Glasgow and West of Scotland
Forum of Housing Associations

Regulation of Social Housing in Scotland
GWSF Response to Scottish Housing Regulator Consultation

Introduction

Glasgow and West of Scotland Forum of Housing Associations (GWSF) represents 57 community-controlled housing associations and co-operatives (CCHAs). CCHAs provide decent, affordable housing for nearly 75,000 households in west central Scotland, while also improving the environmental, social and economic well being of their communities. CCHA governance is based on leadership by local people, with around 800 tenants serving on the management committee of CCHAs in the west of Scotland.

We have completed the standard SHR consultation questionnaire. But there are a few key issues that we wish to highlight at the start of our response.

General comments on the Consultation Document

The overall tone of the consultation document has created concern among our members. They have told us that the drafting of the consultation document does not recognise:

- The generally strong performance of the housing association sector over an extended period, pre-dating the creation of the new Scottish Housing Regulator;
- The limited risks identified by previous regulatory regimes for social housing in Scotland, in relation to the quality of the housing services provided;
- The diversity of the housing association movement; and, particularly
- The importance that our own members place on community control to provide sustainable housing and create attractive neighbourhoods in some of the most challenging parts of the West of Scotland.

The most substantive concerns raised in our response relate to the sections on:

- Monitoring and reporting on the Scottish Social Housing Charter – where we believe that the current proposals need to be substantially revised in order to meet your principle relating to proportionate regulation;
- Standards of governance and financial management
    - We fully support your wish to see high standards throughout the housing association sector but believe that your proposed guidance is too detailed and too prescriptive

  - We also believe that you need to better recognise that community-controlled housing associations are independent social businesses, with their own local democratic accountabilities;
- Mandatory maximum terms for voluntary committee members and the payment of committee members;
- Regulation – where we believe that the consultation paper does not reflect your obligations under section 4 of the Housing (Scotland) Act 2010 to '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.

Our response also includes **a supplementary evidence paper**, in which we comment in detail on your proposals in relation to mandatory maximum terms for housing association committee members.

The Consultation Document and SHR's recent public statements on this issue are factually incorrect and are at odds you're your stated intention of being "expert" and "evidence-based" in your approach to regulation. We have highlighted how your proposals for mandatory maximum terms compare with a wide range of governance and regulatory codes. Our evidence paper shows that there is no evidence to support your repeated statements that your proposals on this matter would align practice in RSLs with what happens in other sectors.

We have heard the Chair of the SHR talk about 'right touch, not light touch regulation'. We believe that the consultation paper does not have the right touch (or tone) and recommend that the SHR reconsider what a 'right touch' regulatory system would look like. We make a series of suggestions about this in our detailed response.

Respondent Information Form and Consultation Questionnaire

CONSULTATION ON THE PROPOSED APPROACH TO THE REGULATION OF SOCIAL HOUSING IN SCOTLAND

FEEDBACK FORM
Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Glasgow and West of Scotland Forum of Housing Associations

Title **Mr** ☒ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☐ ***Please tick as appropriate***

Surname

Harvey

Forename

Jim

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3. Permissions - I am responding as…

Individual ☐ / **Group/Organisation** ☒

Please tick as appropriate

(a) Do you agree to your response being made available to the public (on Scottish Housing Regulator website)?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public.

Are you content for your ***response*** to be made available?

Please tick as appropriate ☒ **Yes** ☐ **No**

Consultation Questionnaire

Question 1.

Do you agree with our proposed principles and approach to building a strategy for consulting and involving tenants?

Yes ☐ No ☒

How can we make sure tenants and others can contribute to our work?

In the main, your proposals relate to involving tenants who are already involved in representative bodies. But the vast majority of tenants are not involved in formal structures such as the RTO networks. We agree that tenants should be at the heart of your work – but if you focus your engagement in the manner proposed, you will not reach the vast majority of tenants.

From experience, GWSF's members do not recognise your view that tenants are concerned about 'unequal bargaining power'. We think the users of social housing are broadly the same as consumers of other services. Their main interest lies in the range, quality, responsiveness and value for money of the services that they receive personally. Where they experience a problem, they want to have a clear process for raising this and to have any problems resolved quickly. There are typically low levels of interest in more formal types of engagement.

We believe that this is how most tenants will view any engagement with the SHR, and that your strategy for tenant involvement should reflect that. There would be great value in you consulting on this strategy – and incorporating your response to the recommendations from the IPSOS/ MORI research on measuring tenant satisfaction you published earlier this year.

We note your intention to 'continue and develop the role of the tenant assessors'. We are not sure how this will work, given the move away from routine inspections and a greater emphasis on desktop assessment by the SHR and self-assessment by landlords.

We are also aware that since 2002 you have had a Tenants' Regulation Advisory Group. We understand that its role was to advise the SHR on issues relating to regulatory policy and practice, as they affect tenants. The role for such a group (if any) should also be made clear in your strategy.

Finally, while supporting the suggestion that tenants (and other current or potential service users) should be at the heart of your work, this should be in the clear context of your other regulatory principles – including targeting, consistency and

proportionality. Throughout the Consultation Document, you refer repeatedly to your **statutory objective**, but there is much less clarity about how will meet your **statutory obligations** for the performance of your functions, as set out in sections 3 and 4 of the Housing (Scotland) Act 2010.

We suggest that in developing your strategy for consulting and involving tenants and others, you should develop more specific proposals on how you will gather information about the views and priorities of the vast majority of tenants who are not involved in traditional, formal participation activities and how you will be accountable to all tenants and other service users. We believe that you should consult widely on your strategy – and we would be happy to participate in that consultation.

Question 2.

Do you agree with our proposed approach to co-operating with other regulators and scrutiny bodies

Yes ☒ No ☐

Are there any alternative approaches we should consider?

Question 3.

Do you agree with our proposed approach to involving landlords and other sector interests?

Yes ☐ No ☒

Are there alternative approaches we should consider?

GWSF is happy to engage with SHR to represent our members' interests. We would like to see you developing a formal framework for this engagement, based on a clear purpose, an inclusive approach, and a firm commitment from you that you will take proper account of the views of landlords and other sector interests in shaping your regulatory policy and practice.

There are important lessons for you to learn from the present consultation. For example, your proposals on Housing Association governance were developed and published without taking the views of the sector. And your proposals for self-assessment and reporting in relation to the Charter were developed without a formal regulatory impact assessment being provided.

This leads to the issue of accountability. The Statutory Code of Practice for Regulators (BERR, 2007) sets out what is expected of regulators in terms of

accountability – and this approach is well worth considering in relation to the SHR.

The Statutory Code states that regulators should:

- Create effective consultation and feedback opportunities to enable continuing cooperative relationships with regulated entities and other interested parties;
- Consult with regulated bodies and other interested parties when setting and publishing standards for the regulator's service and performance;
- Ensure that these standards include the costs to regulated bodies of regulatory interventions – as well as perceptions (from regulated bodies and interested parties) on the proportionality and effectiveness of the approaches and costs; and
- Provide an effective complaints procedure.

We asked about SHR's accountability relationships with regulated bodies when SHR's Chair and Chief Executive spoke at GWSF's annual conference on 11 November.

You stated that your accountability is to Parliament and service users. This is much narrower than the best practice set out in the Statutory Code of Practice.

If you continue to define your accountability in these restricted terms, we think you will continue to experience difficulty in establishing constructive working relationships with the bodies you regulate.

There is nothing in our comments about accountability that would compromise your independence as a regulator. Instead, the issues we raise are more about your culture as an organisation and your ability to understand and work effectively with regulated bodies.

The SHR's obligations under the 2010 Act are to consult 'landlords or their representative bodies'. We believe that (as well as having a continuing relationship with representative bodies) there will be occasions when you will need to engage directly with landlords – and this should be reflected in the final document. Some of our members have expressed concerns that they had not had sufficient access to (or opportunity to influence) the SHR during the present consultation. We believe you have missed valuable opportunities to discuss the detail of your proposals with the bodies you will regulate. We hope you will agree that a more open and inclusive approach to future consultations would be to the benefit of all concerned.

We suggest that more consideration should be given to the purpose for engagement with representative bodies; the direct involvement of landlords, when appropriate; and the accountability of the SHR to RSLs and other interested parties.

Question 4.

Do you agree with our proposals on how we will identify risk in RSLs?

Yes ☐ No ☒

Do you have any additional comments to make on this topic?

We agree with the general principles you have set out, which reflect SHR's move away from inspection-based regulation of housing associations since 2008.

However, we do have significant concerns about you have translated these principles into proposed actions. For example:

- You say in Paragraph 2.3 that you will require landlords to "give us only the data and information we will need to get (this) assurance". However the proposals for the ACPR in Section 3 are a new and potentially burdensome set of information requirements.
- There is no information yet on what measures the SHR will specify for the ARC. It is critical that the proposals you bring forward on this are proportionate, in accordance with your statutory obligations.
- You say in Paragraph 2.7 that you will consider a range of factors relating to landlords in deciding a proportionate approach. In Paragraph 2.10 you mention the items listed in Section 4 of the Housing (Scotland) Act 2010, which we believe are critical if you are to meet your statutory obligations. But you have not explained how the four factors stated in the Act will be taken into account in your assessment of risk.
- We refer you to the Stage 3 debate on the Housing Bill that took place on 3 November 2010. In introducing the section 4 amendments, the Minister for Housing and Communities told Parliament that he **"would expect the Regulator to take account of the different circumstances and resources of social landlords and avoid imposing unnecessary burdens or bureaucracy"**. We cannot see how you have met that expectation, for example in relation to smaller landlords. There is also a danger that in making your regulatory judgements on a landlord-by-landlord basis, consistency and proportionality of response may be lost.
- It is important for you to be clearer what is meant by RSLs of "systemic importance". For example, would these RSLs be specified (for example in the regulation plans)? And, more importantly, the consultation document does not set out clearly what being an RSL of systemic importance means in terms of risk assessment. The implication is that there will be greater demands made and a more intensive risk assessment, but it would be helpful to make this clear.

We believe that the SHR must ensure that it only gathers the data and information required – and that it clarifies how, in practical terms, it will use different risk assessment criteria for different types of RSL.

Question 5.

Do you agree with our proposals on how we will identify risk in councils?

Yes ☐ No ☐ **No view**

Do you have any additional comments to make on this topic?

We have not offered detailed comments on this question because we do not have sufficient information about the detail of the shared risk assessment process led by Audit Scotland.

We think it is important that both RSLs and councils should provide the same level of assurance about risk in relation to all of the factors that underpin high quality outcomes for tenants and service users, even if the means of achieving this differ because of the shared risk assessment process that applies to councils.

Question 6.

Do you agree with our proposed approach on regulatory engagement?

Yes ☒ No ☐

Are there any other factors we need to consider?

We agree with the general approach you have set out. Our main area of concern is the burden that you may place on landlords by requesting large volumes of information as a matter of routine every year. We have commented on this in detail in other sections of our response.

Question 7.

Do you agree with our proposed approach on how we will enable tenants to raise significant performance failures with us?

Yes ☐ No ☒

Are there other approaches we should consider?

Given your intention that tenants' interests should be at the heart of what you do, this section could be considerably strengthened to properly respect the role of tenants. For example:

- We agree that your role is not to investigate individual complaints, but there is an obvious opportunity for you to be proactive in identifying "systemic"

problems rather than only expecting the Scottish Public Services Ombudsman to draw them to your attention (as implied at 2.24).

- Where tenants provide information to you about what they consider to be significant failures, we believe you should provide feedback to them, within defined timescales, on the action you propose to take.
- You should commit to more formal timescales for a) establishing whether there is in fact a case to investigate, and b) if there is, carrying out your investigation. Otherwise, the implication is that you will investigate tenant concerns at a time and in a manner that is convenient or manageable to you. We do not think this is compatible with your objective, or that it will meet tenants' expectations.
- Significant performance failures are covered in statute. We believe that you should also commit to publish annual information about the number of notifications of significant performance failures you receive; the number investigated; and the broad outcomes. This is what you would expect an individual landlord to do in relation to its own complaints procedures.

We suggest that the SHR should commit to responding to tenants concerns within a defined timescale. And that you should publish information annually about how tenants are using these new rights and your own responses.

Question 8.

Do you agree with our proposed approach on whistleblowing, notifiable events and the disclosure of information to us by Auditors?

Yes ☒ **with caveats below** No ☐

Are there other factors we should consider?

We believe that you should consult on the two amended guidance documents that are proposed - on whistleblowing and notifiable events.

On the role of auditors, it would be helpful if the SHR provided some more practical guidance. Para 2.34 just re-states section 72 of the 2010 Act, which is extremely broad.

We would also like you to commit to reviewing the impact of the section 72 provisions and to publishing your findings. For example, in relation to auditor practice in disclosing information; the value of the disclosures made in terms of your functions; and whether landlords are incurring additional costs as a result of the duties placed on auditors.

Question 9.

Do you agree with our proposals on self-assessment by landlords and tenants?

Yes ☐ No ☒

What other issues or factors should we consider in this area?

The key issue here is the Scottish Social Housing Charter. We share the view that you set out in your own response to the Charter consultation. To paraphrase this – there are too many outcomes and they are not sufficiently precise. You also note that the current draft Charter would 'make it extremely challenging for us to develop a meaningful and manageable regulatory assessment and reporting framework'. There is a great need for you and the Scottish Government to work together with representative bodies and other stakeholders to ensure both the Charter and future regulation systems are fit for purpose and proportionate.

Given this, we believe that you need to consider carefully what information it is reasonable to expect landlords to collect and report on every year.

The legislation does not state that you must require that landlords report on every aspect of the final Charter every year. You have introduced this as one of your regulatory principles. Clearly, the information you do require on an annual basis will need to relate to the final Charter – but it need not cover every item every year (even if the Charter is significantly revised). For this reason, you should reconsider the wording of the requirements in Paragraph 3.13 – particularly where you refer to 'covering all the Charter's outcomes'.

GWSF is not included as one of the organisations that you would work with on developing and implementing effective self-assessment. We assume this is an oversight, and that you will include us along with the other representative bodies.

We generally welcome your proposed use of tenant and service user satisfaction as a principal indicator of performance. We will be happy to take part in further consultation with you about the most appropriate questions that landlords should ask – and the frequency with which tenant satisfaction surveys should be undertaken.

However, we do have concerns that there will be significant unplanned costs for landlords if you require landlords to provide a considerably greater volume of data than at present, and on a greater frequency. It is essential that the self-assessment system is cost effective (for both landlords and the SHR); purposeful; and proportionate.

At present, based on the draft Charter, this is clearly not the case and will result in substantial additional expenditure across the housing association sector. Given

other pressure on costs that may impact on tenants' rents, we believe that this cannot be justified. Your next set of proposals (once the Charter is finalised) needs to contain a credible business impact assessment. You may wish to consider piloting your proposed approach to help inform this, as was the case when new regulatory approaches were introduced following the enactment of the Housing (Scotland) Act 2001. We would be happy to discuss how we could assist with that.

You do not appear to have considered tailoring the data and evidence requirements to the level of risk and scale of operation of landlords. We do not support the 'one size fits all' approach to regulation – and believe that you could reasonably set out core requirements for all landlords, which are considerably less onerous than you currently propose and which could be augmented when required. This would be consistent with section 4 of the Housing (Scotland) Act 2010 and the ministerial statements to Parliament we have already referred to in answering question 4.

There is a pressing need for the SHR to work with the Scottish Government (and others) to improve the draft Scottish Social Housing Charter. Thereafter annual returns from landlords to the SHR should be the minimum required to allow risk analysis; represent good value for money; and be tailored to the risk presented by different landlords (and different types of landlords).

Question 10.

Do you agree with our proposals on how landlords should involve tenants and others in self-assessment?

Yes ☐ No ☒

Are there any other factors we should consider in this area?

In our consultation response to the Scottish Government on the draft Charter, we suggested a different approach that would work with the grain of the draft Charter without tying RSLs into substantial annual evidence gathering, assessment and reporting against such a wide range of outcomes and standards. We proposed some significant re-ordering of the Charter is undertaken which would:

- Focus on five overarching outcomes;
- Encourage a more landlord/ tenant focused (rather than regulator/ landlord) approach to performance assessment;
- Allow a more proportionate approach to assessment;
- Dramatically reduce the additional costs for RSLs and tenants (and the SHR)

of managing and reporting performance;

- Build performance management into the day-to-day work of RSLs – rather than it being seen as an obtrusive ‘add-on’.

As a **first step**, we proposed that the section on outcomes should be redrafted to have five overarching outcomes covering:

- The customer/ landlord relationship;
- Quality of housing;
- Neighbourhood and community;
- Access to housing and support; and
- Getting good value from rents and service charges.

As a **second step**, we suggested that the remaining statements in the Charter are clearly described as standards.

As a **third step**, we suggested that a limited number of key indicators should be established by the SHR which all landlords would require to report on (as part of their ARC) each year. The requirement for every landlord to submit an Annual Charter Performance Report to the SHR would be removed. Instead, the focus would be on **reporting by landlords to tenants** on standards in the Charter that are agreed to be locally important.

To support this, **sample indicators and measures** would be prepared as a working tool for tenants and landlords, to supplement the Charter outcomes and standards. Landlords and tenants would be able to draw on these indicators and measures to identify those most relevant for that RSL. This approach would be similar to the basket of indicators provided by the Improvement Service to assist each council (and their community partners) identify a number of appropriate indicators in their Single Outcome Agreement. This approach would allow consistent use of indicators and measures by RSLs and encourage benchmarking and peer performance review.

On an annual basis, each RSL would agree with its tenants and other customers a small number of measures (and accompanying indicators), which would be the focus of their detailed annual gathering of views to support the performance review. These would be measures that were particularly appropriate and relevant for that RSL and its customers. Reports on progress against the agreed standards would be provided to tenants. The standards that an RSL used as the focus of performance reviews could change from year to year. The SHR would require all RSLs to report only on a carefully selected range of indicators in the Annual Return on the Charter.

In addition, there may be exceptional cases where the SHR had particular concerns about an individual RSL (for example, as a result of the ARC data or complaints from tenants). In these cases, the SHR could use its powers to require additional information where more detailed investigation or action may be needed.

This leaner and more targeted approach would considerably reduce the significant cost of the complex annual reporting model you have proposed. It would provide a focal point for the agreement between customers and RSLs of the most significant issues for the RSL at that time. It would also avoid the requirement on RSLs to gather significant volumes of information from customers on an annual basis.

We believe that the Charter requires substantial redrafting. Our approach responds to serious concerns about the cost of gathering significant volumes of information about performance and satisfaction every year, relative to the practical difference this would make. It encourages an active dialogue between tenants (and other customers) and landlords. And it provides the SHR with a basis for designing a better approach to performance monitoring and reporting.

Question 11.

Do you agree with our proposals on landlords submitting Annual Charter Performance Reports?

Yes ☐ No ☒

Are there any other approaches we should consider?

Based on the current draft Scottish Social Housing Charter, your approach would mean that for 71 'outcomes and standards' (as well as any additional local outcomes that are agreed with tenants), the following steps would need to be taken every year for each RSL, regardless of its size, resources or operating structure:

- RSL agrees with tenants how they will be involved in self-assessment;
- Publish a statement on how homeless people; owners and Gypsies/ Travellers will be involved in the self-assessment
- Performance self-assessed by RSLs throughout the year (which the SHR requires to cover all of the applicable Charter outcomes as well as local outcomes);
- Evidence gathered from tenants' surveys and other satisfaction measures;
- Undertake comparisons with previous years; other landlords; and sector performance;
- 'Key measures' gathered into an Annual Return on the Charter (ARC);
- ARC submitted to the SHR;
- ARC validated by the SHR;

- ARCs prepared into a report for each RSL by the SHR;
- Report on each landlord published on the SHR's website;
- Performance and satisfaction information gathered into an Annual Charter Performance Report (ACPR), developed by the landlord and its tenants;
- ARC and ACPR provided in hard copy to all tenants by the RSL;
- ACPR provided to the SHR by the RSL;
- ACPR published by the SHR;
- SHR forms view on the quality of landlords' service delivery;
- SHR identifies further scrutiny required;
- Review by SHR of the approaches taken to self-assessment;
- Issue by the SHR of additional guidance;
- SHR publishes regulation plans for RSLs in the 'medium' and 'high' engagement categories;
- SHR publishes a report on the sector's performance in achieving the Charter.

This approach would be inefficient and disproportionate, given that the intention was to create a regulatory regime that minimises the burden on good landlords and concentrates efforts on improving performance.

We propose that a carefully constructed Annual Return on the Charter should be developed by the SHR in conjunction with representative bodies and other stakeholders. This would gather the minimum amount of information that the SHR requires to assess risk – and would meet the SHR's principle of regulation being proportionate. The proposal for a second Annual Charter Performance Report should be dropped, and replaced with a broader requirement for landlords to report on the Charter to their tenants on terms that are agreed locally between tenants and landlords.

Question 12.

Do you agree with our proposed approach to assessing and reporting on landlords' progress against the Charter?

Yes ☐ No ☒

Are there any other issues or factors we should consider?

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

Section 41 of the Act says that the SHR must publish performance reports annually. But the Act does not say that you must publish information every year on how every landlord is performing in relation to every outcome and standard in

the Charter. Nor does it say that every social landlord must base its performance management systems on self-assessment against the Charter. The proposed approach is not only expensive and inefficient for landlords. It is also expensive and inefficient for the SHR.

The proposed approach is also far more intensive than the requirements that apply to many other public services within neighbourhoods. We do not understand why this should be the case.

In relation to Paragraph 3.38, it is unclear how you intend to use your powers to set performance improvement targets. The Consultation Document does not add to what is already on the face of the 2010 Act, and we remain concerned that the powers are unnecessary (when viewed alongside all of the inquiry, intervention and other powers in the 2010 Act).

The SHR should use the flexibility that it has in relation to the publishing of performance reports to make sure that the requirements on landlords are proportionate. Care should be taken not to make burdensome and expensive requirements on social landlords that greatly exceed the requirements placed on other providers of services used by the public.

Question 13.

Do you agree with our proposed regulatory registration criteria?

Yes ☒ **with caveats (see below)** No ☐

Are there any alternative or additional criteria we should consider?

Paragraph 4.3 should be more explicit about the issues you will need to consider, if you receive applications to register from organisations from outside Scotland. Criterion 1 should be amended to add a requirement to demonstrate that the new landlord can perform a role that is **additional** to existing RSLs.

In Criterion 2, we believe that there should be explicit reference to **accountability to tenants and service users**, in line with your determination to place tenants' interests at the heart of what you do.

You should make clear that any landlord applying for registration must be able to demonstrate that tenants can play a significant part in the proposed governance structures, and that they are able to demonstrate how they would establish effective roots in local communities. There should, for example be at least some tenant representation on governing bodies. You have not commented at all on the desirability of tenant or service user membership of governing bodies, which is at odds with your statutory objective.

Question 14.

Do you agree with our proposed de-registration criteria?

Yes ☐ No ☒

Are there any additional or alternative criteria we should consider?

You should make clear that what is said in relation to compulsory de-registration is really technical guidance – and that in such cases the SHR will generally have used its intervention powers, in determining the substantive case for de-registration. Without this explanation, there is the potential to create needless concern.

In relation to Criterion 2, it is inappropriate for the SHR to suggest that it would always regard the loss of status as a social tenant as a material factor, since this implies that you would **never** be prepared to consider approving an application for de-registration. The key test on this matter should be whether a majority of tenants voting in an independent ballot are willing to support de-registration, with all the benefits and potential downsides that might apply in individual cases.

Your statement that de-registration should always be conditional on the full repayment of any public grants or loans is incompatible with statutory requirements.

In practice, housing associations have received grants or loans on the basis that the housing assets would have an agreed lifespan (typically, 30 years for rehabilitated properties and 60 years for new build). In our view, SHR has no legal basis for suggesting that requirements to repay grants exist in perpetuity.

Question 15.

Do you agree with our proposed regulatory Standards as set out in Annex A?

Yes ☒ No ☐

Do you have any additional comments on these Standards?

We believe that the six standards are broadly satisfactory, sensible and clear. There are three phrases which should be described using plain language:

- the reference to "sustainable achievement" in the 2nd standard;
- the reference to "economic effectiveness" in the 3rd standard; and
- the reference to "mitigates risk" in the 4th standard.

We suggest that the six standards are adapted to reflect our suggested changes.

Question 16.

Do you agree with our proposed guidance on Regulatory Standards?

Yes ☐ No ☒

Do you have any additional comments on the guidance?

While much of the guidance is reasonable, some specific elements are not. Notably:

- **Guidance point 2.2**: Many RSLs have not received public funds for a long time. We suggest that this reference is removed.
- **Guidance point 3.6**: You should restrict your regulatory interest to cases involving very specific factors such as alleged impropriety or salary levels that are likely to affect the reputation of the sector.
- **Guidance point 4.1**: We are concerned about the requirement for the governing body to "evidence **any** of its decisions". We suggest that the focus should be on being able to evidence the reasons behind important or substantive decisions.
- **Guidance point 6.2:** You references to "targeted recruitment" are particularly relevant to RSLs that appoint governing body members based on professional skills, they are less relevant to RSLs that have election-based arrangements where governing body members are drawn from the local community.
- **Guidance point 6.2:** Your requirements on mandatory maximum terms for governing body members are completely unacceptable to our members, for the reasons explained later in our response. The same applies to your policy on payment of governing body members, at **Guidance point 6.3**.

Overall, we believe that you should reconsider the merits of your proposed approach (detailed, universally binding guidance) in relation to the alternative approach adopted by your counterpart in England, the Tenant Services Authority (TSA). The TSA does not prescribe detailed constitutional or governance requirements for registered providers. Instead, it sets broad, principles-based regulatory standards and requires that providers should comply with an appropriate code of governance that is compatible with those standards.

GWSF would be happy to explore this approach with you further, for example by developing a code of governance which reflects our members' governance values and needs while also meeting the governance standards you have proposed in the Consultation Document and those aspects of the accompanying guidance that we consider to be relevant (e.g. excluding your proposals on fixed periods of tenure, and excluding your proposals on payment of governing body members).

We recommend that you should consider the alternative option of specifying that RSLs should comply with a code of governance that meets your regulatory standards, to better reflect the diversity of the sector.

If you retain guidance to accompany the regulatory standards, you should establish an appropriate distinction between matters that are mandatory for all RSLs, and matters such as the appointment of governing body members where a more flexible, "comply or explain" approach would be more appropriate.

Question 17.

Do you agree with our proposed constitutional standards as set out in Annex B?

Yes ☐ No ☒

Do you have any additional comments on these standards?

We strongly disagree with the proposed Constitutional Standards.

We question whether SHR has legal powers to set such standards for existing RSLs, as opposed to doing so for new organisations seeking registration.

Your powers to set constitutional standards are not mentioned specifically in the Housing (Scotland) Act 2010, or covered in the Act's definition of governance standards. Section 24 of the Act sets out a range of constitutional requirements that are described as legislative registration criteria. These are reserved to Scottish Ministers rather than delegated to you. On that basis, we think the SHR's powers in this area for existing RSLs will be open to legal challenge.

On a practical level, your proposals to set Constitutional Standards for existing RSLs mark a significant departure from established regulatory practice (in both Scotland and England). The Constitutional Standards you have proposed are too detailed and prescriptive. They intermingle statutory obligations, constitutional arrangements and SHR requirements on wider aspects of governance in a muddling way.

For example, why is specifying an annual appraisal of governing body members' performance a constitutional rather than a policy matter? What level of detail is appropriate in a constitution about delegations to committees and staff, relative to the standing orders and other policies that will typically sit behind a constitution?

Your proposals do not adequately reflect the different types of governance and accountability models in operation, which may make it difficult for RSLs to change their constitutional arrangements. For example, RSLs with open and democratic constitutions – such as community-controlled housing associations - will need their

members (typically, three-quarters of those voting at a general meeting) to approve constitutional changes.

Legal advice obtained by GWSF indicates that SHR's proposals will create practical difficulties for existing RSLs, and has raised the question of how you might reasonably intervene in cases where a governing body is unable to comply with your requirements. If compliance with regulatory standards and guidance require a change to the rules of an RSL then it is not within the power of the governing body of the RSL to bring the RSL into compliance. We believe this raises significant issues in terms of the feasibility of what SHR is proposing.

We have particular concerns about:

- **Overall**: The Constitutional Standards repeat guidance and legal obligations that are specified elsewhere. For example, statutory obligations in relation to equalities and charity law are re-stated; and guidance on group structures and model constitutions are re-stated. We do not think this is necessary.
- **Point 5**: The requirement for all RSLs to consider whether there is a need for an Audit Committee on an annual basis. Annex A (Audit Guidance) suggests that this would only be required for RSLS "with systemic importance".
- **Point 12**: There are too many requirements in relation to governing bodies and their members, and some are far too prescriptive. We have particular concerns about mandatory maximum tenure for governing body members and mandatory annual appraisal of committee members.
- In the case of the latter, it is not clear whether you are specifying a requirement for individual and/or collective appraisals. Your requirements do not recognise that some organisations assess committee effectiveness in a less rigid way (for example, by alternating annual reviews between collective assessments one year, and individual reviews/development plans in the next).
- **Point 13**: It is not clear whether or how you will require RSLs that do not have democratic constitutions to remedy the resulting accountability gap (for example, very large RSLs where shareholding membership is restricted to board members only, and subsidiary RSLs where the parent RSL may have rights that supersede those of the subsidiary's other members).

SHR should restrict its role to setting constitutional standards for social landlords applying for registration.

If constitutional standards are retained for existing RSLs, you should either:

- **Agree that relevant constitutional standards should be incorporated in governance codes developed by representative bodies such as ourselves**

- **Develop broader and less prescriptive standards, which differentiate between mandatory, statutory requirements and a "comply or explain" approach that would reflect the organisational diversity that exists within the RSL sector.**

Question 18.

Do you agree with the requirements set out in our guidance on RSL payment and benefits to governing body members and employees?

Yes ☐ No ☒

Do you have any additional comments on this area?

We do not agree, as a matter of principle, that RSLs should be able to pay governing body members. The change in policy that is proposed creates the following problems:

- We do not see how payment contributes to the SHR's statutory objective of promoting the interests of tenants and service users;
- Payment diminishes the contribution that volunteers make to the success and positive public perception of housing associations;
- Payment has great potential to damage the reputation of the RSL sector as a whole. Your policy will impact negatively on the vast majority of RSLs who choose not to pay, not just the small minority who may wish to do so;
- Payment is at odds with the values and ethos of most RSLs in Scotland, most of which are charities – and charities rarely pay their trustees;
- Payment will create issues for charitable organisations, as the Charity Regulator states that a charity can never pay a majority of its trustees – meaning that only some governing body members could be paid;
- Your proposed policy may blur the boundary between paid employees, and voluntary governing body members.

Our members are clear that tenants would have strong concerns about payment for governing body members, yet you do not mention any requirement for RSLs that choose to pay having to consult tenants. We suggest this should be a formal requirement in any change of policy, since your statutory objective is to promote and safeguard the interests of tenants, and it is tenants' rents that will fund payments for board and committee members.

Our members raised the payment issue with SHR during the recent consultation events. We do not accept your view that the repeal of Schedule 7 to the Housing (Scotland) Act 2001 means that SHR has no alternative but to adopt a permissive policy on payment, or that maintaining the status quo on payment would be

contrary to the expressed will of Parliament.

Your arguments are not borne out by the facts of the legislative process. The Policy Memorandum accompanying the Housing (Scotland) Bill stated only that the rationale for repealing Schedule 7 was to replace the existing statutory provisions with “a principles-based, ethical code of conduct”. The issue of paying governing body members did not feature at any time in the Government’s presentation of the Bill or in Parliament’s consideration of the Bill.

To suggest otherwise suggests to us that you are exceeding your authority by making policy for the housing association sector rather than regulating the sector in accordance with legislation and the will of Parliament. The Consultation Document articulates your policy choice, by offering the view that “We consider the potential payment of governing body members to be a mechanism to enable RSLs to have the right people with the right skills on the governing body”.

You have stated at 5.22 that “Employees can become executive members of the governing body (if the RSL’s constitution permits that)”. You have not offered any explanation or justification for this. We draw your attention to the 2005 research report for Communities Scotland by Heriot-Watt and Oxford Brookes Universities which concluded that “There is no convincing case for encouraging RSLs to co-opt senior managers as full committee members”.

We suggest that the SHR maintains the status quo, and that there should be regulatory restrictions that prohibit governing body members receiving payment for their role.

Question 19.

Do you agree with our proposals on governing body members?

Yes ☐ No ☒

Are there any issues we need to consider here?

We have fundamental objections to your proposals on governing body membership. We think that you will encounter strong and continued resistance to these proposals from across the housing association sector, if you insist on retaining them.

The evidence against your proposals is comprehensive and compelling.

Firstly, your proposals to restrict membership to six years (and nine years at the absolute most) will impact negatively on RSLs:

- They will weaken the governance of many RSLs – making it more difficult for RSLs to build strong governing bodies involving active, skilled and informed

tenants and residents;

- They will destabilise governing bodies – with experienced voluntary committee members having to step down simply to satisfy a regulatory requirement that runs counter to established good governance codes and the practices of other regulators;
- They will diminish the long term investment that RSLs make in developing the skills of tenants and residents to be effective governing body members;
- They will make it more difficult for new governing body members to learn from the experience of those who have been there a long time;
- They will discourage rather than encourage volunteering for the good of the community;
- They fail to recognise the fact that many Scottish RSLs elect rather than appoint their governing body members, and that eligibility for governing body membership is in many instances determined by place of residence and commitment to serve rather than on pre-determined skills assessments;
- They fail to recognise that in such cases, it takes time to build volunteers' skills and capacity and that mandatory fixed terms are incompatible with that fact.
- They are directly adds with the recommendations in independent governance research published by your predecessor organisation, Communities Scotland, in 2005. That research report concluded that **"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".**

Secondly, the presentation and subsequent justification of your proposals has been misleading and lacking in rigour.

Our members have no difficulty with the idea that turnover and refreshing membership of governing bodies are sound governance principles, or with the practice of reviewing committee composition and skills periodically.

However, you have misinterpreted and misrepresented what governance and regulatory codes and practice in comparable sectors actually say. You have also suggested publicly that housing associations are somehow "out of step" with governance norms in other sectors. This is **factually wrong**.

Appendix 1 to our response provides a detailed statement of what the governance codes you have referred to actually say, the governance standards that actually apply in other sectors, and the policies that a range of other regulators adopt on these matters. To summarise the key facts:

- Mandatory fixed terms are **not applicable** in many parts of the community sector, among organisations with similar purposes to community controlled housing associations (for example, development trusts, credit unions, charities with place-based remits, charities with high levels of service user involvement in their governance)

- Mandatory fixed terms are **not applicable** to many other institutions that elect rather than appoint their governing body members and therefore have a governance framework based on democratic accountability (for example, local authorities)
- Mandatory fixed terms **do not form any part** of the regulatory requirements set by other regulators whose responsibilities extend to housing associations and other community organisations (for example, the Office of the Scottish Charity Regulator, the Charity Commission for England and Wales, the Tenant Services Authority and the Financial Services Authority).

Thirdly, your proposals are poorly attuned to the bodies you have responsibility for regulating and to the diversity that exists in the RSL sector in Scotland

As far as community-controlled housing associations are concerned, ours is a community governance model based on the participation of local people who volunteer to make their communities better places to live.

SHR Board members have stated publicly that this is outweighed by the fact that RSLs are significant businesses and that the interests of tenants and taxpayers must be protected. This is wrong shows limited awareness of the bodies you will regulate. The management committees of community-controlled housing associations have a **30-year track record** of leading multi-million pound social businesses, providing excellent local services, and exercising strong stewardship of many millions of pounds of public and private investment. None of this appears to be known to the Board of the new Regulator.

Fourthly, your proposals raise significant legal issues which we will pursue further on behalf of our members, if this proves to be necessary

We consider that your proposals on this issue meet the definition of a "governance target" set out in section 37 of the Housing (Scotland) Act 2010. Since your target would apply to all RSLs, this means that you would have a statutory obligation to consult Scottish Ministers. We do not think it is clear from your Consultation Document whether you appreciate this, since the document states that you do not intend to set any sector-wide governance targets on which you would have to consult Ministers.

It is not clear that you have thought through the practicalities of applying your proposals to existing RSLs that have democratic constitutions under which responsibility for constitutional change rests with an RSL's members.

Legal advice obtained by GWSF confirms that irrespective of any regulatory requirements set by you, the necessary constitutional changes required would need to be approved by an RSL's shareholding members in accordance with its Rules. Governing bodies have no powers to compel shareholders to give the necessary approval to Rule changes.

Your responses to questions raised on this issue at consultation meetings have

lacked clarity and have shown clearly that the detail of your proposals has not been thought through.

At GWSF's annual conference, you indicated that regulatory intervention would follow in any cases where an RSL's shareholding members did not approve constitutional changes. But you failed to address what the purpose or scope of that intervention would be, or how an RSL's governing body could remedy the "breach" of regulatory standards involved.

Your proposals to impose mandatory restrictions on the length of governing body membership are fundamentally flawed. You should recognise this by stating publicly at the earliest opportunity your intention to abandon these proposals.

As part of your commitment to "intelligent regulation", it is essential that you recognise that mandatory and prescriptive requirements are entirely inappropriate.

As already indicated, we have no difficulty with the principle that housing associations should seek to achieve a balance between continuity and renewal on their governing bodies. We do not agree that detailed or prescriptive regulatory guidance is the right means of achieving this.

We repeat our suggestion that RSLs should adopt a code of governance that is appropriate to their purpose and context while also meeting principles-based regulatory standards. GWSF would be happy to work with our members to develop a code of governance for this purpose – and to consult SHR on the content, to ensure that it is compatible with regulatory standards and good governance practice.

Question 20.

Do you agree with our proposal to work with the sector to develop a model code of conduct for governing body members?

Yes ☐ No ☒

Are there any alternative approaches we should consider?

We disagree with this proposal. We do not think that it is the role of the SHR to play a direct role in developing a model code of conduct for governing body members. We believe that the RSL sector has the skills and expertise to develop its own codes of conduct, as has always happened to date.

We do not think that there is value in this proposal, and suggest the status quo is maintained – with RSLs developing their own codes of conduct.

Question 21.

Do you agree with our requirements set out in our guidance around additional audit for some RSLs?

Yes ☐ No ☐

Are there alternative approaches we should consider?

We do not think you have provided enough information to give an answer to this question. We are unclear of the SHR's definition of RSLs that are "of systemic importance". The document states that these are RSLs that present a particular risk to the SHRs regulatory purpose. We would welcome further detail on the characteristics of these RSLs, and roughly how many RSLs will be considered to be of systemic importance.

The SHR should clearly define what characteristics would lead to an RSL being determined as being a particular risk and of systemic importance.

Question 22.

Do you agree with our proposals to conduct checks of a random selection of landlords to review information?

Yes ☒ No ☐

Are there other approaches we should consider?

We agree with this proposal. However, we think that it is important that:

- the information that the SHR requires from landlords in the first instance is simple and kept to a minimum;
- the checks are proportionate;
- the SHR is able to demonstrate the value of these checks – through evaluating the outcome of these checks and the added value they bring.

Question 23.

Do you agree with our proposed approach to using our inquiry powers to gain additional information?

Yes ☒ No ☐

What other approaches should we consider?

We think that it is vital that the landlord receives clear, written information about the purpose of an inquiry, and what will be required of the landlord. The landlord should also be provided with written information on the outcome of the inquiry.

Question 24.

Do you agree with our proposed approach to using our inquiry powers to get more assurance and investigate matters of concern?

Yes ☐ No ☒

What other approaches should we consider?

We broadly agree with the process for using inquiry powers to get more assurance and investigate areas of concern. However, we are concerned that the SHR will not normally publish a report at the end of this process. We understand that there is a need for flexibility – as there may be both advantages and disadvantages of publication in each individual case. However, we think that it is important that the SHR is accountable for how it uses these powers. We are unclear how you will achieve this.

As a minimum, we suggest that the SHR should publish an annual report of how often it has used these powers, and what issues were explored. This report could be anonymised, if required.

Question 25.

Do you agree with our proposed approach to using our inquiry powers to inspect to hold landlords to account?

Yes ☒ No ☐

What alternative or additional approaches should we consider?

We welcome your commitment to setting topics for thematic inspections considering the significance of the issues to the sector itself, tenants, lenders and others. We hope this means that you will discuss and agree topics for thematic inspections with a range of stakeholder interests, in line with your commitment to joint working with many groups and individuals as set out in Section One of your consultation document.

At consultation events, you have spoken of your wish to highlight the achievements of good performing landlords and to promote the sharing of good

practice. We agree that this is essential if your work is to add value, but we are not clear how you will actually do this, or how you will be able to do it within the resources that are available to you.

We have a number of suggestions to strengthen your proposed approach to inspections:

- At 6.19 you state that you will normally publish a report following this type of inquiry. You should clarify in what circumstances an inspection report would not be published.
- At 6.20 you state that you will base your judgements on "sound evidence and clear criteria". These need to be based on published standards – such as a clear and measurable Scottish Social Housing Charter or the SHR standards on RSL governance and financial management. This would ensure that inquiries are focused, and avoid potential for regulation moving into areas that it should not be concerned with.
- We welcome the opportunity to request a review of reports on inquiries, as set out at 6.28. However, the timescale for landlords requesting a review is too short (at just one week), particularly as any decision to seek review may need to be approved by the governing body.
- We are concerned that there is no line of appeal if a landlord is dissatisfied with the outcome of the review. This absence of routes to challenge or appeal SHR judgements is a major weakness. We recommend that the SHR establish a system whereby appeals can be considered ultimately by an independent person, who would report back to the SHR Board. This mechanism could be used in other situations where landlords wanted to challenge major decisions made by the SHR.
- This would be consistent with the BERR Statutory Code of Practice for Regulators, and with the way that tenants can challenge landlords' actions through the Scottish Public Services Ombudsman. If you do not put such checks and balances in place, the only recourse available to landlords will be to seek judicial review.

Question 26.

Do you agree with our proposals to do short notice or unannounced inspections?

Yes ☒ No ☐

Are there any other factors we should consider?

We agree with these proposals. However, the consultation document includes little detail on when this type of inspection may be used. It would be useful to have examples of situations where short notice or unannounced inspections would be considered, or criteria that the SHR will use to decide if this type of inspection is necessary.

Question 27.

Do you agree with our proposed approach to grading outcomes?

Yes ☐ No ☐ **No view**

Are there alternative approaches we should consider?

We do not have a view on your proposed approach to grading outcomes using the descriptions you suggest. However, if the proposed descriptions are used, the SHR must:

- Make a long-term commitment to keeping these descriptions, and not amending these.

  There have been many changes to the inspection framework and grading practices over the past 10 years. Consistency in descriptions is required to help tenants and others to get to know the descriptions used to describe quality of outcomes.
- Be clearer about whether the descriptors will be used to cover the whole organisation, whole service, or individual issues covered during an inspection.
- Re-consider the characteristics to describe “satisfactory” – as “finely balanced” and “not always able to demonstrate delivering good outcomes” does not appear to be what most people would understand by satisfactory.

Question 28.

Do you agree with our criteria for statutory intervention?

Yes ☐ No ☐

Are there other criteria we should consider?

Overall, we support the SHR's commitment to only using statutory intervention powers when necessary. However, we think it is important that the SHR clearly sets out how it would work with social landlords outwith its formal statutory intervention powers. We think it is vital that the SHR's role in relation to **non-statutory** support is clearly specified, transparent and open to scrutiny.

We are also not clear whether there will be further consultation on a code of practice on regulatory intervention, or whether the proposals in the consultation document amount to a draft code of practice as required by the 2010 Act. The reference to the code of practice in 7.5 is not clear.

We suggest that the SHR sets out in greater detail how you will work with social landlords before using your statutory intervention powers, publishes clearer guidelines for non-statutory engagement, and how for how you will ensure that your activities in both areas will be accountable and open to scrutiny.

Question 29.

Do you agree with our proposed approach to how we will intervene?

Yes ☐ No ☒

Are there alternative approaches we should consider?

We do not agree with these proposals. Our key concern is that there is no opportunity to appeal statutory interventions – either for tenants or landlords. We respect that the SHR has statutory powers and must be able to make judgements independently and promptly, but we also think there needs to be an opportunity to challenge the use of powers where tenants or landlords think that the SHR is wrong. Again, this would be consistent with the BERR Statutory Code of Practice for Regulators.

We agree, as set out at 7.9, that landlords and the SHR should work together to address concerns. However, we are concerned that, within this system, any challenge to the SHR's judgements may be seen as non-cooperation.

We are concerned about the vague and subjective reference to "organisational effectiveness" in 7.14. Any intervention must be based on formal standards – with reference to the Scottish Social Housing Charter, Standards for Governance and Financial Management, or similar. This should be more explicitly stated.

We are unsure about the proposal to notify public and private funders and lenders, as set out in 7.16 and 7.17. We recognise that this is a necessary step for statutory interventions, but would be concerned if funders and lenders were notified where non-statutory interventions were taking place.

The SHR should introduce an opportunity for landlords and/ or tenants to appeal statutory interventions. You should also make an explicit commitment to communicating the reasons for intervention, formally and in writing.

Question 30.

Do you agree with our proposals on what we expect regulated bodies to do following our statutory intervention?

Yes ☒ No ☐

Are there additional factors we should consider?

We agree with these proposals. We believe that expectations in relation to compliance, co-operation and accountability (of both the landlord and the regulator) are clear-cut if the SHR is using its formal statutory powers. However, as stated previously, we are concerned that these expectations become less clear when the SHR is working with landlords to provide "support" without exercising formal statutory powers.

We suggest that the SHR clearly sets out your role and expectations of landlords in relation to lower level, non-statutory interventions, and the guidelines you will follow in such cases.

Question 31.

Do you agree with our proposed approach to consenting to changes to RSL constitutions?

Yes ☐ No ☒

Do you have any comments on our proposed approach?

We support your overall aim of working to simplify and streamline the process of obtaining consent for changes to RSL constitutions. However, we are concerned that:

- We do not think it is the role of the SHR to develop draft Constitutional Standards or core constitutional clauses for existing RSLs, as suggested in 8.10 and 8.15.
- We are concerned that the SHR will consider every constitutional change that is proposed – even very minor changes.
- We agree that RSLs proposing to become a subsidiary should apply for

consent, and this is already becoming more common in some parts of the sector. We believe that this type of change must be subject to tenant ballots, not only approval by members of the RSL. As the statutory purpose of the regulator is to safeguard tenants' interests, this should be clearly specified in the specific guidance referred to in 8.11. (This is also relevant to statements at 8.43).

We suggest that the SHR distinguishes more clearly between substantive constitutional change, and more minor change. The SHR should also be clear that where an RSL wishes to become the subsidiary of another RSL, this should be subject to tenant ballot. We would wish the proposed guidance to be issued by SHR on tenant ballots to specifically address circumstances where an RSL wishes to become the subsidiary of another RSL.

We do not agree with the views you have expressed at consultation events that SHR does not have the ability to specify a requirement for tenant ballots in such cases. Section 15 of the Housing (Scotland) Act gives SHR powers "to do anything which appears necessary or expedient for the purpose of, or in connection with, the performance of its functions." On this particular issue, there is a clear and direct connection with your statutory objective of safeguarding and promoting the interests of tenants and others.

Question 32.

Do you agree with our proposed approach to consenting to RSL organisation changes?

Yes ☒ No ☐

Do you have any comments on our proposed approach?

We agree with these proposals.

Question 33.

Do you agree with our proposal to increase the disposals covered by general consent?

Yes ☒ No ☐

Do you have any comments on this proposal

It is important that the benefits should be more than saving time for SHR staff. There should be comparable benefits for social landlords.

We suggest that the process of approving and recording of General Consents by RSLs should also be simplified.

Question 34.

Do you agree with the proposal to increase the monetary limit to £100,000 for disposals through sale or excambion of social and non-social housing land, untenanted social housing dwellings or other assets?

Yes ☒ No ☐

Do you have any comments on this proposal?

We agree with this proposal.

Question 35.

Do you agree with our proposal to permit through general consent disposals covered by an agreed disposal strategy?

Yes ☒ No ☐

Do you have any comments on this approach

We support these proposals. The SHR should clarify whether the limits set out in 8.37 relate to individual transactions or the cumulative value of transactions. The SHR should also work with the Scottish Government to ensure that processes for obtaining approvals do not overlap. For example, if the Scottish Government agrees that an RSL can dispose of properties and recycle receipts into new housing provision, does the RSL then need to also have this discussion and approval process with the SHR?

Question 36.

Do you agree with the proposal to permit through general consent disposals by granting of standard securities on the condition that we have sufficient assurance through our regulatory engagement?

Yes ☐ No ☐

Do you have any additional comments on this proposal?

We welcome the streamlining of consents. However, to answer we would need more information on the RSLs this would apply to – and the criteria for selecting these.

We also recommend that the SHR consider whether this is the right time to be relinquishing control over consent for some disposals, given that RSLs are being encouraged to use models of "financial innovation" for new house building. Some large RSLs may have higher risk borrowing strategies, and there may be value in retaining SHR approval for disposals, to protect tenants' interests.

Question 37.

Do you agree with our proposal to continue the existing approach to giving consent to floating charges?

Yes ☒ No ☐

Are there any other factors we should consider?

We agree with this proposal.

Question 38 (EQIA).

Thinking about the groups mentioned above, what else do we need to know about to help us understand their diverse needs and/or experiences and where can we get this information?

The SHR's role is to safeguard and promote the interests of current and future tenants, homeless people and other people who use services provided by social landlords. This is a varied group – including people with a wide variety of age, ethnic origin, faith, sexual orientation, gender, gender identity and disability.

In working with RTOs and other tenant and resident groups, the SHR should be aware that:

- research has shown that only around 1% of tenants are aware that there is a housing regulator in Scotland[1];
- awareness of the housing regulator is higher amongst tenants actively involved in Registered Tenants Organisations[2];
- RTOs rarely undertake targeted work to involve people from equalities groups and many struggle to attract a diverse range of tenants[3].

The SHR should therefore take targeted action to involve equalities organisations and individuals from equalities groups in its work – particularly when considering communication and tenant participation between tenants and the SHR.

With the introduction of the new Equality Act 2010, it is important that an equality impact assessment also considers issues relating to faith, gender reassignment and pregnancy alongside race, disability, gender and age.

Question 39 (EQIA).

Do you agree with our conclusion that our proposed approach will promote equality of opportunity?

Yes ☐ No ☒

What else do we need to do to achieve this?

The SHR needs to consider how its own practices may impact positively or negatively on equality, as well as how it can encourage social landlords to promote equality. The SHR should:

- introduce a principle of 'equality – promoting equality of opportunity for tenants and others' or similar as one of your principles to underpin the way

[1] Identifying Priorities of Tenants of Social Landlords, Scottish Government, 2009
[2] As above
[3] Evaluating Social Landlords' Progress on Tenant Participation, Communities Scotland, 2007

you regulate (at 1.6);

- commit to considering equality and diversity when building your strategy for consulting and involving tenants and others (at 1.11)
- explicitly state that you will work jointly with the Equality and Human Rights Commission (at 1.16 to 1.18)
- commit to working proactively with equalities organisations to ensure that tenants are able to raise concerns with the regulator (at 2.22 to 2.29)
- ensure that landlords have access to clear guidance on equalities when self assessing performance against the Charter (Section 3)
- remember that Gypsies/ Travellers are a recognised ethnic group, and will be a client group living in settled accommodation – as well as sites as specified at 3.20.

The SHR should identify the action it is going to take to make sure that it promotes equality firstly within its own organisation, and secondly amongst landlords, and clearly set this out within its Equality Impact Assessment.

Glasgow and West of Scotland Forum of Housing Associations

Appendix 1
Evidence Paper accompanying GWSF's response to the Scottish Housing Regulator (SHR) Consultation Document

1) Introduction

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 response to the 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.

In the Consultation Document, SHR offers the following justification for its proposal to set mandatory maximum periods of tenure:

"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".

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 confirm its view that mandatory fixed terms are the norm in other sectors. SHR has not answered these questions directly, and it has made a series of statements to the press:

- **"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 codes and other documents that we examined. 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 constititionally 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 Corporate Guidance 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 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 employees 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 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 Chrtered 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.