

HOUSING (AMENDMENT) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Housing (Amendment) (Scotland) Bill introduced in the Scottish Parliament on 4 September 2017.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 20-EN);
 - a Financial Memorandum (SP Bill 20-FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 20-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

BILL CONTENT

4. The Bill comprises 11 sections. Sections 1 to 7 amend certain provisions of the Housing (Scotland) Act 2010 ("the 2010 Act") in respect of powers that the Scottish Housing Regulator ("the Regulator") exercises over registered social landlords (RSLs) (and in the case of part of section 1 in respect of social landlords generally). Section 8 provides for the Scottish Ministers, by regulations, to modify the functions of the Regulator. Section 9 provides for the Scottish Ministers, by regulations, to reduce local authority influence over RSLs.

POLICY OBJECTIVES OF THE BILL

5. The policy objective of the Bill is to ensure that the influence the Regulator and local authorities can exercise over RSLs is compatible with RSLs being classified by the Office for National Statistics (ONS) as private sector bodies in the United Kingdom national accounts.

Background

Classification of RSLs

6. The ONS is responsible for determining how individual sectors within the economy should be classified in the UK's national accounts. On 28 September 2016, it informed the

Scottish Government that it had reviewed the classification of RSLs in Scotland and determined that they should be classified as public bodies for the purposes of the national accounts¹. (RSLs had previously been classified as private bodies in the national accounts.) It explained that its decision was based on an analysis of powers that the Regulator has, under the 2010 Act, to:

- appoint a manager to an RSL;
- suspend, remove and appoint officers of an RSL;
- exercise control over the disposal of land and housing assets by an RSL (by requiring an RSL to obtain the Regulator's consent to a disposal);
- exercise consent over any changes to the constitution of an RSL; and
- exercise control over voluntary winding-up, dissolution and restructuring of an RSL (mainly by requiring an RSL to obtain the Regulator's consent to these actions).

7. The ONS explained, in terms of the criteria that it applies under the 2010 European System of Accounts (ESA 2010), that these powers indicate that the Regulator exercises control over RSLs. Under ESA 2010, the Regulator is classified as a central government public body. Consequently, the controls that the Regulator exercises through these powers are public sector control, which requires RSLs to be classified to the public sector in the national accounts.

8. The ONS also noted that further public sector controls might exist through the relationships between RSLs and local government.

9. The ONS decision in respect of RSLs in Scotland was accompanied by similar decisions, for similar reasons, in respect of the classification of social housing providers in Northern Ireland and Wales. These followed the decision² by the ONS, in October 2015, to classify private registered providers of social housing (PRPSHs) – the equivalents in England to RSLs – as public sector bodies in light of the regime for regulating them.

Implications of classification

10. If left unchanged, the classification of RSLs as public sector bodies in the national accounts would mean that all new net borrowing by RSLs would count against the Scottish Government's borrowing limits, which at present are £450 million in any one year and £3 billion in total. That would be a significant permanent burden on the Scottish Government's finances.

11. Furthermore, as matters stand at present, RSLs operate independently of the Scottish Government and are free to determine with their private lenders how much they borrow. Consequently, classification of RSLs as public sector bodies in the national accounts would require the Scottish Government to accommodate RSL borrowing within its budget, but without being able to control or limit the level or extent of that borrowing. In such circumstances, and in the interests of being able to manage its finances, the Scottish Government might have to introduce public control over borrowing by RSLs.

¹<https://www.ons.gov.uk/economy/nationalaccounts/uksectoraccounts/articles/statisticalclassificationofregisteredprovidersofsocialhousinginScotlandWalesandNorthernIreland/september2016>

²<http://webarchive.nationalarchives.gov.uk/20160108004619/http://www.ons.gov.uk/ons/rel/na-classification/national-accounts-sector-classification/classification-update---october-2015/index.html>

12. The financial consequences of RSLs continuing to be classified as public sector bodies would have immediate implications for the Scottish Government's commitment to build 50,000 affordable homes. The commitment depends on the Government's planned financial support of over £3 billion for the programme (during financial years 2017/18 to 2020/21) being augmented by the RSL sector undertaking private borrowing of about £300 million a year. If the RSLs' borrowing can no longer be counted as private borrowing, the effective cost to the Scottish Government of delivering on the commitment would, by having to include the RSL borrowing, rise to £4.5 billion.

The Scottish Government's policy

13. Given these implications, the Scottish Government's policy is to reduce the powers that the Regulator and local authorities can exercise over RSLs to the extent necessary for the ONS to be able to classify RSLs as private sector bodies. This policy is similar to that of the UK Government, which by amending the regulation of PRPHs through the Housing and Planning Act 2016 sought to pave the way for ONS to reclassify PRPSHs to the private sector. The Northern Ireland Executive and the Welsh Assembly Government are also pursuing the same policy, for the same reasons, in their respective jurisdictions.

14. In view of the Scottish Government's policy and undertaking to legislate through the Bill, HM Treasury has confirmed that it does not expect borrowing by RSLs to be recognised in Scottish Government budgets while work to legislate is in hand.

Discussions with the ONS

15. In preparing this Bill, the Scottish Government has discussed with the ONS the powers, whether exercised by the Regulator or local authorities, that it considers to be indicators of control, and the steps that need to be taken in connection with them to enable the ONS to reclassify RSLs back to the private sector. These discussions confirmed that the powers of the Regulator listed at paragraph 6 above need either to be reduced, or removed entirely, and that the powers that some local authorities are able to exercise over RSLs also need to be reduced. The discussions also confirmed that these changes could be achieved only through primary legislation. Having established the nature of the changes necessary to secure reclassification, and that such changes could only be delivered through primary legislation, the Scottish Government concluded that there was no other means available to it of achieving its policy objective of having RSLs classified as private sector bodies.

16. In these discussions, the ONS has stressed that any decision on the classification of RSLs rests with the Director of National Accounts and Economic Statistics, who will be advised by the Economic Statistics Classification Committee of the ONS. The Director can only make a decision on the basis of legislation that has been enacted and brought into force. Consequently, the ONS has not been able to confirm definitively that the Bill will achieve its stated objective. However, ONS officials have advised the Scottish Government that, in their opinion, the provisions in the Bill – if enacted and brought into force in their current form – are likely to be sufficient to remove public sector control. In light of this opinion, the Scottish Government considers that there is no alternative to the Bill that would enable it to achieve its policy objective as outlined at paragraph 13 above.

SPECIFIC PROVISIONS

17. The Bill achieves its stated objective by reducing the functions of the Regulator through amendments to various provisions in Parts 5, 8, 9 and 10 of the 2010 Act, and by providing for Ministers – by regulations – to limit the influence that a local authority can exercise over an RSL. As a precaution against the ONS finding, once the Bill has been enacted and brought into force, that the reductions to the Regulator’s functions do not go far enough, the Bill also provides for Ministers – by regulations – to make any further amendments to the Regulator’s functions that might be necessary to secure the reclassification of RSLs.

Amendments to the 2010 Act

18. The amendments to the 2010 Act fall into two categories:

- those in respect of Part 5 of the 2010 Act, which narrow the powers of the Regulator to appoint a manager to an RSL, and to remove, suspend and appoint officers of an RSL; and
- those in respect of Parts 8, 9 and 10 of the Act, which remove completely the powers of the Regulator to exercise consents over the disposal of land and housing assets by an RSL, any changes to the constitution of an RSL, and the voluntary winding-up, dissolution and restructuring of an RSL.

19. In amending Parts 8, 9 and 10 to remove the Regulator’s powers of consent, the Bill reflects the Scottish Government’s commitment to tenants of an RSL continuing to have the right to be consulted about significant changes in the management of their landlord. It does so by providing, where the 2010 Act makes the consent of the Regulator conditional on, or otherwise connected to, an RSL consulting its tenants, that such consultation will continue to take place and have the same purpose and effect as it did before the removal of the Regulator’s powers of consent.

20. Paragraphs 21 to 30 below outline the purpose and effect of each of the Bill’s amendments to the 2010 Act.

21. The ONS identified the powers that the Regulator has under sections 57 and 58 of the 2010 Act to appoint a manager to an RSL as evidence of public sector control. It highlighted in particular the Regulator’s power to appoint a manager if the Regulator considered that a person needed to be appointed in order to ensure that an RSL manages its housing services, or financial or other affairs to an appropriate standard.

22. The Scottish Government established through its discussions with the ONS that this example of public sector control would be removed if the powers of the Regulator under these sections were sufficiently narrow and circumscribed. Therefore, *section 1 of the Bill* amends sections 57 and 58 to narrow the circumstances in which the Regulator can appoint a manager, the purposes for which the appointment can be made, and the period of time for which it can be made. As section 57 applies to all social landlords – i.e. local authority landlords and RSLs – the amendments apply to the Regulator’s powers in respect of all social landlords. All other amendments to the powers of the Regulator under the 2010 Act apply to powers that the Regulator can exercise over RSLs only.

23. As evidence of public sector control, the ONS identified the powers that the Regulator has, under sections 60 to 63 and 65 to suspend, remove and appoint officers of an RSL. In particular, it identified the powers of the Regulator to remove an officer where the Regulator considers the officer is impeding the proper management of the RSL because of absence or other failure to act, and to remove or suspend officers where there has been misconduct or mismanagement in an RSL's financial or other affairs. It also viewed the power of the Regulator to appoint a new officer if it considers that an additional officer is needed for the proper management of the RSL's financial or other affairs, as evidence of public sector control.

24. In its discussions with the ONS, the Scottish Government established that this example of public sector control would be removed if the powers of the Regulator under these sections were sufficiently narrow and circumscribed. Therefore, **section 2 of the Bill** narrows the circumstances in which the Regulator can remove or suspend an officer from an RSL, and narrows the purposes for which it can appoint an officer to an RSL (and the period of time for which it can be made).

25. The ONS identified the powers of the Regulator, under section 107 of the 2010 Act, to consent to the disposal of land and housing assets, as evidence of public sector control. In its discussions with the ONS, the Scottish Government established that retaining these powers would not be compatible with RSLs being classified to the private sector. Therefore, **sections 3 and 4 of the Bill** remove the powers. To ensure that the Regulator is aware of actions by an RSL that might have an impact on the financial health of the RSL, they introduce a requirement on RSLs to notify the Regulator of a disposal within 28 days of having made it. The sections also give effect to the Scottish Government's policy on tenants' rights to be consulted by requiring an RSL to consult tenants whose landlord would be changed as the result of a disposal, and to obtain their agreement to the disposal.

26. The ONS identified the powers that the Regulator has, under section 93, over constitutional changes of an RSL, in particular the power to consent to any change of an RSL's articles of association, as evidence of public sector control. In its discussions with the ONS, the Scottish Government established that retaining these powers would not be compatible with RSLs being classified to the private sector. Therefore, **section 5 of the Bill** removes the powers. To ensure that the Regulator always has accurate and up to date information about the constitutions of RSLs, the section also introduces a requirement on RSLs to notify the Regulator of any changes to their constitutions within 28 days of making the change.

27. The ONS identified powers of the Regulator, under sections 96 to 104, 104A, 124A and 124B of the 2010 Act, to consent to the voluntary winding-up, dissolution and restructuring of an RSL as evidence of public sector control. In its discussions with the ONS, the Scottish Government established that retaining these powers would not be compatible with RSLs being classified to the private sector. Therefore, **sections 6 and 7 of the Bill** remove the powers. To ensure that the Regulator has up to date information on RSLs, the sections introduce a requirement on RSLs to notify the Regulator of a voluntary winding-up, dissolution, or restructuring within 28 days of them having happened. The sections also give effect to the Scottish Government's policy on tenants' rights to be consulted by requiring an RSL to consult tenants, and to obtain their agreement to the restructuring in cases where the restructuring would lead to a change of landlord for the tenants or to the landlord becoming a subsidiary of another body.

Regulation making powers

28. **Section 8 of the Bill** provides for the Scottish Ministers, by regulations, to make further changes to the functions of the Regulator. This is a precaution against the ONS finding, once the Bill has been enacted and brought into force, that the adjustments to the Regulator's functions do not go far enough to enable it to reclassify RSLs to the private sector. In that eventuality, the Scottish Ministers would make any further adjustments to the Regulator's functions that might be necessary to secure reclassification. The Scottish Government intends to use this power only for that purpose, and before it does so it is required by this section to consult the Regulator, and representatives of RSLs and their tenants and lenders.

29. **Section 9 of the Bill** provides for the Scottish Ministers to make regulations for the purpose of limiting the influence that a local authority can exercise over an RSL. In its discussion with the ONS, the Scottish Government established that constitutional arrangements that exist between some local authorities and RSLs may be forms of public sector control. Such control might arise, for example, through the ability of a local authority to nominate a large proportion of the members of an RSL board, or through the ability to veto changes in the constitution of an RSL. The Scottish Government will use the regulation-making power under section 9 to remove such control.

30. In the first instance, the Scottish Ministers intend to specify in regulations that local authorities may only nominate up to a maximum of 24% of the board members of an RSL, and may not exercise control over RSLs, for example through a power to veto changes in an RSL's constitution. They may use the power subsequently if other forms of local authority control that amount to public sector control over RSLs come to light, or if the criteria the ONS applies to determine public sector control in this context changes, and such changes require the powers of local authorities to be amended further to ensure that RSLs can continue to be classified to the private sector.

CONSULTATION

31. Given the narrow focus and the technical nature of the Bill and its policy objective, the Scottish Government concluded that it would be disproportionate to conduct a full public consultation on a draft Bill, or on the policy content of the Bill. Instead, it engaged directly with the Regulator and with the groups and bodies that represent the interests of those who will be affected by the Bill on its plans for responding to the ONS decision to classify RSLs to the public sector.

32. The Scottish Government discussed with the Regulator the implications of the decision by the ONS, and the steps that would need to be taken in legislation to enable the ONS to reclassify RSLs back to the private sector. It briefed the Regulator on the outcome of its discussions with the ONS, and shared with the Regulator drafts of the Bill's provisions. These discussions helped the Government to develop detailed provisions for the Bill that address fully the issues of public sector control identified by the ONS, while retaining as much of the Regulator's powers as is consistent with RSLs being classified to the private sector.

33. The Scottish Government identified RSLs, their tenants and lenders as the groups who would be most affected most by the Bill. It recognised that some local authorities might also be

affected by the Bill. It held regular briefings on the development of the Bill for tenant groups, UK Finance (formerly the Council of Mortgage Lenders), the Glasgow and West of Scotland Forum (GWSF) and the Scottish Federation of Housing Associations (SFHA). It also briefed the Convention of Scottish Local Authorities (CoSLA) and the Association of Local Authority Chief Housing Officers (ALACHO) about the development of the Bill.

34. All of the stakeholder groups recognised that the decision by the ONS to classify RSLs to the public sector posed a large risk to the ability of the Scottish Government to deliver its affordable housing programme. They accepted that the only way of removing the risk was to provide, through legislation, for the ONS to reclassify RSLs back to the private sector. There was, therefore, broad stakeholder support for the Bill, albeit, as discussed in paragraphs 35 to 40 below, that most groups had some concerns over the likely impact of the Bill on the regime for regulating RSLs.

35. Tenant groups were particularly concerned that the Bill would weaken the ability of the Regulator to safeguard the interests of RSLs' tenants. In meetings with the Scottish Government, some tenants went further and expressed concern that the Bill would mean an end to regulation of RSLs. The Scottish Government sought to allay these fears. It explained that the ONS had identified relatively few of the Regulator's powers as constituting public sector control, and that the Bill would change only those powers, leaving the majority of the Regulator's powers unchanged. It reassured tenants and their representatives that regulation of a particular sector, such as the RSL sector, is entirely compatible with that sector being classified as private sector, and that the point at issue in the case of RSLs was the extent and nature of the Regulator's powers.

36. UK Finance also had concerns that the Bill could weaken the ability of the Regulator to continue operating effectively. It was familiar with the changes that the Housing and Planning Act 2016 had introduced for the regulatory regime in England, and understood that the Scottish Government's policy was to achieve equivalent changes in Scotland. It noted that the changes to the Regulator's powers to appoint managers and officers were unlikely to affect the circumstances in which the Regulator makes such appointments in practice. It welcomed the provisions requiring an RSL to inform the Regulator whenever it took any step which under the 2010 Act had required the Regulator's consent. However, it noted that the loss of the Regulator's powers of consent would place an increased onus on individual RSLs to govern themselves soundly, which could lead to lenders having to undertake more intensive due diligence before making new loans to an RSL. It also noted that some lenders might be concerned that removing the Regulator's powers of consent, in cases where tenants have the right to be consulted, could make tenant consultation a more uncertain exercise.

37. In view of their members' involvement in, and commitment to, the Scottish Government's affordable housing programme, the Forum and the SFHA expressed strong support for the Bill. Both bodies were also clear that their members saw themselves as being in every respect private bodies that operate independently under their own governance arrangements. Consequently, both organisations argued that securing reclassification to the private sector was an important matter of principle for them.

38. The Forum and the SFHA shared the UK Finance's assessment that the changes to the Regulator's powers to appoint managers and officers were unlikely to affect the circumstances in which the Regulator made such appointments in practice. In common with UK Finance, they recognised that removing the Regulator's powers of consent would place an increased onus on individual RSLs to govern themselves soundly, but believed that the sector generally should be able to meet that challenge.

39. The Forum was particularly concerned to ensure that the removal of the Regulator's powers of consent should not result in any loss of tenants' existing rights to be consulted. It welcomed the provisions in the Bill that establish the continuation of such rights.

40. CoSLA and ALACHO recognised the need for the Bill, and did not raise any concerns over the changes being made to the powers of the Regulator. They accepted the need for limits to be placed on the ability of local authorities to exercise influence over RSLs. They noted, as any excessive influence was rare, that the regulations that Scottish Ministers will make under *section 9 of the Bill* are unlikely to affect many authorities or RSLs.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

41. The Scottish Government has published an Equality Impact Assessment (EQIA) for the Bill. In summary this shows that the changes which the Bill makes to the powers of the Regulator will not give rise to any discrimination on the basis of age, gender, race, disability, marital status, religion or sexual orientation.

42. The EQIA notes that the Regulator will retain its objective, under section 2 of the 2010 Act, to safeguard and promote the interests of persons who are, or may become, homeless, tenants of social landlords, or recipients of housing services provided by social landlords, and the great majority of its regulatory functions in respect of the performance of social landlords' housing activities, and the RSLs' financial well-being and standards of governance.

43. Importantly the Scottish Social Housing Charter, which Part 3 of the 2010 provides for, will remain in place. The Charter sets out what tenants can expect from social landlords (including RSLs).

44. Outcome 1 in the Charter requires that all social landlords, including RSLs "*Should perform all aspects of their housing services so that: every tenant and other customer has their individual needs recognised, is treated fairly and with respect, and receives fair access to housing and housing services*".

45. This outcome describes what social landlords, by complying with equalities legislation, should achieve for all tenants and other customers regardless of age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex or sexual orientation. It includes landlords' responsibility for finding ways of understanding the needs of different customers and delivering services that recognise and meet these needs. The Regulator will

continue to monitor and report on the performance of RSLs against this and the other standards and outcomes in the Charter once the provisions of the Bill are in force and, where necessary, it will continue to be able to make regulatory interventions where an RSL is failing to meet any standards or outcomes.

46. In addition, duties under equality legislation (such as the Equality Act 2010) will continue to apply to RSLs and how they perform their functions.

47. An Equality Impact Assessment has been published for the Bill.³

Human rights

48. The Scottish Government has assessed the effects of the Bill provisions on the rights of tenants and RSLs under the European Convention on Human Rights (“ECHR”), in particular Article 1, Protocol 1 to the ECHR (protection of property), and has come to the conclusion that the provisions in the Bill do not give rise to any ECHR issues.

49. As far as tenants have a sufficient proprietary interest under Article 1, Protocol 1, the Scottish Government has considered in particular the amendments made by the Bill to provisions on disposal of land and organisational changes in the 2010 Act. Under the current provisions tenants are being consulted on these. Given that there is no change by the Bill of how tenants must be consulted (or in some cases give their consent) prior to any transfer or organisational change taking place, the tenants will retain all their possession rights as far as they have them currently. The rights under Article 1, Protocol 1 do not dictate that there should be Regulator’s consent to a disposal of land or organisational change.

50. With regard to RSLs, the Scottish Government has assessed whether changes made by the Bill raise any issues under Article 1, Protocol 1 of the ECHR. RSLs may claim protection under that Article because it protects a “legal person” as far as a RSL can demonstrate the existence of a right to property.

51. Whilst the possession of housing stock would fall under Article 1 of Protocol 1, that Article recognises the right of a state to control the use the property in the public interest. The Scottish Government does not consider that taking away the requirement for an RSL to obtain the Regulator’s consent when transferring land or assets or carrying out organisational change could be said to restrict the ability of the RSL to use its property. The new obligation on RSLs to provide confirmation of tenant consultation to either the registrar of companies or the Financial Conduct Authority to achieve an organisational change might be considered to be a control of use of the property, but it would be one which is in the public interest, in particular in the interest of tenants and in the interest of a fair and balanced approach in the provision of social housing in Scotland. Therefore, the Scottish Government does not consider this to be a violation of RSL’s rights under Article 1, Protocol 1.

³ <http://www.gov.scot/Topics/People/Equality/18507/EqualityImpactAssessmentSearch>

Island communities

52. The Bill will have no specific implications for island communities.

Local government

53. The Bill is mainly concerned with the Regulator's role in relation to RSLs. It contains only two provisions that apply to local authorities.

54. Section 57 of the 2010 Act gives the Regulator powers to appoint a manager to any social landlord that is failing to meet specified duties. *Section 1 of the Bill* amends these powers. To ensure consistent treatment between RSLs and local authority landlords, the amendment applies to all social landlords.

55. *Section 9 of the Bill* provides for the Scottish Ministers, by regulations, to limit the ability of local authorities to exercise influence over RSLs. Based on its understanding of current constitutional arrangements between local authorities and individual RSLs, the Scottish Government expects the regulations that the Scottish Ministers will make under section 9 to apply to a few local authorities only.

Sustainable development

56. The Scottish Government completed a pre-screening report⁴ for the Bill. This established that the Bill will have no impact on the environment and consequently that a full Strategic Environmental Assessment did not need to be undertaken. In light of this, the Scottish Government considers that the Bill is exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

57. The provision of new good quality, energy efficient, affordable housing supports sustainable development by helping to create sustainable communities, reduce fuel poverty and contribute towards meeting the Scottish Government's climate change targets. As discussed at paragraphs 7 to 9 above, the cost to the Scottish Government of supporting investment in such housing will be significantly lower if RSLs are classified to the private sector. In securing that outcome, the Bill will make a positive contribution to sustainable development.

Business and Regulatory Impact Assessment

58. The Scottish Government has carried out a Business and Regulatory Impact Assessment (BRIA) of the measures in the Bill. This confirmed that enabling the ONS to reclassify RSLs as private sector bodies would avoid the Scottish Government having to account in its budget for all new, net borrowing by RSLs. That would save the Scottish Government from having to find an additional £300 million a year to fund its affordable housing programme in the current Parliament.

⁴ <http://www.gov.scot/Topics/Environment/environmental-assessment/sea/SEAG>

59. The BRIA found that the Bill, with its provisions as drafted, was the only means of providing the ONS with the basis for reclassifying RSLs back to the private sector. It noted that the Scottish Government had engaged with the Regulator, and with RSLs, their tenants and lenders, and with bodies representing these groups; and that these bodies understood why RSLs had to be reclassified. It found that the Bill would give rise to additional costs in the order of £200,000 for the Regulator, and that it might give rise to increased administrative costs for RSLs and their lenders, though it was not possible at this stage to estimate what these might be were they to materialise. The full BRIA can be found on the Scottish Government website at www.gov.scot.

This document relates to the Housing (Amendment) (Scotland) Bill (SP Bill 20) as introduced in the Scottish Parliament on 4 September 2017

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