

# SCOTTISH FEDERATION OF HOUSING ASSOCIATIONS

## WRITTEN SUBMISSION

### Introduction

- 1.1 As the national representative body for housing associations and co-operatives in Scotland, the SFHA welcomes the opportunity to follow up our oral evidence on the Housing (Scotland) Bill 2013 with this written submission to the Infrastructure and Capital Investment Committee.
- 1.2 To provide context, housing associations and housing co-operatives in Scotland own and manage 46% of the country's affordable rented housing stock. This represents 274,996 homes across Scotland, concentrated in some of the poorest communities in our country.
- 1.3 There are some important and distinctive features of associations which differentiate us from other public bodies. Our members are:
  - Independent businesses with goals aligned to the Scottish Government in providing and managing high quality affordable accommodation and housing services;
  - Responsible for accessing and managing some public resources for house building, but mostly reliant on our tenants' rents for income and expenditure;
  - Managing businesses imaginatively and inventively to benefit housing and communities through our not-for-profit ethos;
  - Accountable to our members and tenants, who live or have other interests in the communities and places which they create;
  - Regulated by an independent Scottish Housing Regulator;
  - Able to demonstrate added value in terms of care and support, wider role and financial inclusion.
- 1.4 At the same time, it would be misleading to think of housing associations as a homogeneous group. They were formed from a variety of different circumstances and come in all shapes and sizes, ranging from large ex-local authority stock transfer organisations with tens of thousands of properties, to small community-controlled organisations owning a couple of hundred homes. There are also various group structures and other constitutional arrangements in place within the sector, increasingly so.

## 2 Executive Summary

- 2.1 The SFHA commends the Scottish Government for having the courage to abolish the Right to Buy in Scotland. However, it is our view that a

three year notice period is excessive and we would wish to see this reduced to one year.

- 2.2 The SFHA broadly supports the proposals for social housing allocations and the changes to tenancy agreements. However, in our view, some of their impacts are being slightly overstated, particularly in relation to increasing flexibility within allocations policies. It is our view that it would be more accurate to say that the Bill's proposals will increase landlords' confidence to better utilise flexibility. While the proposals around short tenancies, suspensions and streamlined evictions processes are welcome, they are not a panacea to combat antisocial behaviour. This will still require a multi-agency approach – social landlords are not solely responsible for 'tackling' antisocial behaviour - and a less congested court system. There is a danger that the expectations of those tenants whose lives are blighted by the thoughtless actions of their neighbours will be raised to unrealistic levels by some of the language being used by the Scottish Government. The measures contained in the Bill are but a small part of the overall action required to tackle antisocial behaviour properly.
- 2.3 In respect of the private sector, we would make the general comment that we welcome any moves to address poor private landlord practice. However, we note that there is nothing in this Bill that will bring the private rented sector anywhere near the levels of the social rented sector in terms of the regulation of management or of physical property standards. There appears to be nothing in this Bill that would have a robust impact on driving up standards in the privately owned sector. .
- 2.4 In respect of regulation, while we support the principle underpinning section 79 (a) (which seeks to enable the SHR to act decisively where an RSL is in serious financial jeopardy) the practical impact of the proposed legislative changes is not clear. We do not support section 79 (b) of the Bill and have proposed an alternative to repeal.
- 2.5 We urge the Committee to establish a requirement for the SHR to produce a Code of Regulatory Practice and we agree with others that it would be desirable to establish an appeal mechanism in line with the current Scottish Government consultation on a draft Strategic Code of Practice for Scottish regulators.
- 2.6 It is SFHA's view that the prospects for achieving more constructive and productive relationships between SHR and the regulated and representative bodies would be enhanced by amending section 5 of the Housing (Scotland) Act 2010.
- 2.7 Within the spirit of the 2010 Act affecting mergers, there may be merit in considering the case for a ballot in cases where RSLs seek to join group structures. We offer alternative views on this matter to assist the Committee in its deliberations.

### **3 Specific Questions on the Housing (Scotland) Bill 2013**

- 3.1 The ICI Committee's call for evidence asked a specific set of questions. Not all are of direct or significant relevance to our members, and we have therefore limited our responses to those that are.
- 3.2 As we respond to the individual questions posed by the ICI Committee, we also intend to make comment on some wider principles in relation to how this Bill is likely to impact upon our sector.

#### **Part 1: Right to Buy**

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

- 3.3 The SFHA is pleased that the Bill aims to end all forms of Right to Buy (RTB). We fully support the proposal and have campaigned long and hard for this. It is vital that we protect the existing social rented stock.
- 3.4 However, we wish to make it clear that we are not against the principle of home ownership or mixed tenure per se. Rather that we are against the principle of high discounts, particularly given the urgent need for more social housing. The SFHA made its position on RTB clear in our response<sup>1</sup> to the 2012 Scottish Government consultation *The Future of Right to Buy in Scotland*. The vast majority of housing associations and co-operatives not already protected by charitable status also successfully made their cases to extend the ten year RSL exemption from the Modernised RTB until 30<sup>th</sup> September 2022. All 57 organisations that applied for this exemption were successful.
- 3.5 During our oral evidence to the ICI Committee we referred to research<sup>2</sup> that tracked what happened to properties purchased under RTB, and suggested that up to £2billion per year is paid out in excess Housing Benefit on ex RTB properties now rented out, at higher rents, in the private sector.

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

- 3.6 It is the SFHA view that 3 years is excessive. While we understand the principle of reasonable notice and the Scottish Government's concern

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<sup>1</sup> SFHA response to 2012 Scottish Government RTB consultation. Available at [http://www.sfha.co.uk/index.php?option=com\\_docman&task=doc\\_view&gid=3158&tmpl=com\\_ponent&format=raw&Itemid=340](http://www.sfha.co.uk/index.php?option=com_docman&task=doc_view&gid=3158&tmpl=com_ponent&format=raw&Itemid=340) (accessed 28<sup>th</sup> Feb 2014)

<sup>2</sup> Sprigings, N. and Smith, Duncan H (2012), *Unintended Consequences: Local Housing Allowance meets the Right to Buy*. Available at [http://extra.shu.ac.uk/ppp-online/wp-content/uploads/2013/06/consequences\\_local\\_housing\\_allowance.pdf](http://extra.shu.ac.uk/ppp-online/wp-content/uploads/2013/06/consequences_local_housing_allowance.pdf) (accessed 28th Feb 2014)

at a potential legal challenge under Human Rights legislation, it is our view that there is no real test or precedent as to whether one, two or three years is a fair notice period other than subjective opinion. Moreover, there are many other issues within the complexities of RTB that are more open to legal challenge than this, (e.g. there are those whose RTB is currently suspended that will effectively have their right ended without notice – Pressured Area Status and the RSL ten year suspension from Modernised RTB being two examples). Notwithstanding any of this, almost three quarters of responses to the RTB consultation were in favour of a notice period of less than three years. It is our view that, in the spirit of the credibility of future Scottish Government consultations, it would be reasonable to reflect this when setting the length of the notice period.

- 3.7 Based on the majority of our members' views, a notice period of one year from the date of Royal Assent would strike a reasonable balance between giving fair notice to tenants and giving certainty going forward for landlords.
- 3.8 One or two of our members have made suggestions about how receipts might be utilised during the notice period (whatever its eventual length). Our understanding is that in the main the receipts that are generated from RTB sales go back in to the Scottish Government and are redistributed as part of the HAG programme. This approach is unfair on those organisations that may have lost stock through RTB but who are no longer developing.
- 3.9 There is a case for any RTB receipts generated between the period of Royal Assent and the Bill's application to be allowed to be retained by individual RSLs, on the basis that they are ring fenced for re-investment into social housing activities, stock improvements or capital developments. This is the way RTB receipts are dealt with in organisations derived in full or in part from Scottish Homes' stock transfers.

## **Part 2: Social Housing**

**Q4 (there appears to be no Q3). *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?***

- 3.10 We welcome and support the aims and principles of the proposals to increase local flexibility within allocations. We do feel that landlords have already had more flexibility than they perhaps realised and in that sense the Bill is simply reinforcing some of that flexibility and perhaps eradicating any concerns that landlords might have had about just how flexible they could be when deciding who should get priority for their houses.

- 3.11 The Reasonable Preference Categories were introduced as far back as 1966 and their relevance to the 21<sup>st</sup> century is questionable, particularly in light of the Scottish Government research in 2011 *Reasonable Preference in Scottish Social Housing*<sup>3</sup> which found that they were not widely recognised nor were they widely utilised by landlords.
- 3.12 That said, despite the need for an overhaul, some of them could and have been used (e.g. living in unsatisfactory housing conditions) to cover a variety of different circumstances. The new category of “Persons living in unsatisfactory housing conditions...” is a very similar catch-all category, and for that reason it may well be that in practice we don’t see major changes to the allocation policies of many housing associations and co-operatives.
- 3.13 *The redefinition and introduction of locally agreed categories* may give some landlords the confidence to take a broader, more strategic view of their allocations policy and deal with the twin issues of tenancy sustainability and community sustainability. It may also make the introduction of local lettings initiatives more transparent.
- 3.14 *The duty to take Local Housing Strategies into account* should reinforce the strong partnership work already being carried out across Scotland between housing associations and co-operatives and local authorities, particularly in relation to homelessness and housing options.
- 3.15 *The duty to consult on changes to allocation policies* ties in with the provisions of the Housing (Scotland) Act 2001. We agree with the non-prescriptive approach being suggested by the Scottish Government and trust that the Regulator will do likewise. There may be resource implications for some landlords, although we get the strong sense that the vast majority of housing associations and co-operatives already consult widely on their allocations policies, in the spirit of the 2001 Act.
- 3.16 *Taking ownership of a property into account when deciding priority for housing* is a reasonable move, designed to prevent applicants from profiteering. However, owning a house that is clearly unsuitable for the applicant should not prevent an allocation, and reasonable landlords will continue to allocate sensitively and sensibly in this regard. The introduction of the new short tenancy specifically for homeowners who find themselves in particular circumstances may also help to strike the balance between legitimately excluding homeowners who clearly do not need social housing and accommodating those whose owned property is unsuitable or inaccessible.

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<sup>3</sup> Bretherton, J and Pleace, N, (2011), *Reasonable Preference in Scottish Social Housing*. Available at <http://www.scotland.gov.uk/Resource/Doc/353058/0118823.pdf> (accessed 28th Feb 2014)

- 3.17 *Taking age into account* - our members were keen for this to be included and it should certainly help in relation to sensitive lettings and avoiding 'lifestyle clashes'. However, because age is a protected characteristic under the Equality Act, we do wonder how this will actually operate in practice, and the inclusion of this proposal – despite it being, on the face of it, slightly at odds with existing legislation – is a bold move. We would suspect that this proposal, if enacted, is every bit as likely to face a legal challenge as any RTB notice period.
- 3.18 *The proposals around suspensions* are welcome in principle, and build on existing good practice. However, as with many of the Bill's proposals, the implementation detail will be critical and we will be seeking clear guidance from the Scottish Government as to the level of evidence required in relation to previous antisocial behaviour, how long a suspension can last for, and also how far back in time it is reasonable for a landlord to go when considering historical antisocial behaviour. The same principles – a need for guidance on levels of evidence required etc. – apply in relation to the creation/conversion to a short tenancy for previous antisocial behaviour.
- 3.19 Some tidying up of the drafting of section 7 is required to achieve consistency of approach in relation to taking into account the abandonment, damage or eviction from previous tenancies in other parts of the UK, and not just in Scotland.
- 3.20 Some of our members have expressed concern that the suspension provisions might be rendered impotent by applicants who may have otherwise been subject to a suspension simply being referred for an allocation via the homelessness route. The Scottish Government has been very clear in its discussions and consultations with the SFHA that this would go against the spirit of the Bill's intentions and we would suggest, therefore, that some sort of provision is made to ensure that this is not allowed to happen in practice.
- 3.21 The introduction of a right of appeal for the applicant is fair and balanced, and will mean that landlords will need to be very clear on their reasons for suspension.
- 3.22 One of the aims of the Bill is to clarify previous legislation, and particularly in relation to the existing Housing Acts. With this in mind we would like to highlight a concern that has been raised by several of our members. Prior to the Housing (Scotland) Act 2001 being enacted, housing associations and co-operatives were able to advise applicants that they were not in sufficient housing need to enable them to be placed on a housing list. In other words, they operated a 'cut-off point'. This served the dual purpose of managing the applicant's expectations and preventing unnecessary landlord resources (tenants' rents in other words) being diverted into maintaining lists of people who were never

going to be housed. Then the 2001 Act introduced the 'right' for anyone aged 16 or over to be on the housing list of a social landlord. We suspect that the policy aim at the time was to allow anyone over the age of 16 to *apply* for social housing, rather than simply be kept on a meaningless and expensive list. We therefore feel that it would be in keeping with the aims of the Bill, in respect of both the clarification of legislation and the commitment to introducing more flexibility for landlords, to revert to the pre-2001 position of allowing landlords to set needs thresholds that they can apply when maintaining housing lists, thus managing expectations and creating resource efficiencies. This approach would necessarily include the provision of advice for the applicant on any alternative housing options they may have.

***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?***

- 3.23 *Short Tenancies* - It is difficult to argue against the principle of any of the proposals. Because of the highly technical nature of some of the proposed changes, there may be some practical implementation difficulties, which will require training for landlords' staff. Some issues still aren't clear. For example, short tenancies go hand-in-hand with support, which needs to be resourced. The 'who' and 'how' this is to be resourced will require clarification. It is also unclear whether there is a limit on how often a tenancy can be converted.
- 3.24 *Full Tenancies* - The new 12 month qualifying period for assignments, sublets, joint tenancies, and some successions is welcome. We are confident that landlords will continue to be flexible according to the many different circumstances which present themselves in respect of such tenancy amendments. We are pleased to see the introduction of grounds under which landlords may refuse an assignment request even if the 12 month qualifying period is met. The SFHA and CIH Scotland wanted to go further in this respect and shift the onus by removing the tenant's *right* to assign, replacing it with a landlord *power* to allow it, where it made best use of stock or where the assignee would have been at, or close to, the top of the priority list for housing.
- 3.25 The SFHA supports the new streamlined evictions process. We were disappointed in Shelter's reaction to this proposal during the oral evidence to the ICI Committee, which was that, in their view, some social landlords would use the process to evict tenants for very minor criminal offences. Social landlords have made great strides in recent years to reduce the number of evictions they carry out, and can clearly demonstrate that evictions are a last-resort measure. Shelter have

acknowledged this in their annual evictions report, published in March 2013<sup>4</sup> stating “*This plateau in evictions follows a 49 per cent decrease in evictions over the past 4 years which is likely to be due to landlord good practice and work on tenancy sustainment*”. Shelter can possibly even take some of the credit for it, in their role as ‘critical friend’, but the notion that social landlords would in some way abuse this streamlined system is not supported by any evidence. The fact of the matter is there are antisocial behaviour cases where the landlord’s hands are tied in respect of eviction because of the understandable reluctance of witnesses to give evidence in a civil case. Our understanding of what is being proposed is that, while the reasonableness test in respect of other social housing evictions is being waived (which is what Shelter are concerned about), there will still be a proportionality test applied by sheriffs, in relation to Human Rights legislation (Article 8; European Court of Human Rights). This ought to allay any fears that Shelter might have around tenants being evicted for very minor offences.

- 3.26 The SFHA supports amending the eviction grounds for adapted properties. The safeguard of ‘suitable alternative accommodation’ provides sufficient comfort for us that the housing needs of the successor are suitably protected.

**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?**

- 3.27 There appears to be a reasonable balance between allowing landlords to take more robust action and affording more protection for tenants by ensuring that landlords can fully account for any action to end a short tenancy. As with many of the other proposals, we await further detail and guidance on the issue.

### **Part 3: Private Rented Housing**

**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?**

- 3.28 The SFHA and others would have preferred to see a pilot housing tribunal covering both private and social sector cases. The delays in the current sheriff court system are likely to undermine some of the proposals in the Bill and raises tenant expectations to unrealistic levels in relation to how swiftly antisocial behaviour can be dealt with. We do acknowledge that there is a civil court review in progress, which may

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<sup>4</sup> Shelter, (March 2013), *Evictions by social landlords in Scotland 2011-12*. Available at [http://scotland.shelter.org.uk/professional\\_resources/policy\\_library/policy\\_library\\_folder/evictions\\_by\\_social\\_landlords\\_in\\_scotland\\_2011-2012](http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/evictions_by_social_landlords_in_scotland_2011-2012) (accessed 28th Feb 2014)

address some of the concerns our members have around the congested sheriff court system as it currently operates.

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

3.29 The SFHA will leave detailed comment on this to others, but the private rented sector, while clearly not a homogeneous group, is of interest to many of our members who operate within mixed tenure communities. The private rented sector is increasingly being used as a way of discharging homelessness duties by local authorities, and is being promoted by the Scottish Government as a genuine housing option. The sector is also a strain on the welfare budget, with SFHA's own 2012 research, *Housing Benefit Spending: Busting the Myths*<sup>5</sup> estimating Housing Benefit to have increased in the private rented sector by 153% in the past decade, compared to a 21% increase in the social rented sector. In light of this, we would therefore make the general comment that we welcome any moves to address poor private landlord practice, though we note that the proposals fall far short of bringing the private rented sector anywhere near the levels of the social rented sector in terms of the regulation of management or of physical property standards. On that last point, there may be a missed opportunity to have included in the Bill an enhanced Repairing Standard.

***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?***

3.30 The principle is welcome, though once again we cannot really comment at this stage until more detail on the content of any proposals and how they will be resourced is known. We note that once again the Bill is legislating for discretionary powers, which may not lead to a consistent, Scotland-wide approach across all 32 local authorities.

#### **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?***

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<sup>5</sup> SFHA (2012), *Housing Benefit Spending: Busting the Myths*. Available at <http://www.sfha.co.uk/sfha/publications/housing-benefit-spending-busting-the-myths> (accessed 28<sup>th</sup> Feb 2014)

- 3.31 These proposals are broadly in line with the arrangements for Property Factors (which many of our members are) and it seems a sensible move. We look forward to seeing the detail, particularly in relation to a Code of Practice, as this is where the potential strength of the proposal lies.

***Q11. Do you have any views on the proposed mechanism for resolving disputes between letting agents and their customers (landlords and tenants)?***

- 3.32 It would be sensible, and consistent, to allow for third party reporting to the tribunal in relation to the activities of letting agents. This would allow local authorities to raise any concerns they may have, in a similar way that is being legislated for in Part 3 of the Bill.

**Part 5: Mobile Home Sites with Permanent Residents**

***Q12. Do you have any views on the proposed new licensing scheme?***

- 3.33 This proposal will not have a significant impact on our members and we therefore do not intend to make any detailed comment on it.

***Q13. What implications might this new scheme have for both mobile home site operators and permanent residents of sites?***

- 3.34 This proposal will not have a significant impact on our members and we therefore do not intend to make any detailed comment on it.

**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?***

- 3.35 SFHA will leave detailed comment on this to others. However, we would repeat our concerns in relation to the physical standards of privately owned homes, particularly in respect of energy efficiency, that they are generally much lower than in the social rented sector. There is nothing in this Bill that would have a robust impact on driving these standards up in the privately owned sector.

**Part 7: Miscellaneous Provisions**

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

- 3.36 We agree that the introduction of an exemption to the 20 year rule should facilitate the 'Help to Buy' scheme.

3.37 SFHA's main interest in this section of the Bill 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.

3.38 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 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 involvement in each case;
- For whatever reason, regulatory scrutiny and intervention failed to avert or provide early warning of the financial problems that crystallised in 2012;
- SHR relied on non-statutory methods of engagement, instead of using of its existing formal statutory intervention powers.

3.39 On the specific measures now proposed in section 79 of the Bill:

- While supporting the general principle underpinning section 79 (a), the practical impact of the proposed legislative changes is not clear. None of the 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.
- A number of our members have commented that the wording of section 79 (a) could be strengthened by requiring that the SHR obtains ministerial consent before using these powers. This should include a requirement that the SHR would need to provide a detailed explanation as to how each of the four criteria were met before using the power.
- 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 any value in 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. This could be achieved by requiring SHR to publish information about inquiries that result in a direction to transfer an RSL's assets.
- We have a concern that removing the duty to consult lenders (where all of the four criteria specified in section 79 (a) apply) may have the potential to reduce lenders' appetite to lend to the sector and/or encourage less favourable borrowing terms. It is our understanding that the current obligation on the SHR under Section 67(4) to consult with secured creditors is not onerous, i.e. there is no minimum consultation period and no specification as to the level of consultation required. There is also no obligation on the SHR to comply with the views of secured creditors. Any decision still rests at the discretion of the SHR. So we are not convinced that there would be too little time to consult lenders in such instances.

## **Other Issues**

### ***Q17. Are there any other comments you would like to make on the Bill's policy objectives or specific provisions?***

- 3.40 SFHA has had sight of GWSF's *Housing Regulation in Scotland* paper, which is being submitted to the Committee alongside GWSF's written evidence on the Bill. SFHA endorses the content of the paper.
- 3.41 We recognise that 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. SFHA<sup>6</sup> 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:

- Regulatory intervention and the need for statutory mechanisms for reviews and appeals;
- Consultation and involvement requirements;
- Tenant consultation and RSL moves to group structures.

### **Regulatory intervention and the need for statutory mechanisms for reviews and appeals**

3.42 The 2010 Act requires the 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).

3.43 These aspects of the current legislation are not operating satisfactorily:

- SHR has not published the codes of 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. Without commenting on the merits of individual cases, SFHA is 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 non-statutory methods "behind the scenes", 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.

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<sup>6</sup> in common with the Glasgow and West of Scotland Forum of Housing Associations (GWSF)

Moreover, there is no appeals process available to RSLs who believe that regulatory actions are disproportionate or inappropriate.

- 3.44 SFHA and GWSF agree 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.
- 3.45 We wish to highlight to the Committee the current Scottish Government consultation on a Scottish Regulators' Strategic Code of Practice, which includes a requirement on all Scottish Regulators, including the Scottish Housing Regulator, to offer an independent, impartial and transparent appeals procedure and to regularly publish data on appeals made and the proportion upheld.<sup>7</sup>
- 3.46 In putting forward our proposals, it is not our intention to constrain SHR's ability to take effective regulatory action. Rather 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.
- 3.47 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

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<sup>7</sup> Scottish Government, (February 2014), *Consultation on Scottish Regulators' Strategic Code of Practice*. Available at <http://www.scotland.gov.uk/Publications/2014/02/5027> (accessed 28th February 2014)

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.

- 3.48 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 social landlords, tenants, SHR or the Scottish Parliament.

### **Consultation and Involvement Requirements**

- 3.49 The Housing (Scotland) Act 2010 places the SHR under an obligation to consult with social landlords and their representative bodies on a range of specific matters. Although there has been some improvement in recent months, these arrangements have not been operating effectively 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.

- 3.50 The prospects for achieving more constructive and productive relationships between SHR and the housing sector would in our view be enhanced by amending 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 be a more proactive and constructive approach by SHR to working with the housing association sector and would provide a platform for greater partnership working and co-operation on how housing associations can improve standards and meet regulatory expectations.

- 3.51 We would wish to highlight to the Committee that the current Scottish Government consultation on a draft Scottish Regulators' Strategic Code of Practice includes a requirement on all regulators, including the Scottish Housing Regulator, to develop effective relationships with those they regulate and to have clear, two-way communication in place.<sup>8</sup>

### **Tenant consent for RSL moves to group structures**

- 3.52 As our introduction indicates, RSLs should not be thought of as a homogeneous group as they vary in size, focus and geography. Increasingly organisations are looking at group structures and other

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<sup>8</sup> Scottish Government, (February 2014), *Consultation on Scottish Regulators' Strategic Code of Practice*. Available at <http://www.scotland.gov.uk/Publications/2014/02/5027> (accessed 28th February 2014)

constitutional partnerships as the potential for mergers anticipated in 2009/10 is complicated by pension liabilities. There has been just one merger in the last three years.

- 3.53 It may help to provide some context. Currently listed on the SHR website are 161 registered housing associations of which 14 registered Scottish housing associations operate as subsidiaries providing housing within group structures and more under discussion.<sup>9</sup> Four housing associations registered in Scotland act as parents with one more to be added shortly. Five Scottish housing associations are part of groups operating under parent bodies registered in England.
- 3.54 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.
- 3.55 The current Bill could provide an opportunity to address this, to ensure proper protection for the interests of tenants. The current Housing (Scotland) Bill could make provision for the protection of tenants' interests 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.
- 3.56 We have explored views on the potential to extend formal tenant consultation. Views within the sector on this issue vary and we have tried here to capture the arguments for and against.

The case in support of statutory changes relating to housing association group structures can be summarised as follows:

- Restructuring via group structures is happening on a substantial scale in the Scottish housing association sector with potentially significant implications for the future interests of many thousands of tenants and service users and with no

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<sup>9</sup> A total of 145 subsidiaries are listed mostly unregistered and many dormant. The subsidiaries were set up for a variety of reasons, not necessarily housing provision.

requirement for consultation;

- Group structures could have long-term consequences for tenants, because a parent housing association could, potentially, exercise ultimate control over such matters as a subsidiary RSL's business plan, rent policy, housing investment policy, funding costs and service delivery structures and locations.

The arguments against statutory changes relating to housing association group structures can be summarised as follows

- A group structure is not the same as a transfer of engagements as there is no change of landlord. A ballot of members should be all that is required. Tenants can become members and therefore have a say in whether the organisation becomes part of a group in that way;
- Requiring a ballot of tenants can be onerous, costly and time consuming. The turn-out for any ballot might be low with inconclusive results, particularly dangerous where there is a threat of insolvency;
- A ballot in every case of a proposed group structure is overly prescriptive: it should be up to each individual organisation as to how it communicates and gauges the opinion of its tenants when joining a group.

3.57 If a proposal for extending tenant ballots were to be adopted, it should involve the same exceptions as already apply to other types of RSL reorganisation. 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.

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

3.58 As noted in the recent SPICe briefing on the Bill, SFHA and GWSF 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

legislation.<sup>10</sup> 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 Concluding Comments**

4.1 We have outlined above our views on the content of the Bill and have proposed additional regulation-related issues for inclusion.

4.2 We acknowledge that we have already provided oral evidence to the Committee on the Bill and we wish to thank the Committee for that opportunity. However, at that time, due to ongoing discussions with members and other partners, we were not in a position to comment on the proposed changes to regulatory powers nor to propose additional content. We would be very happy to provide further oral evidence on issues in this written evidence that the Committee did not have the opportunity to explore with us during the earlier oral evidence.

**Scottish Federation of Housing Associations**  
**28 February 2014**

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<sup>10</sup> Housing (Scotland) Act 1987, section 20