



## Scottish Housing Regulator (SHR) Consultation on “The Regulation of Social Housing in Scotland”



### GWSF/EVH/SHARE Briefing (October 2011)

GWSF and EVH recently published a summary of the Consultation Document published by the Scottish Housing Regulator (SHR), “The Regulation of Social Housing in Scotland”. As promised, we have written a follow-up Briefing, with SHARE joining us as co-publishers.

Many aspects of the Consultation Document are technical or reflect established regulatory practice. But some parts of the Document involve major changes for housing associations and have generated widespread discussion among GWSF, EVH and SHARE members.

This Briefing covers four of the big issues that members have been raising with us:

- **Monitoring and reporting against the Scottish Social Housing Charter**
- **Regulatory standards and guidance on housing association governance**
- **The SHR’s statutory duty to carry out its functions in a proportionate, transparent and accountable way**
- **How the proposals as a whole meet the SHR’s stated aims**

The Briefing sets out our shared perspective on each of these issues, along with our ideas about how the SHR’s proposals could be improved. We hope it will be useful in informing your own organisation’s response to the consultation, which closes on **25 November 2011**.

## 1) Monitoring and reporting on the Scottish Social Housing Charter

### SHR and the Scottish Social Housing Charter

The Scottish Government rather than the Scottish Housing Regulator (SHR) is responsible for the Charter.

The **draft Charter** in its present form is unfocused, poorly drafted and contains **71 separate outcomes**. It will form the basis for future reporting to SHR about services for tenants and others.

SHR's **main proposals** are that every landlord will provide it with two reports every year:

- **Annual Return on the Charter (ARC)**

This would report on 'key measures' associated with the Charter (these measures have not yet been specified, they will only be decided after the Charter comes into force);

- **Annual Charter Performance Report (ACPR)**

This would be a self-assessment report, co-developed with tenants and other service users, covering your organisation's performance against all 71 Charter outcomes as well as local outcomes!

### The Annual Charter Performance Report

Our concerns lie with the Annual Charter Performance Report rather than the ARC, provided that future proposals for the ARC are reasonable.

The ACPR is a **new regulatory requirement** and will consume a high level of resources for both landlords and the SHR. It means that **every social landlord, regardless of its size, resources or the quality of its services**, will be tied up in a regulatory reporting process that is unlikely to deliver real benefits for tenants.

The Housing (Scotland) Act 2010 allows SHR **more flexibility on monitoring the Charter** than is reflected in the Consultation Document.

Section 41 of the 2010 Act says that SHR must publish performance reports annually. But **the Act does not say** that SHR must publish information every year about how every landlord is performing in relation to every outcome and standard in the Charter. Nor that every social landlord must base its performance management systems on self-assessment against the Charter.

### The costs and benefits of the Charter and the Annual Charter Performance Report

Statutory guidance<sup>1</sup> states that the benefits of specific regulatory measures should **justify the costs involved** and that the measures should entail **the minimum burden** on regulated bodies compatible with achieving regulatory objectives.

The current proposals for monitoring the Charter **do not meet these tests**.

The Government and SHR have both said that landlords who perform well will **benefit from less intrusive regulation, but there is a catch**.

**The catch** is that every social landlord in Scotland will first have to supply SHR with its proposed Annual Charter Performance Report every year.

SHR has not provided a **regulatory impact assessment** for the costs this will create, and the assessment from the Government lacks credibility. According to the Government, landlords will not incur **any** additional costs as a result of evidencing their performance against all of the Charter outcomes every year!

Our own members have estimated that the **cost of the ACPR process could range from £7,000 to £45,000 a year**, with some larger organisations saying they would need to employ an additional staff member with responsibility for meeting new regulatory information requirements.

Since there are 200 RSLs in Scotland, the annual cost of the ACPR process could run into **several million pounds** across the sector.

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<sup>1</sup> Regulator's Compliance Code: The Statutory Code of

## A more efficient approach

Monitoring the Charter can be leaner and more targeted. **We would like to see:**

- The Government making **changes to the Charter**, to differentiate between overarching outcomes and more detailed standards;
- SHR **removing the requirement** for an Annual Charter Performance Report and focusing instead on a single report – the Annual Return on the Charter (ARC);
- Landlords reporting to tenants on those standards in the Charter that are agreed to be **locally important**, rather than landlords having to report on each and every aspect of the Charter to tenants and the SHR.

These are the main features of our **alternative approach**. This draws on how local authorities and their community partners **monitor and report on Single Outcome Agreements**.

- The Charter would be revised to describe a much smaller number of **overarching outcomes**.
- SHR would use the Annual Return on the Charter to collect data on a **targeted range of measures** derived from the overarching outcomes.
- SHR would form its initial judgements on service performance using the **ARC data and the other information available to it** (e.g. from the Scottish Public Services Ombudsman; tenant reporting of serious performance failures; notifiable events).
- Each Charter outcome would be accompanied by **standards** describing the features of effective services and **a range of possible performance indicators**.
- **Tenants and landlords** would agree which of the Standards and performance indicators – as many or as few as are locally important – should be covered in annual or other reports. Annual reports would be provided to tenants, not to the Regulator.

SHR could still obtain more detailed self-assessment or other information, **where there is a need to do this**.

For example:

- For very large landlords where poor service results would have the greatest impact, or
- For landlords of any type or size where ARC returns or other information indicate that more detailed investigation or action is needed.

SHR's regulation plans and its statutory powers to obtain information and to conduct inquiries mean that it has **all the powers needed** to make this different approach work.

## 2) Standards of governance and financial management

### Too much detail, too much prescription

SHR's six high level **Regulatory Standards** on governance and financial management are **sensible and clear**. But the guidance accompanying the standards is in many respects **too detailed and too prescriptive**.

This applies particularly to the proposal to set **detailed Constitutional Standards**. The present SHR does not set these types of standards for existing RSLs, and the Housing (Scotland) Act 2010 contains no references to the new SHR doing this.

This is one of a number of areas where the SHR's proposals risk becoming **far too intrusive**. Other examples include SHR's intention to produce model clauses for RSL constitutions and a uniform code of conduct for governing bodies.

Each of these proposals is at odds with the statement in the Introduction to the Consultation Document, that **"RSLs are independent housing associations and co-operatives ... responsible for their own performance and management"**.

### Comply or explain ...

One of the hallmarks of effective governance codes and guidance is that they are based on **the principles of "comply or explain"**, rather than setting absolute and mandatory requirements.

These principles apply to **all three governance codes** quoted by SHR as having informed its approach – and to the present SHR's **Regulatory Code of Governance** and the accompanying supporting guidance. SHR departs from this approach by stating that **all RSLs must meet all aspects of the guidance** set out in the Consultation Document.

Comply or explain principles generally restrict mandatory requirements to areas where there are **specific legal obligations**. They also **allow for choice and flexibility** in how good governance standards are applied.

The need to avoid too much prescription is obvious in the case of Scottish RSLs. There is **great diversity among RSLs** in terms of their values, organisational purpose, democratic accountability, operating context, and approach to appointing governing body members.

### Time's up? Mandatory fixed terms for voluntary committee members

Predictably, SHR's proposals have created huge concerns among housing associations. Community-controlled housing associations (CCHAs), for example, have a **stakeholder governance model** based on **democratic elections, tenants and local residents** being governing body members, and **volunteering for the good of the community**.

We think mandatory limits on service are fine for organisations that pay board members – for example **Quangos and the banks**. But they are completely unsuited to the stakeholder governance model we have described, and they will **weaken rather strengthen** the governance of many RSLs.

SHR quotes the **UK Corporate Governance Code** (UKCGC) for private sector listed companies as the justification for its proposals. This is an odd choice, when there are **comparable codes** for the voluntary, community and public sectors. The references to the UKCGC are **in any event inaccurate**:

- The first paragraph of the UKCGC says that it is a **"comply or explain"** code
- The UKCGC **does not set mandatory limits** on service of either six or nine years.

Instead, the UKCGC recommends that non-executive directors with more than nine years service should be subject to re-election by shareholders. In the vast majority of Scottish RSLs, **committee members are subject to open elections from day one**.

Mandatory limits on service will **destabilise the governance** of many housing associations. It would lead to large numbers of **experienced voluntary committee members** having to step down **simply to satisfy a regulatory**

**requirement.** And it would diminish the **long-term investment** that housing associations make in developing the skills of tenants and other residents to be effective committee members.

### **Money, Money, Money Payment of committee and board members**

SHR suggests that the **removal of previous statutory restrictions** (Schedule 7) is the main reason for adopting a permissive policy on payment of committee and board members.

**We do not accept this argument.** Following a detailed review of housing association governance, the present SHR considered permitting payment by introducing a Special Exception to Schedule 7 but **chose not to do this.**

The **new SHR also has choices** on this matter.

There is nothing to prevent it setting **regulatory standards** to maintain the status quo on payment. But **it has made the opposite choice**, by describing payment as "... a mechanism to enable RSLs to have the right people with the right skills on the governing body".

Committee members regard this statement as **diminishing the contribution** that voluntarism makes to ensuring the success, credibility and sustainability of housing associations in communities throughout Scotland. They also find it hard to see how the SHR's payment policy will contribute to its **statutory objective** of promoting the interests of tenants and service users.

Elsewhere in the Document, SHR states that its role includes "**upholding the good reputation of individual RSLs and the RSL sector**", with tenants, taxpayers, the public etc.

We think there will be **even less appetite for payment among tenants** than committee members, and that tenants might expect SHR itself to have a direct role in approving any proposals to pay in individual RSLs.

Payment will be a matter of choice for individual RSLs. But the change in policy that is proposed is at odds with the **values and ethos** of the vast

majority of Scottish housing associations, **most of which are charities.** Very few Scottish charities in other sectors pay trustees.

Those who do pay face a practical dilemma, since the Charity Regulator stipulates that **a charity may never pay a majority of its trustees.**

In other words, charitable housing associations wishing to pay their board or committee members will have to create a **two-tier system**, made up of some members who are volunteers and some who are paid.

### **Who's in charge? Paid employees as governing body members**

This aspect of the SHR's proposals is inconsistent with statements elsewhere in the Consultation Document that the role of governing bodies is to "**exercise independent control**".

While this is common practice in the private sector, employment contracts and accountability arrangements are very different in the housing association sector.

Overall, we are struggling to see why the SHR thinks **RSL governance should be more like the private sector.**

### 3) The SHR's legal duties: proportionate, accountable, transparent regulation, targeted only where action is needed

#### The Housing (Scotland) Act 2010

The 2010 Act says that the SHR must explain **how it will perform its functions** in a way that meets these requirements.

And that in doing so, SHR should “take into account the **different types of social landlord**, for example by taking into account a) legal status and governance arrangements, b) property owned or managed, c) annual turnover, and d) number of employees”.

The Consultation Document offers some additional guidance about “RSLs of systemic importance”. But the overall approach is to **apply the same requirements to all social landlords** and for SHR to apply its own judgments about what is reasonable in individual cases.

#### Why this part of the 2010 Act matters

To give some brief examples:

- Should **small, lean landlords** with very few employees put **the SHR's reporting requirements** ahead of providing a good service to their tenants?
- SHR's counterpart in England initially exempted landlords owning less than 1,000 houses from having to submit annual self-assessment reports against its regulatory standards. It has since **abolished this requirement** for **all** registered providers.
- SHR's proposed policy on paying governing body members risks damaging the reputation and good standing of all housing associations in Scotland.
- Classifying RSLs based on their governance arrangements, as the 2010 Act allows, would put **clear blue water** between RSLs whose governance arrangements are **community-focused and voluntary**, and those whose governance is **more closely aligned to Quangos or private sector companies**.

#### Accountability and transparency

The Consultation Document does not fully address how the SHR will ensure that it performs its functions in an **accountable and transparent** way.

This is important, since SHR staff will apply **high levels of judgment** in determining regulatory actions in individual cases. And since many SHR interventions will be **informal rather than statutory**.

We would like to see more information from SHR in the final regulation framework, on matters such as:

- The respective **roles and responsibilities** of the SHR Board and executive officers;
- The **checks and balances** that will be in place to ensure that the SHR's interventions are effective, evidence-based and proportionate;
- How regulated bodies, tenants or others may **challenge or seek further information** about regulatory judgements.

Accountability issues are a key part of the **Statutory Code of Practice for Regulators** we have already referred to. The Statutory Code covers a range of matters that are all relevant to SHR's legal duties on accountability, including:

- Consulting with regulated bodies and other interested parties, when setting and publishing standards and targets for a **regulator's service and performance**.
- Ensuring that these standards include **costs to regulated bodies**, and **stakeholder perceptions of the proportionality and effectiveness** of regulatory approaches and costs.
- Providing an **effective complaints procedure** including a final stage to an independent, external person.

These could all usefully be addressed in the SHR's **final regulatory framework**, to reflect the requirements of the Statutory Code of Practice for Regulators.

## 4) The big picture ... the whole regulatory package

### The SHR's objectives and role

The SHR's **statutory objective** is to **safeguard and promote** the interests of tenants and others who use social landlords' services. The Consultation Document says SHR will be "**an intelligent regulator**, with the right balance between **proactive and reactive regulation**", and that it will "**streamline the requirements** we place on social landlords where we can".

The Consultation Document does not ask for comments about whether **the whole regulatory framework** that is proposed will achieve these aims. This is **a critical question** for those responding to the consultation.

### Is social housing a top scrutiny priority?

Intensive regulation is certainly needed in some sectors. The **banks and energy companies** spring to mind, along with public services responsible for **protecting children and vulnerable adults** from harm. Do social housing providers need to be as intensively regulated?

In setting out its proposals, SHR says that tenants and other service users have "**unequal bargaining power**" with housing providers. But it's just as important to remember that poor service outcomes for tenants are **the exception** in social housing, **not the rule**:

- Inspections by the present SHR say that **two-thirds of all inspected services** provided by housing associations are **good or excellent**, with only 8% assessed as poor;<sup>2</sup>
- **Service-related issues have been mentioned rarely in regulation plans** since they were introduced in 2008. The 2011 plans highlight problems with repairs services as a reason for engagement in just **two cases out of around 200 housing associations**, the same number to mention housing allocations.<sup>3</sup>

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<sup>2</sup> **Social Landlords in Scotland: Shaping up for improvement (Scottish Housing Regulator 2009)**

<sup>3</sup> **RSL regulation plans in Scotland: a review (Housing Quality Network, 2011)**

### What about the private rented sector?

**Poor quality housing and landlord services** are far more common in the private rented sector. Regulation is less demanding, but there is **growing public concern** that legal enforcement is not effective or consistent. **Large amounts of public money** are paid to private landlords in the form of housing benefit - £370 million in 2009/10, **a quarter of Scotland's housing benefit bill**.

The Scottish Government is promoting **a bigger role for the private rented sector**, through its investment and housing options policies. The Government should **extend the SHR's role**, e.g. by making it responsible for assessing enforcement action by local authorities, just as SHR currently oversees how well councils meet their homelessness obligations.

### Promoting and safeguarding the interests of tenants and service users

Last (but not least), SHR has missed some important ways in which it could meet its statutory objective of promoting and safeguarding the interests of service users:

- There are no measures proposed to **promote governing body membership by tenants or other service users** in RSLs. Instead, the proposals on mandatory terms of service are likely to reduce tenant membership of governing bodies.
- The Consultation Document stops short of saying that SHR will require **tenant ballots** where an RSL wishes to become the subsidiary of another RSL.

Tenant ballots are **just as relevant** to group structure proposals as they are in cases involving a change of landlord. Group structure proposals mean that tenants' landlords will be under the control of another organisation. The case for **tenant consent** in such cases is obvious, based on the SHR's statutory objective.