



Mandatory maximum terms for committee and board members

Facts and Fiction

1) Introduction

In its current Consultation Document, “The regulation of social housing in Scotland”, the Scottish Housing Regulator proposes to set mandatory maximum periods of tenure for housing association committee members. The Consultation Document offers the following justification:

“We consider that the provisions for governing body renewal set out in the UK Corporate Governance Code offer the best approach. We will require RSLs to ensure their constitutions have specified maximum terms of three years, for individual (non-executive) governing body members, normally subject to a maximum continuous period of governing body service of six years”.

GWSF agrees with SHR that promoting a balance between stability and renewal in the membership of housing association management committees is a sound governance principle. Our difficulty is with the prescriptive and compulsory time limits the Regulator is proposing.

Our response to the SHR Consultation Document (question 19) explains why SHR’s proposals to introduce mandatory maximum periods of tenure for voluntary committee members are unsuited to the character and purpose of the community-controlled housing associations we represent. Just as important, we have previously advised SHR that its justification for its proposal is factually incorrect.

On 11 October 2011, GWSF sent SHR a copy of our Briefing on the Consultation Document. Our Briefing noted that:

- The UK Corporate Governance Code **does not** stipulate a mandatory requirement for maximum periods of tenure.
- **None of the other governance codes referred to in the SHR Consultation Document do so either** (these are the present SHR’s Regulatory Code of Governance; The Good Governance Standard for Public Services; and Good Governance: a Code for the Voluntary and Community sector).

At a number of public events, our members have asked SHR to confirm what published evidence exists to substantiate repeated statements by its Board members that mandatory fixed terms are the norm in other sectors. SHR has not answered these questions directly, and it has continued to make misleading statements to the press in recent weeks:

- **“What we are proposing would align practice in RSLs with what normally happens in other organisations across the public, voluntary and private sectors.”** (SHR chair, quoted in *The Herald*, 28 October)

- **“It would be good to hear some evidence for the view that good governance principles, as recognised across other sectors don’t really apply in this one.” (SHR Chair, quoted in The Herald, 15 November)**
- **“What we are proposing would align practice in the RSLs with what happens in other sectors.” (SHR Chair, quoted in Inside Housing, 17 November).**

These statements are **factually inaccurate**.

SHR’s reference in a recent press article to the 2005 Communities Scotland research report, “Governing registered social landlords”, produced by Heriot-Watt and Oxford Brookes Universities, is also factually incorrect. The SHR’s Chair was quoted in The Herald newspaper on 15 November 2011 as saying that **“That report discovered significant issues in terms of weak governance”** in the Scottish RSL sector. Here are two direct quotes from the research Précis report:

“The sector is generally well governed”; and

“Recommendations to limit the terms of non-executive directors as in private companies are not directly relevant to the sector. Indeed, they would probably weaken committees and make it harder to recruit committee members”.

It is now essential to set the record straight, for the benefit of housing associations, tenants and the wider public. Accordingly, this paper sets out in detail what a wide range of good governance codes and regulatory codes actually say on the issue of mandatory maximum periods of tenure.

2) The evidence in summary

SHR has stated that RSLs are unusual in not having mandatory maximum periods of tenure for their governing body members.

We have not found any example of a regulator (or an advisory body) taking away from independent organisations the ability to determine their own constitutional arrangements for tenure.

There are, of course, individual cases of organisations setting terms of tenure in their rules, because they regard this as being compatible with their own individual governance context. But this is quite different from a regulator imposing compulsory conditions on independent organisations.

Table 1 below summarises the evidence we have reviewed. We then provide a summary of the relevant codes and other documents. We have considered evidence relating to a number of sectors that are closely comparable to community-controlled housing associations (such as credit unions and community development trusts), as well as sectors referred to by SHR which are very different (e.g. FTSE 350 companies listed on the Stock Exchange).

Table 1

Regulatory or Advisory Code	Mandatory Tenure Limit for Non Executive Directors?
Financial Reporting Council: The UK Corporate Guidance Code	No
The Scottish Housing Regulator: Regulatory Code of Governance	No
The Independent Commission on Good Governance in Public Services: The Good Governance Standard for Public Services	No
Association of British Credit Unions: Code of Governance for Credit Unions	No
Development Trust Association Scotland: Model Memorandum and Articles	No
ACEVO; ICSA; NCVO; and SCC Good Governance: A Code for the Voluntary and Community Sector	No
Financial Services Authority: Handbook Online	No
Office of the Scottish Charity Regulator (OSCR): Guidance for Charity Trustees, and Meeting the Charity Test	No
Tenant Services Authority, The Regulatory Framework for Social Housing in England	No
National Housing Federation, Code of Governance	No
Scottish Government, Local Governance (Scotland) Act 2004 and the Scottish Local Government (Elections) Act 2009	No

3) The evidence in detail

Financial Reporting Council, UK Corporate Guidance Code, 2010

We have begun with this Code since it is the governance code that SHR has identified as “offering the best approach” – although community-controlled housing associations are of course not for profit, community organisations rather than private sector bodies.

The UK Corporate Governance Code (formerly the Combined Code) sets out standards of good practice in relation to board leadership and effectiveness, remuneration, accountability and relations with shareholders.

The Code begins by stating that “The “comply or explain” approach is the trademark of corporate governance in the UK. It has been in operation since the Code’s beginnings and is the foundation of the Code’s flexibility... The Code is not a rigid set of rules.”

It makes clear that ‘an alternative to following a provision may be justified in particular circumstances if good governance can be achieved by other means. A condition of doing so is that the reasons for it should be explained clearly and carefully to shareholders ... In providing an explanation, the company should aim to illustrate how its actual practices are

both consistent with the principle to which the particular provision relates and contribute to good governance.’

On tenure, it states ‘All directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance.’

It suggests that non-executive directors should be appointed for specified terms subject to re-election and that any [initial] term beyond six years for a non-executive director should be subject to particularly rigorous review, and should take into account the need for progressive refreshing of the board.

It also states ‘All directors of FTSE 350 companies should be subject to annual election by shareholders. All other directors should be subject to election by shareholders at the first annual general meeting after their appointment, and to re-election thereafter at intervals of no more than three years. Non-executive directors who have served longer than nine years should be subject to annual re-election.’

It is important to note that none of the bodies SHR regulates are FTSE 350 companies. All of GWSF’s members are membership, not for profit bodies where the vast majority of shareholding members live within a constitutionally defined areas of operation and the value of their shareholding is £1.

Community-controlled housing associations have fully democratic constitutions. This means that all prospective committee members are subject to elections in which all shareholding members are entitled to vote. Committee members serve for a period of three years, and are then subject to the nomination and election procedures stated in their Rules. While contested elections are not the norm, the fact that they are the constitutional foundation matters greatly, for example in cases where shareholding members wish to hold their housing association to account for its management or performance.

The UK Corporate Governance Code does not set mandatory tenure limits.

The Scottish Housing Regulator, Regulatory Code of Governance, 2008

The present SHR’s Regulatory Code of Governance is based on The Good Governance Standard for Public Services (also known as “the Langlands Principles”, see below). The Langlands Principles describe six principles of good governance for all organisations providing public services. Although RSLs are not public-sector organisations, the six principles also apply to independent organisations that provide public services, such as RSLs. The present SHR identified the Langlands Principles as the best framework for setting standards about the governance of RSLs.

The existing SHR Regulatory Code states that:

- There is a need to strike a balance in the membership of the governing body between continuity and renewal.
- RSLs should regularly review the skills and composition of the governing body and how well it is fulfilling its governance responsibilities. It makes any improvements needed and plans effectively for the renewal of the governing body.

The (separate) supporting guidance states that:

- The governing body should have a clear strategy for achieving its own renewal, beyond the turnover provisions contained in the RSL's constitution. Methods for attracting potential governing body members should be tailored and proportionate to the RSL's circumstances.
- For example, the focus of succession planning in some RSLs may be on developing the experience of people with the potential to become office-bearers, in other organisations the priority may be to attract the governing body members of the future.

The existing SHR Regulatory Code makes no reference to the tenure of members of governing bodies, and does not set mandatory maximum periods of tenure.

The Independent Commission on Good Governance in Public Services: The Good Governance Standard for Public Services, 2004

The Independent Commission on Good Governance in Public Services was established by the Office for Public Management and the Chartered Institute of Public Finance and Accountancy, in partnership with the Joseph Rowntree Foundation. The role of the Commission was to develop a common code and set of principles for good governance across public services.

In relation to striking a balance in the membership of the governing body between continuity and renewal, the Good Governance Standard states that:

- All governing bodies need continuity in their membership, so that they can make the most of the pool of knowledge and understanding and the relationships that have been formed both inside and outside the organisation. It is also important that governing bodies are stimulated by fresh thinking and challenge and that they avoid lapsing into familiar patterns of thinking and behaviour that may not best serve the organisation's purpose. However, turnover in membership that is too extensive or too frequent can mean that the organisation loses the benefit of longer-serving members' learning and experience.
- Options include fixed terms of membership or limits on the number of terms a governor can serve. Another option is to assess individual governors for their continuing objectivity every time they are being considered for reappointment.

The Good Governance Standard does not set mandatory tenure limits. Instead, it describes a number of options that organisations can consider in deciding how best to strike the balance between continuity and renewal.

Association of British Credit Unions Ltd (ABCUL), Code of Governance for Credit Unions, 2010

ABCUL is the leading trade association for credit unions in England, Scotland and Wales. ABCUL represents around 70% of credit unions who in turn provide services to 85% of the British credit union membership. It has developed this code to strengthen credit unions' internal structures, their accountability to members and stakeholders and to complement the regulatory framework for credit unions.

It states that Directors are subject to election by members and to re-election thereafter at intervals of no more than three years. This is exactly the same as the constitutional requirements in most housing associations' Rules.

Like the vast majority of Scottish RSLs, Credit Unions are regulated by the FSA.

The city of Glasgow has more credit unions and higher levels of membership than any other part of the UK. One in five of the city's residents are members of a credit union, compared with the UK average of one in twenty. The UK's largest credit union is the Glasgow Credit Union, which has 27,000 members and which employs 34 members of staff.

The ABCUL Code makes no reference to the tenure of members of governing bodies.

Development Trust Association Scotland (DTA Scotland), Model Memorandum and Articles, 2009

DTA Scotland encourages the growth of new development trusts; supports and strengthens existing trusts; and promotes and represents trusts. It has more than 170 member associations including some that are substantial social businesses on a comparable scale with housing associations. For example, the South Uist (Storas Uibhist) Trust owns and manages 93,000 acres of land, 10 commercial businesses, 1,000 crofts, a wind farm and a harbour.

DTA Scotland provides a model Memorandum and Articles to its members. Both the charities regulator, OSCR, and the Community Assets Branch of the Scottish Government have approved these.

The Memorandum and Articles require one third of Member Directors to resign each year. Those that resign are eligible for re-election. Again, this is directly comparable to the constitutional requirements set out in housing associations' rules.

The approved model Memorandum and Articles for Development Trusts in Scotland make no reference to maximum tenure periods for Member Directors.

Financial Services Authority (FSA), Handbook Online, 2011

The vast majority of Scottish RSLs are industrial and provident societies, and must therefore meet FSA regulatory requirements as well as those of SHR. The FSA is also responsible for regulating credit unions, which have much in common with community-controlled housing associations.

The FSA Handbook provides 'the regulations and guidance as set out by the Financial Services Authority'. The handbook confirms that the FSA supervise firms according to the risks they present to its statutory objectives. FSA assesses risks in terms of their impact (the scale of the effect these risks will have on consumers and the market if they were to happen) and probability (the likelihood of the particular issue occurring).

The FSA Handbook is silent on terms of office for non-executive directors of firms regulated by the FSA.

ACEVO; ICSA; NCVO; SCC, Good Governance: A Code for the Voluntary and Community Sector, 2010

The Code sets out a series of principles of good governance that have been designed to be valid for the entire voluntary and community sector.

An independent Steering Group including representatives from ACEVO, the Institute of Chartered Secretaries and Administrators (ICSA), NCVO and the Small Charities Coalition (SCC) was responsible for developing the Code, with support from the Charity Commission.

Because the Code applies to such a diverse range of organisations, it is in two parts:

- A set of six principles intended to apply to all organisations that adopt the Code;
- “Other important things to consider” in deciding how individual organisations choose to apply the principles in a manner that is appropriate to their individual circumstances.

In relation to the latter, the Code states that:

“Given the diversity of the sector, the good governance characteristics may not be applicable to every organisation. They are for guidance and for use in a way that encourages appropriate flexibility – we anticipate that the ‘apply or explain’ principle will be adopted”.

On the specific question of board renewal, the Code provides advisory rather than mandatory guidance which states the need to ‘maintain a strategy for board renewal that will meet the organisation’s changing needs. This will cover maximum terms of office and succession planning, particularly for the chair and other key positions/skills.’

The Code does not set mandatory time limits for tenure of board members. Rather it sees terms of office as a matter for each organisation to determine.

Office of the Scottish Charity Regulator (OSCR), Guidance for Charity Trustees, 2006, and Meeting the Charity Test, 2011

OSCR is the independent regulator and registrar for over 23,000 Scottish charities. It provides guidance to charities and their trustees.

OSCR does not include a reference to tenure for trustees in any of its guidance for charities or trustees.

Tenant Services Authority (TSA), Regulatory Framework for Social Housing in England, 2010

The Tenant Services Authority is the independent regulator for affordable housing in England. In its Regulatory Framework, the TSA adopts a very different approach to the detailed and prescriptive set of governance requirements proposed by SHR. Instead, the

TSA states that 'Registered providers shall adopt and comply with an appropriate code of governance. They shall give the reasons for their choice and explain areas of non-compliance with their chosen code.'

The TSA does not include a reference to the tenure for members of governing bodies in its Regulatory Framework. On governance matters as a whole, the TSA takes a much higher-level, outcomes-based approach to setting governance standards, in comparison with SHR's proposals.

National Housing Federation, Code of Governance, 2010

The National Housing Federation's specifies a maximum period of tenure of 9 years. However, this is not a mandatory requirement since the 2010 version of the Code states that maximum periods of tenure should be applied 'where practical and for the best interests of the organisation'.

The NHF Code does not specify a mandatory requirement for maximum periods of tenure.

Scottish Government, Local Governance (Scotland) Act 2004 and the Scottish Local Government (Elections) Act 2009

The two acts which govern the election of local authority councillors in Scotland do not set maximum terms for councillors. The 2009 Act sets out a term of office of 5 years – until 2017 when the term will become four years. There is no restriction on councillors standing for re-election. Councils, credit unions and community development trusts are all particularly relevant comparators. Like community-controlled housing associations, they have fully democratic constitutional arrangements based on elections.

Neither of the Acts relating to local authority councillors set any time limit to the tenure of councillors in Scotland.

**GWSF
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