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Local Government and Communities Committee  
The Scottish Parliament  
Edinburgh  
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21 March 2018

Dear Bob

**Housing (Amendment) (Scotland) Bill  
Response by the Scottish Government to the Stage 1 Report by the Local Government  
and Communities Committee**

I would like to thank the Committee for its Stage 1 Report on the Housing (Amendment) (Scotland) Bill and for its recommendation that the Parliament should agree the Bill's general principles.

The Scottish Government has considered the specific points raised in the Report. I have set out our response to them in the Annex to this letter.

I trust that our response provides the Committee with the assurance it was seeking.

I look forward to working with the Committee during its Stage 2 consideration of the Bill.

I am copying this letter to the Clerk to the Committee.

Kind regards

**KEVIN STEWART**

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**HOUSING (AMENDMENT) (SCOTLAND) BILL****RESPONSE BY THE SCOTTISH GOVERNMENT TO THE STAGE 1 REPORT BY THE LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE****Environmental Information (Scotland) Regulations 2004**

38. The Committee recognises the concerns of the Scottish Information Commissioner, however it notes that changes to legislation to address a possible temporary issue might be a step too far. We agree (with the Minister) that a more proportionate response would be to establish with the Information Commissioner whether it is likely that the measures will have the unintended consequences he highlights and to establish arrangements with the SFHA and GWSF which ensure that RSLs continue to provide this information over any such transition period. We recommend that the Minister takes this action and seek an update on the outcome of these discussions.

**Response to paragraph 38**

The Scottish Government discussed with the Scottish Information Commissioner the impact that the Bill might have on the application of the Environmental Information (Scotland) Regulations 2004 (EIRs) to registered social landlords (RSLs). It outlined the many powers, under the Housing (Scotland) Act 2010, that the Scottish Housing Regulator would continue to have over RSLs. The Commissioner acknowledged the extent of these powers, including the revised powers (under sections 1 and 2 of the Bill) to appoint managers to RSLs, to remove and suspend officers from RSLs, and to appoint officers to RSLs. He took the view, however, that the changes that the Bill makes to the Regulator's powers would nonetheless make it less certain that the EIRs continued to apply to RSLs, albeit that any period of uncertainty could be relatively short-lived in view of the Scottish Government's intention to extend the Freedom of Information (Scotland) Act (FoISA) to RSLs with effect from April 2019. He explained that, unfortunately, he was unable to make an authoritative decision on the issue outside of an appeal.

The Scottish Government noted the Commissioner's views. It remained of the opinion that the Regulator would continue to exercise a significant measure of control over RSLs, which was central to the question of whether the EIRs applied to RSLs.

The Scottish Government discussed the Commissioner's view with the Scottish Federation of Housing Associations (SFHA) and the Glasgow and West of Scotland Forum of Housing Associations (GWSF). They considered that their members recognised and acted upon their duties under the EIRs, and noted the importance of them continuing to provide information covered by the EIRs. Their understanding was that the EIRs would continue to apply to RSLs once the Bill had come into force unless the Commissioner determined otherwise.

Against that background, they undertook:

- to remind their members that the EIRs apply to RSLs, and that every RSL should have procedures in place to respond to requests for environmental information in accordance with the EIRs; and
- in the event of the Commissioner determining that the EIRs no longer applied, and in line with the assurances they had given to the Committee, to advise their members to continue to respond as constructively as ever to requests for environmental information through their existing procedures during any transition period between the Bill coming into force and FoISA being extended to RSLs.

The Scottish Government welcomes this undertaking, which it considers will ensure that RSLs continue to provide the information required by the EIRs. It notes, in the event of any dispute arising in respect of a particular request for information during any transition period, that anyone not satisfied by an RSL's response to a request would be able to renew their request when FoISA is extended to RSLs. Designation of RSLs as public authorities for the purposes of FoISA would further confirm RSLs as being subject to the EIRs, and as such subject to the regulation and enforcement powers of the Commissioner.

### **Changes to the Regulator's powers of intervention: sections 1 and 2**

51. The Committee notes the concerns of UK Finance around lender confidence in the RSL sector and calls for further clarity in the Explanatory Notes around the definitions of failure and the circumstances in which the Regulator can intervene. The Committee welcomes the Minister's commitment to discuss the matter further with UK Finance and we request an update on the outcome of these discussions prior to Stage 3 of the Bill.

### **Response to paragraph 51**

The Scottish Government wishes to ensure that financial institutions lending to RSLs continue to have confidence in the strength of the regime for regulating RSLs once the Bill has come into force. It has discussed with UK Finance how the Explanatory Notes could be amended to clarify the type of circumstances in which the Regulator would be able to intervene to deal with a failure by an RSL to comply with the requirements of the Regulator. In light of these discussions, it has agreed with UK Finance that it will add a further sentence to paragraph 20 of the notes to provide examples of the type of failures that could lead to an intervention by the Regulator. The revised paragraph would read as follows (with the new sentence shown in bold):

*“Section 1(3) will amend section 58 by inserting a new subsection (1). This replaces the existing subsection and provides that the manager may be appointed only where the RSL is failing or has already failed to comply with a statutory duty (imposed on it by the 2010 Act or by other legislation) or where the RSL has failed or is failing to comply with a requirement imposed on it by the Regulator. **Examples of the latter would include where the RSL has failed or is failing to comply with the Regulator's requirement to address a failure to achieve standards of financial management and governance set out in the code of conduct under section 36 of the 2010 Act, or the Regulator's requirement to achieve***

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***financial management or governance targets set by the Regulator under section 37 of the 2010 Act.”***

UK Finance has confirmed that it is happy with this revision. The Scottish Government will add the new sentence when the Explanatory Notes are next published (which, if any amendments are agreed to at Stage 2, is likely to be after Stage 2).

**Removal of the Regulator’s consent powers: sections 3-7**

68. We recognise that, with the removal of these consent powers, previous safeguards may be affected and we therefore seek confirmation from the Scottish Government of how it will:

- work with the Regulator to ensure that any intelligence lost through the consents process is addressed by other means;
- work with the social housing sector to ensure that RSLs have the appropriate governance and due diligence measures in place to replace the Regulator’s powers of consent;
- ensure that RSL’s Boards continue to have adequate tenant and diverse representatives who can provide an appropriate challenge function; and
- work with the social housing sector to ensure that any impact on the financial health of RSLs is mitigated.

**Response to paragraph 68**

*First bullet*

The Scottish Government has included provisions in the Bill (at sections 3(6), 4(5), 5(2), 6(4), (5), (6), (9), (10), (11) and (12), and 7(2)) which will require RSLs to notify the Regulator every time they undertake an action (such as disposing of assets, or restructuring their business) which previously would have required the consent of the Regulator. These provisions will ensure that the Regulator continues to obtain basic intelligence about actions that currently require its consent – albeit that it will receive the intelligence after the event, rather than prior to it as is the case at present.

The loss of intelligence before the event will leave the Regulator less well sighted on developments in individual RSLs that could be significant to its understanding of an RSL’s governance and financial health. However, where an RSL is planning to take a step that formerly would have required the consent of the Regulator, it is likely - where such a step would be significant for the business of the RSL – that the RSL’s intentions would become public knowledge before the step takes place. That is particularly true of plans for disposals and restructurings that would be the subject of tenant consultation. The nature of the requirements for tenant consultation in connection with such plans means that the plans will be advertised and be a matter of public knowledge well in advance of a disposal or restructuring taking place. The availability of such information should help the Regulator to compensate for some of the intelligence it will no longer receive before the event when it loses its powers of consent. It is also likely in many cases that RSLs will volunteer information to the Regulator where significant disposals or other major changes are being considered.

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### *Second bullet*

The Regulator, under sections 36-38 of the Housing (Scotland) Act 2010, issues a code of conduct setting out standards of financial management and governance for RSLs, may set financial management or governance targets for RSLs, and may issue guidance on any such targets. These sections of the 2010 Act are not changed or affected by the Bill.

The code of conduct and targets constitute part of the regulatory framework through which the Regulator sets requirements for RSLs to have appropriate governance and due diligence measures in place. The Regulator is currently discussing with RSLs, tenants, lenders and other stakeholders its initial thinking on how it might review and revise the regulatory framework to take account of recent developments in the RSL sector, including the effect of the Regulator losing its powers of consent. The Scottish Government considers that this exercise provides the RSL sector with a timely opportunity to consider the sort of governance and due diligence measures that might be required in the absence of the Regulator's powers of consent.

In addition, the Scottish Government will use its regular discussions with the SFHA and GWSF to seek reassurance that RSLs understand the increased importance of having governing bodies that are capable of exercising effective due diligence, and are taking advantage of the continuous training and development that the SFHA, GWSF and other bodies provide to improve the skills and capacity of the members of governing bodies.

### *Third bullet*

RSLs are independent bodies. Subject to the legislation that applies to them as either registered companies or registered societies, and to the requirements that the Regulator sets out in its regulatory framework, their governance arrangements are determined by their respective constitutional arrangements. The Scottish Government has no role in influencing appointments to, or the composition of, their boards or governing bodies. Further, any attempt to exercise influence in these respects could run counter to the purpose of the Bill by suggesting a measure of public sector control that would not be compatible with RSLs being classified back to the private sector.

Against that background, the Scottish Government cannot act directly to ensure the outcome that the Committee – and indeed, the Scottish Government – wishes to see in this respect. It considers, however, that the requirements of the Regulator in its regulatory framework, along with training on governance by SFHA, GWSF and other bodies provide satisfactory means of achieving the outcome. In its regular discussions with the SFHA and the GWSF, the Scottish Government will remind them of the Committee's concern and encourage them to ensure that RSL governing bodies are diverse in their composition, include tenants, and are capable of providing effective challenge to RSL senior managers.

### *Fourth bullet*

The Scottish Government has discussed with the SFHA and the GWSF the risk that the loss of the Regulator's powers of consent could weaken lenders' confidence in the regulation of the sector and the impact that this might have on RSLs' finances.

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The SFHA and GWSF consider that their members appreciate this risk, and recognise that this places a greater onus on all of their members to demonstrate to their lenders that they have robust and rigorous governance procedures in place. They are keen to work with the Regulator to ensure that the review of the regulatory framework helps to strengthen further the governance of RSLs and, thereby, reassure lenders that RSLs remain creditworthy.

In these circumstances, and subject to the outcome of the review of the regulatory framework, the Scottish Government considers that RSLs would be unlikely to suffer any significant impact on their financial health as a result of the Regulator losing its powers of consent. It will use its regular discussions with the Regulator, the SFHA and GWSF, and UK Finance to confirm that this is the case, and will encourage anyone who has any concerns over the financial health of RSLs to raise those concerns with the Regulator.

### **Scottish Minister regulation-making powers: sections 8 and 9**

79. The Committee welcomes the Government's commitment to only use Section 8 in the eventuality that current proposals are not adequate for ONS to reclassify RSLs as private bodies. The Committee also understands that the Scottish Government only intends to use Section 9 for the limited circumstances set out in the Policy Memorandum referred to above. We agree that adding a sunset clause to Sections 8 and 9 would address the concerns of UK Finance relating to lender confidence. We therefore recommend that the Scottish Government brings forward appropriate amendments at Stage 2.

### **Response to paragraph 79**

The Scottish Government confirms that it will bring forward an amendment at Stage 2 that will provide for the regulation-making powers at sections 8 and 9 to expire three years after the Bill receives Royal Assent.

80. We disagree that the intended purpose of Section 9 to reduce local authority membership on RSLs boards is unduly restrictive and recognise it is necessary to bring about the intended changes.

### **Response to paragraph 80**

The Scottish Government welcomes the Committee's conclusion that the power at section 9 to make regulations reducing local authority membership of RSL boards is necessary to secure the Bill's policy objective.

### **The Scottish Government March 2018**

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