becoming the subsidiaries of **much larger national/regional or UK-wide RSLs**.

A detailed analysis of which Scottish RSL's are a part of a group structure is available.

- 4) In the past, RSL restructuring was typically based on transfers of engagements (merging the assets and liabilities of two RSLs in a single organisation) rather than group structures, and partnerships were more likely to involve RSLs working in neighbouring communities or serving similar client groups.
- 5) The Housing (Scotland) Act 2010 sets out the statutory framework for regulating RSL restructuring through mergers and transfers of engagements, including provision for tenant ballots. This framework now needs to be updated, because transfers of engagements are no longer a significant factor in RSL restructuring. Instead, group structure solutions are now the norm for RSL restructuring, and these are not addressed specifically in the 2010 Act.
- 6) Group structures involving more than one RSL are based on:
 - One RSL acting as group parent and having constitutional control over other RSLs in the group;
 - Subsidiary RSLs retaining their own legal identity and housing stock, but having the legal status of subsidiaries of the parent RSL.

These are not matters of administrative detail. To make a direct comparison with the present Scottish constitutional debate, joining a group structure as a subsidiary is akin to an RSL giving up sovereignty in order to become a devolved administration, with the parent organisation always having ultimate control over the subsidiary's affairs.

- 7) The drivers for RSL group structures are sometimes positive. For example, a wish to improve or expand services for tenants or to help keep rents affordable in the face of

financial challenges. Achieving these benefits in practice is by no means assured and depends entirely on the specific circumstances of the RSLs involved and how they plan to work together. For example:

- Sharing staff or services within a group structure can increase as well as reduce management costs for a smaller RSL joining a group structure as a subsidiary. The financial benefits may in some cases be greater for the prospective parent, if it is a large organisation with a top-heavy management structure and high overheads which it can offset by selling management and other services to subsidiary RSLs.
- A smaller RSL joining a group structure may be able to access private finance sourced by the parent RSL. But on lending within a group structure must be on commercial terms; a smaller RSL will not receive preferential terms because it is part of a group structure. Nor does it follow that a larger parent RSL will necessarily be able to access funding more easily or on better terms than much smaller RSLs.

8) RSLs that have entered into group structure arrangements are understandably keen to emphasise the benefits they think this might bring for tenants. But the current growth of group structures in Scotland is also being driven by wider, more worrying factors:

- In the last 2-3 years, we have seen a number of very large Scottish and UK-wide RSLs pursue business growth strategies that are designed to expand their presence in different parts of Scotland. The main players have included The Wheatley Group (based in Glasgow), The Riverside Group (headquartered in Liverpool), The Sanctuary Group (headquartered in Worcester) and the Gentoo Group (based in Sunderland).
- Some Scottish RSLs have allowed their future financial sustainability to be compromised, because of the scale of new housebuilding they have chosen to carry out at sub-marginal rates of Government subsidy. This has resulted in substantial increases in debt levels and may be a key driver for some group structure arrangements. Other RSLs, originally set up as local vehicles for Scottish Homes or New Town Development Corporation housing transfers, have not had sufficient provision in their business plans to invest in improving the quality of their housing stock.
- Where RSLs get into financial or other difficulties, and supervision by the Scottish Housing Regulator takes place, the outcome is increasingly for the RSL in difficulty to join a group structure.

In some cases, this has led to a group structure involving neighbouring RSLs (for example, Cloch and Oak Tree Housing Associations in Inverclyde).

More frequently, the resulting partnerships have been with much larger organisations that have no connection to the RSL's local community. Recent examples include Tenants First Housing Co-operative in Grampian, which is now a subsidiary of the UK-wide Sanctuary Group; and Cordale Housing Association, a community-based housing association in West Dunbartonshire which is in the process of becoming a subsidiary of Caledonia Housing Association, an RSL that has no connection with West Dunbartonshire and whose main housing stock areas are in Perth and Kinross, Dundee and Angus.

- 9) There are some important lessons to be learned from elsewhere in the UK. Firstly, patterns of stock ownership among many of the largest UK RSLs are highly dispersed:
- For example, The Riverside Group (now the parent of Irvine Housing Association in North Ayrshire and seeking further growth in other parts of Scotland) owns social rented housing in more than 150 local authority areas in England. Its social housing stock is located in such diverse places as Liverpool, Leicester, East Anglia, Kent, London and Milton Keynes.
 - The Riverside Group is a major landlord in several local authorities in the north of England. But it is a minor player in the vast majority of areas where it has stock: it has fewer than 100 houses for low cost rent in 120 of the local authorities where it owns such housing.¹

We are already seeing some group structure relationships in Scotland that have no apparent strategic rationale, other than a desire for growth on the part of the parent RSL. Based on the English experience, this will lead to more landlords providing tenant services through call centres or agency services, rather than having a physical presence for service delivery in their communities. This will also reduce the ability of local authorities to achieve effective partnerships with RSLs in their areas.

- 10) A further important lesson from England is that RSLs joining group structures as subsidiaries have no long-term guarantees about retaining their own separate legal identity. The early 2000s saw many smaller or locally based English housing associations becoming subsidiaries of much larger organisations. By the end of the decade, many parent RSLs in England were seeking to “collapse” their group structures for reasons of simplification, with smaller group members fully absorbed into the parent organisation rather than maintaining their own legal identity.
- 11) To provide some illustration of the collapsing of group structures in England, the Tenant Services Authority reported in 2010 that Sanctuary Housing Association was the parent of 8 other English RSLs which owned more than 22,000 houses between them. By 2013, it appears that only one of the registered subsidiaries (owning less than 2,000 houses) remained as an RSL in its own right.² Sanctuary is just one of a number of group parents in England that have reportedly collapsed their group structures in this manner.

Action needed to provide a clearer strategic and policy context

- 12) The rapid growth of RSL group structure activity is divorced from any rational strategic or policy framework for the future structure of the social housing sector in Scotland. The Scottish Government has stated the following position:

“The Scottish Government's vision for the future of housing associations and housing co-operatives and all other registered social landlords (RSLs), is focused on the outcomes these bodies can achieve rather than on their

¹ Statistical Data Return 2012/13, Homes and Communities Agency. The same data source shows a similar pattern of highly dispersed stock ownership for other UK-based RSLs now operating in Scotland (Places for People, Sanctuary, Home)

² Data Sources: Tenant Services Authority Regulatory Judgement for Sanctuary Housing Association Ltd (December 2010) and Homes & Communities Agency Statistical Data Return 2012/13

structure as a sector... The Government does not believe that it could or should have a particular vision of what that structure might be in the future; rather it should encourage, and work with, all parts of the sector to achieve good housing and other outcomes for communities across the country”.³

An unintended consequence of this laissez-faire position is that it has created an environment in which very large Scottish and UK-wide RSLs can pursue their ambitions for expansion.

- 13) Scottish RSLs are not looking to the Government to play a detailed role in prescribing what the structure of the RSL sector should be. But the current position is untenable if the Government wishes to have an effective influence over how its own policies are delivered and if it also wishes to promote rational, effective delivery partnerships between local authorities and RSLs.
- 14) It is essential that the Scottish Government and leaders from across the political spectrum should now take a more decisive position that actively supports and promotes the key delivery role of Scottish local authorities and of Scotland’s extensive network of local, place-based housing associations and co-operatives.
- 15) Within the Scottish housing system, democratic accountability and a focus on local communities are clear-cut matters for local authorities, community-controlled housing associations and other place-based RSLs with open membership policies and “one member, one vote” constitutions. Given this, Scotland’s politicians should champion the role of locally focused and accountable social landlords and give them real priority as delivery partners of choice for housing policy and programmes.
- 16) There are strong economic arguments for adopting this approach. Social landlords with a local focus and accountability (local authorities and local housing associations) are major contributors to sustaining local economies. By contrast, some of the types of RSL group structures that are now emerging will dilute these economic benefits:
 - RSL subsidiaries within a group structure will frequently be required to arrange borrowing and to buy “group services” from the parent (for example in relation to corporate services, tenant call centres, housing development services, etc);
 - Economic resources (rental income, loan repayments and jobs) will shift from local economies to where the parent operates – whether that is another part of Scotland, or elsewhere in the UK.

The economic impacts of group structure activity are not being quantified far less considered or debated at present. In our view, economic impacts should be central to government thinking about its support for housing in Scotland.

Tenant consent for RSL group structures The Housing (Scotland) Bill

- 17) Group structures involve fundamental changes to an RSL’s constitutional control and its future arrangements for delivering tenant services. But because there is no

³ Scottish Government response to the report of the Scottish Parliament’s Infrastructure and Capital Investment Committee on the draft Scottish Budget for 2013/14 (January 2013)

change of landlord, the Housing (Scotland) Act 2010 provisions for tenant consultation and ballots in cases of RSL restructuring do not apply to group structure proposals. Instead, the only statutory controls are that the Scottish Housing Regulator must give its consent to changes to an RSL's constitution. **Appendix 1** sets out in detail the statutory provisions and their limitations.

- 18) The current Housing (Scotland) Bill provides an opportunity to address these issues directly. The miscellaneous provisions in the Bill propose changes to tenant consultation requirements in cases where an RSL is at risk of possible insolvency⁴, the rationale being to respond to circumstances that were not foreseen at the time of the 2010 Act. We suggest that the same principle should apply to tenant consultation and consent in relation to group structure proposals. The 2010 Act did not make specific provision for these matters and this omission is now significant because of the growth of group structure arrangements since 2010 and the need to provide appropriate safeguards for tenants' interests.
- 19) We suggest that the Bill could be revised as follows:
- Amending Parts 8 and 10 of the Housing (Scotland) Act 2010, to expand the statutory definition of restructuring to include the formation or joining of a group structure involving more than one RSL;
 - Extending the tenant authorisation provisions in Part 10 of the 2010 Act (including the provisions for tenant ballots) to all restructuring cases falling within the expanded definition, regardless of whether the restructuring proposal would result in a change of landlord.⁵
- 20) There is a strong case for making these statutory changes:
- Restructuring via group structures is happening on a substantial scale in the Scottish RSL sector and has a significant impact on the future interests of tenants and service users. It is unacceptable that tenants have **no statutory rights to be consulted or to give their consent** to such significant changes, as would be the case if a restructuring proposal resulted in a change of landlord.
 - When an RSL joins a group structure, it relinquishes sovereignty and ultimate control over its affairs to a third party in return for whatever benefits the group structure arrangement is intended to provide. This has **long-term consequences for tenants**, because a parent RSL will typically have direct influence (and potentially, control) over matters such as a subsidiary RSL's business plan, rent policy, housing investment policy, funding costs and service delivery structures and locations.

Appendix 2 sets out extracts from current SHR guidance on RSL group structures. The guidance extracts show the extent to which an RSL cedes

⁴ In exceptional cases where an RSL is threatened with insolvency (section 79 of the Bill).

⁵ Our proposal for tenant ballots would not apply to cases where exceptional regulatory action is needed. Section 79 of the current Housing (Scotland) Bill proposes that SHR would not be obliged to consult tenants before using its exceptional statutory powers to direct a transfer of an RSL's assets, if the RSL was potentially insolvent. We would expect the same principle to apply to any tenant ballot requirements introduced for group structure proposals, ie ballots would be the norm but would not be required where an RSL was potentially insolvent and a statutory inquiry by SHR resulted in emergency action to avert the potential insolvency.

ultimate control over its affairs, if it decides to become a subsidiary within a group structure and if the parent RSL wishes to exercise its constitutional control over a subsidiary RSL. As we have already shown, this could include the risk that the subsidiary RSL will ultimately lose its separate legal identity at some point in the future.

- An RSL seeking to join a group structure needs only to **obtain the agreement of its shareholding members, not its tenants and rent-payers**. This can create a substantial democratic deficit.

For example, the decision to create The Wheatley Group and for Glasgow Housing Association to become a subsidiary of Wheatley was made by GHA's board (under GHA's constitution, its board are the only shareholding members). More than 40,000 GHA tenants had no say in the decision, nor will Wheatley's Board be directly accountable to GHA tenants for its current plans to expand the Group's activities, even though the Group's main assets are tenants' homes.

While the democratic deficit is most pronounced in the case of The Wheatley Group, it also applies in other cases and is largely hidden from public view. RSLs are under no obligation to publish a record of how many shareholders take part in votes about joining a group structure, or how the number voting relates to the total number of shareholders or the total number of tenants affected.

- There are strong concerns among many Scottish housing associations that they are becoming **sitting targets for takeovers** by very large RSLs.

In making statutory provision for tenant consent to mergers and transfers of engagements during the passage of the Housing (Scotland) Act 2010, the Minister for Housing and Communities told Parliament that “...**Such a safeguard is important not only for tenants but for landlords as the need to secure tenant support will make it much harder for another landlord to contemplate a hostile takeover bid.** (Col 3491)”.⁶ The same thinking and safeguards now need to be applied to restructuring through group structures.

SHR's regulatory requirements and decision-making framework for RSL group structures

- 21) Changes to legislation should be accompanied by improvements to SHR's regulatory requirements and decision-making processes for RSL group structures. Currently, these are set out in SHR's Regulatory Framework and in a Regulatory Guidance Note published in April 2012.
- 22) SHR has recently announced that it has commissioned external research to inform changes to its regulatory guidance on group structures. We look forward to having the opportunity to discuss the research findings when these are published by SHR.
- 23) We would suggest three main areas where current regulatory guidance and practice could be strengthened to improve transparency and accountability and to better safeguard the interest of tenants.

⁶ SPICe Briefing: Housing (Scotland) Bill as amended at Stage 2 (October 2010)

a) How group structure partners are identified/selected

- 24) Some important aspects of group structure activity lack transparency and are not subject to any clear rules on ethical practice.
- Some GWSF members have told us recently that they have been contacted by consultants acting for other RSLs, to test potential interest in group structure discussions. There is also a degree of ambulance chasing, to target RSLs suspected of being in difficulty.
 - Group structure discussions can create significant potential for conflicts of interest (for example, in relation to senior staff salary increases/bonuses and enhancement of pension entitlements if an RSL joins a group structure).
- 25) Addressing these issues does not require changes in legislation. Through changes to its regulatory guidance and practice, SHR could ensure that:
- RSLs are required to adopt a transparent and accountable process for identifying potential group structure partners (whether on a voluntary basis or in cases where a group structure forms part of a rescue plan for an RSL in difficulty);
 - RSLs are required to provide their tenants with a proper level of information about the process they have followed, and about the criteria applied and options considered, when selecting a group structure partner;
 - SHR itself scrutinises how potential conflicts of interest have been managed in the development of group structure proposals, and ensures that RSLs are accountable to tenants for any material enhancements to senior staff remuneration that have occurred, directly as a result of group structure proposals.
- 26) Greater transparency would also be beneficial with regard to SHR's own role in cases where rescue partners are being sought. This can be addressed under existing legislation which requires SHR to consult on and publish a code of practice on regulatory intervention.⁷ Such a code of practice should make clear that SHR has no role (formal or otherwise) in recommending potential group structure partners, unless it is using the statutory intervention powers set out in the 2010 Act.

b) How group structure proposals are assessed, to safeguard tenants' interests

- 27) Current regulatory guidance is focused overwhelmingly on the business case put forward by **the RSL that is seeking to join a group structure**. It is much less clear how **the prospective parent RSL** is assessed by SHR. For example, in relation to:
- The prospective parent RSL's risk profile
 - The prospective RSL's reasons for seeking to expand its structure to areas where it has no existing role and with which it has no strategic connection
 - The impact the group structure proposal may have on the parent RSL's own tenants, and their views on the proposal.

⁷ Section 54 of the Housing (Scotland) Act 2010

- 28) These issues need to be embedded in SHR's approach, since its overall purpose is to safeguard tenants' interests. A number of the very large RSLs seeking to expand through group structures are complex organisations whose business models involve significant risks that potentially impact on the future interests of tenants. For example, if the prospective parent has multiple non-registered subsidiaries that operate for commercial purposes; or if the prospective parent uses complex financial instruments or higher-risk types of borrowing that may expose their subsidiaries to much higher levels of risk if there is on lending within the group.
- 29) Greater clarity is also needed about SHR's role in assessing impact on the interests of the prospective parent RSL's tenants. For example, does SHR expect prospective parent RSLs to meet financial neutrality conditions? If not, are the parent RSL's tenants subsidising direct financial incentives to RSLs joining their landlord's group structure?
- 30) Some group structure proposals involve parent organisations that are regulated by the Homes and Communities Agency (HCA), the housing regulator for registered housing providers in England, rather than by SHR. It is not clear whether SHR relies on information provided by the HCA when assessing group structures involving an English-based parent, or whether it carries out its own independent assessment of the motivations, risk profiles or business plans of the RSLs concerned. It is important that there should be transparency on these matters, since SHR's statutory purpose is to safeguard the interests of tenants and service users in Scotland. SHR has still to publish details of its joint working protocols with the HCA, and this would seem to be a key area for action in making changes to SHR's guidance on group structures.

c) Transparency and accountability for regulatory decisions

- 31) SHR does not currently publish any information about the specific benefits it expects RSL group structure proposals to deliver for tenants, when giving its consent to the proposals. Similarly, it does not publish any information about the extent to which those benefits for tenants are subsequently achieved. As such, there is a significant gap in public reporting of regulatory decisions on group structures. This does not sit comfortably with SHR's statutory purpose of safeguarding tenants' interests or with its overarching statutory obligation to perform its functions in a transparent and accountable manner.
- 32) The public minutes of SHR Board meetings indicate that with one exception (The Wheatley Group), the SHR Board has not been responsible for approving regulatory consents for constitutional changes relating to group structures.⁸ It is in our view essential that SHR's Board should be directly responsible for group structure consents:
- Group structure proposals have a direct and significant impact on tenants' interests. SHR's statutory purpose is to safeguard those interests.
 - Statutory consent to group structure proposals should not be classed as routine operational decisions that SHR's Board should delegate to officers.

⁸ SHR Board meeting minutes suggest that an exception was made in the case of Wheatley because its registration as a non asset owning RSL was deemed to be a policy decision.

- SHR's Board rather than its executive officers are accountable to Parliament for the performance of its regulatory functions. It is right that SHR's own internal processes should reflect that accountability relationship where major decisions affecting large numbers of tenants are concerned.

**Glasgow and West of Scotland Forum of Housing Associations
February 2014**

Appendix 1

Current Legislation and Regulatory Guidance relating to RSL Restructuring

1. Current Provisions on RSL Restructuring: Housing (Scotland) Act 2010

Part 8 of the 2010 Act, sections 96 to 104 sets out statutory requirements for regulatory consents where an RSL is seeking to restructure:

- “Restructure” in this context includes transfers of engagements, amalgamations and voluntary winding up/dissolution.
- Section 96(3) says SHR shall not give consent to restructuring proposals “... unless satisfied that (the RSL) has consulted its tenants about the matter for which consent is needed”.
- Section 97 confirms that transfers of engagements, amalgamations etc require the RSL seeking to restructure to pass a special resolution (in practice, an affirmative vote by its shareholding members) and to have this approved by SHR and registered by the Financial Conduct Authority.
- The RSL seeking to restructure needs to show it has consulted with tenants in order to obtain SHR consent. If a restructuring proposal would result in a change of landlord, Part 10 of the 2010 Act applies (“Special procedure for disposals and restructuring resulting in change of landlord”)

The main features of the special procedure set out in Part 10 of the 2010 Act are that:

- There is a statutory requirement for enhanced tenant consultation, with a range of specific requirements set out in section 115 (eg issue of a formal notice by the RSL, provision of information about the consequences of the change proposed, opportunities for tenants to make representations about the changes proposed).
- SHR’s consent to the disposal is subject to “tenant authorisation”. Tenant authorisation (i.e. consent) may take the form of a tenant ballot (section 118) or the written agreement of the tenants affected (section 119).

Part 8 Sections 96 to 104 of the 2010 Act and the special procedure for tenant authorisation set out in Part 10 of the Act **do not apply** to circumstances where an RSL is seeking SHR approval to join a group structure as the subsidiary of another RSL.

Instead:

- **Part 8, section 93 of the 2010 Act** requires SHR to give its consent to material changes to an RSL’s constitution (becoming a subsidiary of another RSL would require this).

There are **no provisions in the 2010 Act** that require tenant consent if an RSL is seeking to become the subsidiary of another RSL.

2. Regulatory Policy and Procedures

Regulatory policy and procedures about RSL restructuring proposals are set out in the following documents published by SHR:

- SHR Regulatory Framework: [Consent to constitutional and organisational change and disposals](#) (March 2012)
- SHR Regulatory Guidance: [Organisational Changes](#) (April 2012)

- SHR Regulatory Guidance: [Group Structures and Constitutional Partnerships](#) (April 2012)
- SHR Regulatory Guidance: [Requirements for Tenant Ballot or Written Authorisation](#)

Where a change of landlord would be involved, the Regulatory Framework states that a tenant ballot will normally be required, unless a landlord makes a convincing case for why another form of written consent by tenants should be sought.

The separate SHR guidance on organisational change proposals and group structure proposals replicate the 2010 Act in applying **different thresholds for tenants' rights and tenant consent**, depending on whether restructuring proposals will result in a change of landlord.

If there is no change of landlord, SHR's guidance on Group Structures and Constitutional Partnerships confirms that there will be a **lower threshold in terms of tenant information and consent**:

"If the proposal does not involve a change of landlord we will expect tenants to be consulted about the proposal. We will wish to see a description of action taken to inform and consult tenants and any Registered Tenants Organisations about the proposals, and consultation outcomes. We may require the RSL to ensure tenants have access to independent advice funded by the RSL. RSLs should have a clear communications/consultation strategy that allows sufficient time for meaningful tenant consultation on the RSL's proposals". **Regulatory Guidance on Group Structures and Constitutional Partnerships, Appendix 1**

Appendix 2

Scottish Housing Regulator Guidance on RSL Group Structures

The following extracts from SHR's Regulatory Guidance (April 2012) illustrate the reduction independent decision-making capacity that will typically be involved if an RSL joins a group structure as the subsidiary of another RSL:

"We place a strong emphasis on the role the parent body plays within the group structure, for example by determining the group's strategy and objectives, monitoring the performance of subsidiaries, and taking action where objectives and standards are not being met" (para 14);

"The constitutions of group members must enable the parent to exercise and to take corrective action, where required" (para 20);

"Within group structures, the parent must have constitutional control over its subsidiaries... Constitutional control by the parent should normally be exercised through:

- *Powers to control the majority of votes at a general meeting of a subsidiary; and /or,*
- *Powers to appoint and remove a majority of the subsidiary's governing body" (paras 24-25)*

"Parent RSLs should exercise high-level control, by monitoring the activities and performance of their subsidiaries. Parent RSLs should take timely and effective action if their subsidiaries do not operate within approved limits or fail to meet agreed standards of performance." (para 27)

*"We require that if a subsidiary is an RSL, its governing body should as a minimum have sufficient members to form a quorum independently of any members who are also governing body members of the parent organisation. **This does not restrict constitutional rights a parent may have to appoint or remove governing body members of a subsidiary or to use any other step-in rights**". (para 31)*

"The basis for interventions by the parent should be clearly described and applied. For example:

- *If a subsidiary does not adhere to financial or other agreed limits, the parent should have clearly defined rights to step in and take action;*
- *Parent RSLs should have unrestricted step-in rights where a subsidiary or its governing body is experiencing serious problems (for example, relating to the governance, financial management or performance of the subsidiary). Step-in rights should include the power to appoint and where necessary remove members of the subsidiary's governing body". (para 42)*