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Stage 1 Report on the Housing (Amendment) (Scotland) Bill



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Local Government and Communities Committee

To consider and report on communities, housing, local government, planning and regeneration matters falling within the responsibility of the Cabinet Secretary for Communities, Social Security and Equalities.



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Introduction

1. The [Housing \(Amendment\) \(Scotland\) Bill](#) ("the Bill") was introduced in Parliament by Angela Constance MSP, the Cabinet Secretary for Communities, Social Security and Equalities on 4 September 2017. ¹
2. The Policy Memorandum to the Bill sets out—
 - ” The policy objective of the Bill is to ensure that the influence the Scottish Housing Regulator (the Regulator) and local authorities can exercise over RSLs is compatible with RSLs being classified by the Office for National Statistics (ONS) as private sector bodies in the United Kingdom national accounts. ²

Change of membership

3. The membership of the Committee changed during the scrutiny of the Bill. On 9 January 2018 Elaine Smith MSP left the Local Government and Communities Committee and Monica Lennon MSP joined.

Background to the Bill

ONS reclassification

4. The Office for National Statistics (ONS) is responsible for preparing the national accounts and in order to do so, it needs to classify the institutional units within the UK economy to an institutional sector (for example, as non-financial corporations or general government units).³
5. The national accounts are produced in accordance with European guidelines and in order to ensure that it produces accounts to internationally comparable standards, the ONS often reviews the classification of various bodies to ensure they comply with guidelines as they are updated.
6. A recent key update⁴ and its associated manual⁵ led the ONS to undertake a review of Registered Social Landlords (RSLs) in Scotland as the guidance updated definitions of public and private bodies for the purpose of accounting based on the element of control that government has over organisations. Prior to this review, RSLs had been classified as private bodies for the purposes of the national accounts and therefore any borrowing undertaken by RSLs would not count against national limits on borrowing.
7. This review led to the ONS as reclassifying RSLs as public bodies for the purposes of accounting, given that amongst other things, the Scottish Housing Regulator (the Regulator) has powers over the management and constitutional changes of RSLs, and powers of consent over the disposal of RSLs' land and housing assets. The ONS also intimated that further public sector control may exist through the ability of some local authorities to exercise voting rights and through having powers over RSLs to appoint officers.^{3 6}
8. Whilst it has made an announcement regarding its decision to reclassify RSLs as public bodies, the ONS has postponed any further action in relation to this reclassification to allow the Scottish Government to act.⁷

The Bill's proposals

9. The Bill proposes to address the issue by putting in measures to reduce or remove some of the powers that the Regulator has over RSLs which led the ONS to reach the decision to reclassify them as public bodies. Most of these are achieved through changes to the Housing (Scotland Act) 2010 (the 2010 Act). It also provides regulation-making powers to allow Scottish Ministers to reduce or limit powers which local authorities have over RSLs which may also contribute to reclassification. This, in turn, it expects would allow the ONS to reclassify RSLs as private bodies and therefore their expenditure and borrowing would not count against Scottish Government borrowing limits.
10. The Bill itself is short and technical, comprising 11 sections. It intends to achieve the above by doing the following:

- narrow the powers of the Regulator to appoint a manager to an RSL, and to remove, suspend and appoint officers of an RSL;
 - remove the need for the Regulator's consent to: the disposal of land and housing assets by an RSL; any changes to the constitution of an RSL; and the voluntary winding-up, dissolution and restructuring of an RSL, while protecting tenant's rights to be consulted about certain changes;
 - provide Scottish Ministers with regulation making powers to limit the influence that a local authority has over an RSL.
11. The Scottish Government did not hold a formal public consultation on the Bill as it felt that it would be disproportionate to do so given its technical and focused nature. Instead, it engaged directly with the Regulator and groups and bodies representative of those who would be affected by the Bill's proposals, including UK Finance, Scottish Federation of Housing Associations (SFHA), the Glasgow and West of Scotland Forum of Housing Association (GWSF) and tenant groups.³
 12. The Scottish Government stated that its discussions with the Regulator and close collaboration on the steps which would be required to enable the ONS to reclassify RSLs back to the private sector, helped it to develop the detailed provisions which would address the issues of public control whilst retaining much of the Regulator's powers of regulation.²
 13. Of those the Scottish Government consulted with, there was broad support for the legislative proposals as the decision to reclassify the RSLs as public sector bodies posed a threat to the Scottish Government's ability to deliver its affordable housing programme. Some highlighted concerns around the impact on the regulatory regime, however the Scottish Government provides further information in the Policy Memorandum on how it sought to allay these concerns. These concerns were also explored in more detail by the Committee in its scrutiny of the Bill.²
 14. During the Committee's consideration of the Bill, the Scottish Government wrote to the Committee to confirm that, following a decision by the ONS to classify RSLs in England as public bodies, similar legislation has been successful in encouraging the ONS to reclassify RSLs there as private bodies for accounting purposes.⁸
 15. The SFHA confirmed—
 - ” We also think that reversal of the reclassification will achieve a level playing field across the United Kingdom, which is important for the lending industry and the financial profile. That will give the sector the headroom that we need alongside the lending industry to be able to fund the programme that we require to provide in the coming period.

Source: Local Government and Communities Committee 29 November 2017, Sally Thomas (Scottish Federation of Housing Associations), contrib. 5⁹

Committee consideration

16. The Committee issued a call for views on the Bill on 8 September 2017 running until 26 October 2017, which it launched alongside an easy-read summary guide to the Bill. The Committee received 16 responses to its call for views.
17. Those who responded were broadly content that the measures were an appropriate and proportionate response to the ONS's decision and that failure to act would put the Scottish Government's ambitions on the provision of affordable housing at risk. Most also could not see how the measures could be achieved other than the legislative proposals in the Bill. As referred to during the Scottish Government's consultation, some organisations raised some specific issues around the regulatory powers, governance procedures, the confidence of lenders in the wake of reduced regulation and other unintended consequences. These are explored in more detail in the next section.
18. The Committee therefore sought oral evidence from those who had raised issues at its Committee meeting on Wednesday 29 November 2017. The Committee also explored these issues with the Minister for Local Government and Housing at its meeting on 13 December 2017.
19. Official Reports of these meetings, alongside the associated papers, correspondence and written submissions are all available of the Committee's webpage here:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/105932.aspx>
20. The Committee thanks all those who took time to provide it with written and oral evidence.

Key issues considered

21. The Committee considered some general issues, before looking at specific aspects of the Bill.

The impact of not legislating

22. Those who the Committee heard from generally agreed that the measures were necessary and that the proposals in the Bill could not be achieved by means other than the legislative measures proposed in this Bill. Some also referred to the consequences should the measures in the Bill not be taken forward.

23. For example, GWSF highlighted the risk to the Scottish Government's target of delivering at least 50,000 affordable homes should action not be taken to reverse the decision to reclassify RSLs as public bodies—

” ... ultimately the bill is about how housing association debt is treated. It will be treated as Scottish Government debt if the decision to reclassify RSLs is not reversed. Treating that debt as such would be bad at any time, but it is really bad at a time when there is a welcome, hugely ramped-up development programme.

Source: Local Government and Communities Committee 29 November 2017, David Bookbinder (Glasgow and West of Scotland Forum of Housing Associations), contrib. 2¹⁰

24. The SFHA agreed that the measures were necessary, particularly to protect the Scottish Government's housing development programme. It also felt that the measures would provide assurances to lenders to RSLs in contributing to the programme—

” The lending industry is critical to the housing programme and the ability of housing associations and co-operatives to build at scale and within a timeframe that is appropriate to the needs of the population.

Source: Local Government and Communities Committee 29 November 2017, Sally Thomas (Scottish Federation of Housing Associations), contrib. 5⁹

25. UK Finance agreed that the measures were an appropriate and proportionate response to the decision of the ONS and recognised that the measures are broadly consistent with measures taken elsewhere. It agreed that the measures still allowed for an effective regulatory function which would safeguard existing and future investment in the sector. ¹¹

26. The Regulator also agreed with the views expressed above and highlighted that the measures would not change its statutory objectives and functions as regulator—

” Certain elements mean that we will have to operate in different ways, but we are broadly comfortable that we can do that. Indeed, the coincidence of our doing a regulatory framework review, which we flagged up the last time that we visited the committee, is fortunate, as it means that we can take into account in that review the issues that the legislation raises. We are very comfortable with the approach that is being taken.

Source: Local Government and Communities Committee 29 November 2017, George Walker (Scottish Housing Regulator), contrib. 6¹²

27. The Minister for Local Government and Communities confirmed the impact should the changes not go ahead—

” ... although classification might appear to be just a technical matter, that would have the real and significant consequence of placing a new and permanent burden on the Scottish Government’s finances. One result would be that borrowing by RSLs to support our affordable housing programme would no longer count as private borrowing. It would count as Government borrowing—effectively adding £1.5 billion to our £3 billion investment in the programme. That would put our target of building 50,000 new affordable homes at risk.

Source: Local Government and Communities Committee 13 December 2017, The Minister for Local Government and Housing (Kevin Stewart), contrib. 3¹³

28. In the Policy Memorandum, the Scottish Government states that it may have to introduce public control over RSL borrowing should the changes not go through.²

29. We agree that measures need to be taken to facilitate the ONS to reclassify RSLs as private bodies to avoid RSLs’ borrowing being classed as Scottish Government borrowing. This will allow RSLs to continue to borrow and build to ensure delivery of the Government’s ambitions to deliver at least 50,000 affordable homes. The Committee agrees that the specific measures proposed in the Bill are proportionate and should not affect tenant and lender confidence in the regulatory framework.

30. The Committee notes that, whilst most were broadly content with proposals, some specific issues remain and these are explored in more detail below.

Environmental Information (Scotland) Regulations 2004

31. The Scottish Information Commissioner said that a possible unintended consequence of the removal of certain powers by the Regulator and local authorities over RSLs could result in them falling outwith the scope of the Environmental Information (Scotland) Regulations 2004 (EIRs) as they could be deemed as being subject to lesser public control. The regulations provide that there is a public right to request (and to receive) the environmental information they hold and RSLs must actively disseminate environmental information. The Scottish Information Commissioner was concerned that current rights to information could be lost.^{14 3}

32. It was noted that making RSLs subject to Freedom of Information (Scotland) Act 2002 (FOI Act) requirements, as local authority landlords currently are, was a possible solution should this be an issue. This would automatically bring RSLs within the scope of the Environmental Information (Scotland) Regulations 2004. On 6 December 2017, the Scottish Government confirmed that it had issued a consultation on a draft order which would make RSLs subject to the FOI Act. ¹⁵
33. The Scottish Information Commissioner noted, however, that even if RSLs were brought within the scope of the FOI Act and a consequence of the Bill was that RSLs fell out with the scope of EIRs, there still could be a gap between the implementation of the Bill and the implementation of FOI Act extension to RSLs. Therefore there would be a period where RSLs were not subject to the regulations. ¹⁶
34. Whilst the SFHA and GWSF both confirmed that, should RSLs be brought under FOI and there was a period prior to its implementation where RSLs were not subject to the EIRs, they would expect their members to continue to provide environmental information, even if they were not required to do so by law—
- ” Given that they are subject to the EIRs at the moment, the extension of FOI will cement and extend that thinking. If there is a small time gap, I do not think that our members will suddenly think, “Oh wow, we don’t have to answer any questions on our repair service any more.”
- Source: Local Government and Communities Committee 29 November 2017, David Bookbinder, contrib. ²⁰¹⁷
35. The Scottish Information Commissioner highlighted though, that there still remained a practical risk in terms of redressing a decision that an applicant had disagreed with during that period. As a possible solution, it suggested—
- ” An additional provision could be considered, whereby the legislation makes it clear that the EIRs apply to RSLs. That could be a new provision in the bill, stating that RSLs are to be treated as Scottish public authorities for the purposes of the EIRs, or a consequential amendment to the EIRs, specifically adding RSLs either to the definition of Scottish public authorities or by reference to a schedule.
- Source: Local Government and Communities Committee 29 November 2017, Daren Fitzhenry, contrib. ²³¹⁸
36. The Minister for Local Government and Housing confirmed that, dependent on progress with the Bill, he expected the measures to be implemented by September 2018, followed by the ONS review. He said that he expected extension of the FOI Act to RSLs to take effect on April 2019. Therefore, should the Information Commissioner's concerns regarding the impact on RSL's duties under EIRs be realised, any such gap might only be for six months. ¹⁹
37. The Minister suggested that given the Information Commissioner has not taken a formal view on whether the measures would have the unintended consequence referred to above, it is not clear that there will be a gap. He said he would discuss with the Information Commissioner whether it is likely that the measures will have the unintended consequences he suggests it will. Rather than using legislation, which both the Commissioner and the Minister said would be technically

challenging, and in light of the commitments provided by the SFHA and GWSF, he suggested—

” ... we would want to find a proportionate means of dealing with that gap of six months or so... we might discuss with the SFHA and the forum voluntary arrangements under which their members would continue responding to information requests—environmental or otherwise—during any interim period. That might not be ideal but, given the probable length of any gap period, it might be a much more pragmatic way of proceeding.

Source: Local Government and Communities Committee 13 December 2017, Kevin Stewart, contrib. 19¹⁹

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

Changes to the Regulator’s powers of intervention - Sections 1 and 2

39. Section 57 of the 2010 Act gives the Regulator powers to appoint, or require the social landlord to appoint, a manager for housing activities if the landlord is, or is at risk of, failing in its housing activities (e.g. not meeting an outcome in the Scottish Social Housing Standard) and that a person needs to be appointed to ensure that the social landlord provides housing services to an appropriate standard. The Regulator has never used this power.
40. Section 58 of the 2010 Act also allows the Regulator to appoint a manager to an RSL where it considers that this is necessary to ensure the RSL manages its financial or other affairs to an appropriate standard. The Regulator has used this power seven times.
41. Sections 60, 61, 62 and 65 of the 2010 Act provides the Regulator with a range of powers to remove an officer of an RSL, suspend a responsible individual, remove a responsible individual and appoint an officer to a RSL. The Regulator has never used its powers under sections 60,61 or 62. The Regulator has used its power under section 65 to appoint an officer to a RSL on five occasions, including in four cases where the Regulator also used its power to appoint a manager.
42. Sections 1 and 2 of the Bill propose to amend the 2010 Act to:
- Narrow the circumstances when a manger can be appointed: for an appointment of a manger for housing activities, the Regulator will be able to

appoint a manager where a social landlord has failed or is failing to achieve standards. They will no longer be able to be appointed where there is a risk of failing to achieve standards. For the 'appointment of a manager for financial or other affairs', this is now limited to situations where the RSL is failing, or has already failed to, comply with a duty required by law or a requirement imposed by the Regulator.

- Narrow the circumstances in which the Regulator can remove or suspend an officer from an RSL. In particular, in sections 60, 61 and 62 of the 2010 Act, the more general grounds for removal or suspension are replaced with more specific grounds related to a failure to comply with a statutory duty or a requirement imposed on the landlord by the Regulator.
- Narrow the reasons why a manager, or an officer, can be appointed: they can only be appointed to fix the problem that the Regulator has identified.
- Introduce a time limit for the manager's/officer's appointment: the limit will be the time necessary to fix the problem identified by the Regulator.³

43. Those we heard from were broadly content with these proposals. For example, GWSF expressed surprise at the breadth of the original powers, but felt confident that, in the past, the powers had been used far more narrowly in a small number of housing associations with serious issues. It said—

” We think that, instead of making the regulator turn to those original and rather broad criteria, the bill, by narrowing those criteria, reflects actual practice.

Source: Local Government and Communities Committee 29 November 2017, David Bookbinder, contrib. 27²⁰

44. The Regulator confirmed that the powers as narrowed would not have hampered their interventions in previous cases and it emphasised that it takes a proportionate approach to the use of its regulatory powers, only intervening where it was judged as serious and warranted. It confirmed that the changes would allow it to continue to act proportionately in its approach to regulation and interventions.²¹

45. UK Finance, however, said that consideration should be given to widening the definition of failure to apply to not only a failure to meet standards set out in the regulatory framework, but to include reference to a failure to meet regulatory standards. This it said, would reassure funders that intervention could take place when an RSL is failing, rather than when it has failed or at the point of insolvency.²²

46. UK Finance explained—

” Although lenders and investors who are familiar with the sector and with how regulation works would be able to see the link in the bill to the definition encompassing a failure to meet a regulatory requirement, investors who might be contemplating coming into the market in Scotland and who would be more distant from and less familiar with the system might not be able to make that link so easily, and that might lead to their being reticent in deciding whether to step into the market.

Source: Local Government and Communities Committee 29 November 2017, John Marr, contrib. 28²³

47. In relation to this issue, the Regulator noted that it could aid clarity to include reference to regulatory standards in the bill. It noted however—

” we are pretty confident, having read the bill, that regulatory standards are referenced and that the way in which the bill is constructed means that it points to statutory provisions, and regulatory standards are set through statutory provisions. Therefore, although including them would be clearer, we are still pretty relaxed about regulatory standards being the touch point for us in interpreting whether we need to intervene in an organisation.

Source: Local Government and Communities Committee 29 November 2017, Michael Cameron (Scottish Housing Regulator), contrib. 31²⁴

48. Upon hearing this explanation, UK Finance confirmed—

” I accept what the Regulator said about being quite comfortable with regulatory standards as the touch point. In considering how, or whether, to address the point, it may be that the explanatory notes to the bill could be elaborated to include that reference more specifically, if it is felt that the bill is not the place for it.

Source: Local Government and Communities Committee 29 November 2017, John Marr, contrib. 39²⁵

49. The Minister for Local Government and Housing acknowledged UK Finance's concerns, but sought to allay these and individual lender concerns by highlighting the regulatory requirements that the Regulator will still be able to make, following amendments made by the Bill under the 2010 act and other legislation in respect of "failure". This includes failure:

- to meet standards or an outcome in the social housing charter,
- to meet a performance improvement target,
- to implement a performance improvement plan and
- to comply with an enforcement notice.

He also highlighted that section 58 of the 2010 Act allows for the Regulator to appoint a manager where an RSL has failed to meet a statutory duty relating to financial affairs. He also confirmed that he would be willing to have further discussions with UK Finance on their suggestion that the explanatory notes could provide further clarification in respect of the definition of "failure" and the point at which the Regulator could intervene. ²⁶

50. The Committee notes that the intention of these measures is to narrow the powers of the Regulator over RSLs, whilst maintaining an effective regulatory regime allowing the Regulator to continue to use its intervention powers in a proportionate and appropriate manner. We are content with the measures as proposed and the assurance from the Regulator that the amended powers under the Bill will not prevent it from carrying out interventions such as those it has previously undertaken.

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

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

52. The 2010 Act provides that the Regulator must provide its consent before RSLs can make certain changes affecting its organisation. The Bill (sections 3-7) proposes to remove these powers of consent in the following areas:
- Disposal of land etc by RSLs (section 3 and 4)- a disposal could mean, for example, a sale of tenanted social housing stock, sale of untenanted housing stock, or granting security over land where the loan relates to on-lending to a subsidiary;
 - Organisational changes affecting landlords - change of name, office or constitution by registered social landlord or rule changes (section 5); and
 - Organisational changes affecting registered social landlords - restructuring, winding up and dissolution of registered social landlords (section 6 and 7).
53. Where decisions on the above matters are made by the RSL, the Bill proposes that RSLs must notify the Regulator within 28 days of the changes being made. The Scottish Government has sought to protect existing tenant consultation requirements where RSLs seek to take any of the above forward.³
54. Those we heard from were generally supportive of the Bill's proposals. For example, many welcomed the protection of the existing requirement for RSLs to consult with tenants on various matters which would also act as a safeguard. The Regulator said it "a very helpful protection with which we all agree."²⁷ GWSF stated—
- ” The bill does not include the word “ballot”, but, as the forum sees it, the only way of complying with the bill's requirements is to hold a ballot and to abide by it, so we are happy that those important provisions are indeed protected.
- Source: Local Government and Communities Committee 29 November 2017, David Bookbinder, contrib. 55²⁸
55. The Minister confirmed that the proposals as drafted were designed to protect tenants interests in removing the Regulator's powers of consent—

” I was encouraged that, in its evidence to the committee, the Glasgow and West of Scotland Forum of Housing Associations confirmed that it is happy with those provisions. In effect, they mean that tenants will continue to enjoy the ultimate protection of being able to veto proposals on disposal of assets and restructuring if they are not persuaded that such proposals are in their interests.

During the passage of the bill, my officials and I will continue to liaise with tenant bodies. I am aware that only one of the regional networks responded to the committee’s call for written evidence, but it was supportive of the bill.

Source: Local Government and Communities Committee 13 December 2017, Kevin Stewart, contrib. 26²⁹

56. Some the Committee heard from, raised concerns that the removal of the Regulator’s powers of consent would result in a loss of regulatory 'intelligence' for the Regulator and that there would be an increased onus on individual RSLs to govern themselves soundly.
57. The Regulator confirmed that some of the safeguards that were previously provided by the 'intelligence' obtained through the consents process will be removed. There will, therefore, be some increased risk in the system. It highlighted, however, that it would look at through its regulatory framework review how to use its remaining powers to obtain the same level of assurances from RSLs and to act to protect the interests of tenants and service users. It made it clear, however, that they would not be seeking to create a consent process by proxy.³⁰
58. The GWSF stated that where it comes to disposal of social housing, RSLs do not take these decisions lightly and they undertake a range of due diligence. It highlighted that a number of protections would remain in place—

” Although it is not at all likely that there will be scale disposals to worry about, theoretically, if a housing association appeared to be making disposals that threatened the balance of its own social housing and had implications for the area—or, indeed, national implications—that would be become an issue not just for the regulator but for the Scottish Government. However, I do not envisage that happening because of the care with which associations consider those important decisions.

Source: Local Government and Communities Committee 29 November 2017, David Bookbinder, contrib. 51³¹

59. The SFHA confirmed that it would work alongside the Regulator to ensure that its members' governance arrangements are sound and that they are using taxpayers money effectively and efficiently—

” That is not to say that we expect to see governance failures or weaker governance, but as a result of the change we know that we will have to ensure that we are on the ball in terms of governance being the absolute best that it can be, in the interests of tenants, taxpayers and the development programme.

Source: Local Government and Communities Committee 29 November 2017, Sally Thomas, contrib. 57³²

60. The Regulator confirmed that a key issue emerging from the regulatory framework review was the issue of RSL boards self assuring themselves, but it did not expect—
- ” an overnight failure of governance because of the change. However, we will encourage boards to ensure that they are self-assuring in the areas where consent has been required. In the past, an association might have found comfort by asking the regulator whether something was appropriate and reasonable. As that will no longer be available, self-assurance and encouraging self-assurance will be important parts of the consultation that we will bring forward in the new year.
- Source: Local Government and Communities Committee 29 November 2017, George Walker, contrib. 58³³
61. In its written evidence, the GWSF stated that the process whereby RSLs have to apply for consent from the Regulator for all rule changes has become too controlling on the part of the Regulator and too onerous for RSLs. It did not expect to see wholesale changes to RSLs rules, but that the provisions—
- ” may, however, make it more straightforward for sensible changes to be made, where these, for example, will help associations prevent potentially disruptive individuals or groups having undue influence or control over an association’s affairs. ³⁴
62. The Committee noted, however, that an RSL’s board requires well-qualified individuals, including tenants, to ensure that the decisions of senior officers are challenged appropriately. Both the SFHA and GWSF agreed that providing a challenge function by local tenants was hugely important to the governance of an RSL. The SFHA said—
- ” ... we need to do the best that we can to ensure that there is tenant representation in the best way possible, and that tenants are supported to contribute in the best way possible to governance arrangements. We also need to do the best that we can to take on board and to continually review and reassess...whether we are achieving good governance and diversity, and whether behaviour is a challenge rather than a disruption.
- Source: Local Government and Communities Committee 29 November 2017, Sally Thomas, contrib. 64³⁵
63. On the risks posed for lenders on the removal of consent powers in sections 3-7, UK Finance said that alongside reassurances provided by changes to the regulatory framework—
- ” ... we are comforted by and take reassurance from the fact that associations, through their own due diligence, and lenders, through their due diligence, and the possibility of an increased role for self-assessment, could help to fill some of the gaps that might arise through the change. Clearly, there will be provisions within existing loan agreements requiring the borrower to seek lender consent for specific events, which would definitely include constitutional changes. Lenders will still go through that process of engagement with their borrowers to provide consent or otherwise to those changes upon merger.
- Source: Local Government and Communities Committee 29 November 2017, John Marr, contrib. 70³⁶

64. It was highlighted that there could be increased costs to RSLs in relation to improving self-assessment and governance procedures associated with the removal of consent powers. The SFHA highlighted that it, along with GWSF and UK Finance as part of the regulatory review, would assist with advising and supporting the strengthening of RSL board activity at minimum cost—

” The bigger ones can probably do what they need to do using their own means and without taking a big hit to their resources. Other organisations will find it much more difficult, time consuming and resource intensive in proportion to their size and activity. We will focus our resources as a support organisation to ensure that they are targeted in the right way in order to minimise the costs and effort that would be involved for individual organisations.

Source: Local Government and Communities Committee 29 November 2017, Sally Thomas, contrib. 74³⁷

65. The Minister recognised that the removal of the consent powers would have an impact on the way that the Regulator operates. He noted, however, that the measures were necessary in classifying RSLs as private bodies responsible for their own commercial decisions, as the Regulator’s powers, at present, "enable it to act as the owner of RSLs". He said—

” I am encouraged by the reaction of the Scottish Federation of Housing Associations and the Glasgow and West of Scotland Forum of Housing Associations. They recognise that the bill represents a new challenge for RSLs too, but note that the due diligence that they undertake already in preparing business cases for the approval of the regulator and their bankers will stand them in good stead when the regulator no longer has powers of consent over them.

Source: Local Government and Communities Committee 13 December 2017, Kevin Stewart, contrib. 10³⁸

66. The Minister stated—

” RSLs in Scotland generally have good governance arrangements. I assure the committee that we will continue to monitor what goes on—as, I am sure, the committee will. The regulator has a major role to play and will continue to liaise with RSLs. If members of the committee or other members have examples in which they feel that governance is not the best, I want, and would be grateful, to know about them.

Source: Local Government and Communities Committee 13 December 2017, Kevin Stewart, contrib. 42³⁹

67. We consider that the measures put in place at section 3 - 7 are necessary in encouraging the ONS to reclassify RSLs as private bodies for the purposes of the national accounts. We welcome the measures taken to ensure that tenants interests are protected by maintaining the requirements for tenant consultation.

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

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

Scottish Minister Regulation making powers – Sections 8 and 9

69. Section 8 of the Bill proposes that Scottish Ministers be given regulation making powers to further modify the functions of the Regulator in relation to social landlords. The Scottish Ministers would be required to consult with the Regulator, and other relevant stakeholders, before making any regulations under this section.
70. The Scottish Government has proposed this power in case the ONS still considers that further adjustments to the Regulator's powers are necessary for them to classify RSLs as private sector bodies.
71. Some local authorities may have a degree of influence over RSLs, for example, by having the ability to appoint officers of the RSL or by having certain voting rights. This is most likely to be the case where a local authority has transferred its housing stock to an RSL. As the ONS indicated to the Scottish Government that this could be viewed as a form of public sector control, the Scottish Government is seeking to remove that control. Section 9 of the Bill proposes to give Scottish Ministers regulation making powers for the purpose of limiting, or removing, the influence that a local authority can exercise over an RSL.³
72. Most we heard from were unconcerned about these provisions. However, UK Finance were concerned about the open ended nature of the measures in Section 8 and argued that a sunset provision should be included so that it falls away at the end of the current parliamentary term in 2021. They argued that:

” Our concern is that inclusion of the provision—as I said, we understand why it is there—but leaving it entirely open ended would prolong the uncertainty for investors considering coming into the market. It would be helpful if the period within which the power could be exercised were to be limited in some way. We have suggested that the period could last until the end of the current session of Parliament, although, given how quickly the ONS has acted down south, it may be that the power is not even necessary.

Source: Local Government and Communities Committee 29 November 2017, John Marr, contrib. 79⁴⁰

73. The SFHA and GWSF subsequently wrote to the Committee confirming that they would be comfortable with a sunset clause being used to limit both the use of Sections 8 and 9 for a limited period until the ONS had reclassified RSLs as private bodies. The Regulator limited his comments to section 8 but agreed that a sunset clause would be valuable.⁴¹

74. The Minister agreed that the powers would not be required indefinitely, so agreed to consider adding sunset clauses to both Sections 8 and 9, subject to review by the Committee, to lapse three years after the bill has received Royal Assent.

” I hope that such provisions will give the committee and UK Finance the assurance that the widely drawn powers in sections 8 and 9 will exist for a limited period only... I am also happy to confirm for the record today that the Government will use the powers only—I repeat, only—for the purpose of securing reclassification, and only to the extent that is necessary for that purpose, in order to ensure that RSLs can continue to operate as they currently do.

Source: Local Government and Communities Committee 13 December 2017, Kevin Stewart, contrib. 32⁴²

75. In relation to the powers in Section 9, the Policy Memorandum (paragraphs 29, 30) sets out that, in the first instance, the Scottish Ministers intend to specify in regulations that local authorities may only nominate up to a maximum of 24 per cent of the board members of an RSL, and may not exercise control over RSLs, for example, through a power to veto changes in an RSL’s constitution.⁴³

76. Inverclyde Council’s written evidence said that the Council considered that the plans to restrict the local authority power of nomination to a maximum of 24 per cent of the board members of an RSL was, "unduly restrictive" and said that this does not "allow for the exercise of local discretion for local circumstances." They argued that local authorities should be, "permitted to negotiate local representation in local circumstances and to ensure compliance with the overall necessity of reclassification that there be always minority representation on RSL boards."⁴⁴

77. GWSF stated that whilst ideally they would not want Ministers to dictate how boards are structured, in most cases, the reduction would be minimal and it was a proportionate response to the requirement to remove public sector control—

” We are talking about nuances of between a third and a quarter. I would have thought that, under the proposed arrangement, local authority board members would still have an influence, as they do under the current 33 per cent arrangement. It is clutching at straws to say that the proposal will make a big difference, especially if, as we believe, the ONS needs that change to happen.

Source: Local Government and Communities Committee 29 November 2017, David Bookbinder, contrib. 87⁴⁵ Local Government and Communities Committee 29 November 2017, David Bookbinder, contrib. 93⁴⁶

78. The Minister confirmed that whilst appreciating Inverclyde's Council's concerns, the measures only apply to local authorities with stock transfer and this was the only council to raise the issue. He confirmed that the 24 per cent limit was necessary for the following reason—

” To prevent a local authority from blocking any constitutional change in an RSL, a 75 per cent majority of board members is required. Our discussions with the ONS have made it clear that the limit is unavoidable. It is the limit that has been set south of the border, and only when that was set in regulation was the ONS able to reclassify housing associations there.

Source: Local Government and Communities Committee 13 December 2017, Kevin Stewart, contrib. 36⁴⁷

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

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

Delegated Powers Provisions

81. In a report on the Bill published on 28 November 2017, the Delegated Powers and Law Reform (DPLR) Committee commented that the scope of the regulation making powers in Sections 8 and 9 were drawn too broadly. The DPLR Committee considered that, in principle, the powers could be framed more narrowly in accordance with the policy objective. It recommended that the Scottish Government consider this further in advance of Stage 2. ⁴⁸

82. The Minister confirmed—

” Both powers are drawn widely in order to give the Government flexibility in making adjustments to the powers of the regulator and local authorities, respectively. That flexibility might prove to be necessary in securing reclassification, so I would be extremely reluctant to lose it.

Source: Local Government and Communities Committee 13 December 2017, Kevin Stewart, contrib. ³²⁴²

83. As previously reported, the Minister agreed to add a sunset clause to both Sections 8 and 9 and he hoped that this and his assertion that the powers would only be used for limited means, would address the concerns raised by the DPLR Committee. ⁴²

84. We thank the DPLR Committee for its report and believe that our recommendation at paragraph 78 should go some way to addressing the DPLR Committee's concerns.

Policy and Financial Memorandum

85. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the Policy and Financial Memorandum which accompany the Bill.

86. The Committee considers that the level of detail provided in the Policy Memorandum on the policy intention behind the provisions in the Bill assisted the Committee in its scrutiny of the Bill.

87. The Finance and Constitution Committee launched a call for views on the Financial Memorandum on 4 September 2017, which ran until 13 October 2017. It received 5 responses and given that it received no substantive comments, it took no further action.⁴⁹

88. The Financial Memorandum states that with the removal of the consent powers, the Regulator would need to engage more closely with a number of RSLs to compensate for the loss of assurance that the consents framework currently provides. The Regulator estimated that it might need to employ three additional staff at a cost of £176k.

89. On this issue the Regulator clarified—

” We identified the need for three members of staff, together with that figure, in an attempt to quantify what the impact on our resources might be. That might not necessarily translate into the employment of three members of staff, but we felt that that quantified the additional resource requirement on us if we are to obtain the type of assurance that is currently provided through the consents framework. We might need to do more than we currently do through the consents framework, because it not only provides us with regulatory assurance, but enables us to stop things that would not be in the interests of tenants and other service users. The framework also ensures that any disposal or change that happens without our consent is void. Following the proposed changes, that will no longer be the case, so there might be a bigger requirement on us to engage with organisations in which something happens that should not have happened.

Source: Local Government and Communities Committee 29 November 2017, Michael Cameron, contrib. 48⁵⁰

90. The Committee was content with the Regulator's response to this issue raised in the Financial Memorandum.

Conclusions and Recommendations

91. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill.
92. The Committee has made a number of requests for further information from the Scottish Government on issues related to certain aspects of the Bill, which are set out in the main body of this report. We have also recommended amendments at Stage 2 in relation to section 8 and 9. That said, at this stage, the Committee is content that the Bill provides appropriate and proportionate measures to meet its primary purpose.
93. The Committee therefore recommends that the Parliament agrees the general principles of the Bill.

Annex A - Extracts from the Minutes and the Official Report of Meetings

29th Meeting, 2017 (Session 5), Wednesday 29 November 2017

1. Housing Amendment (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

- George Walker, Chair, and Michael Cameron, Chief Executive, Scottish Housing Regulator;
- Sally Thomas, Chief Executive, Scottish Federation of Housing Associations;
- David Bookbinder, Director, Glasgow and West of Scotland Forum of Housing Associations;
- Daren Fitzhenry, Scottish Information Commissioner;
- John Marr, Senior Policy Adviser, UK Finance.

3. Housing (Amendment) (Scotland) Bill (in private): The Committee considered the evidence heard earlier in the meeting.

The organisations who gave evidence on 29 November 2017 were invited to provide any further written evidence they felt may assist the Committee as part of its scrutiny of the bill. The following responses were received:

- [Correspondence from Glasgow and West of Scotland Forum of Housing Associations to the Clerk of 5 December 2017](#)
- [Correspondence from the Scottish Housing Regulator to the Convener of 6 December 2017](#)
- [Correspondence from the Scottish Information Commissioner to the Convener of 8 December 2017](#)
- [Correspondence from the Scottish Federation of Housing Associations to the Clerk of 8 December 2017](#)

[Official Report for 29 November](#)

31st Meeting, 2017 (Session 5), Wednesday 13 December 2017

2. Housing Amendment (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

- Kevin Stewart, Minister for Local Government and Housing, William Fleming, Head, Housing Services Policy Unit, Yvonne Gavan, Senior Policy Officer, Housing Services Policy Unit, and Heike Gading, Solicitor, Scottish Government.

3. Housing (Amendment) (Scotland) Bill (in private): The Committee considered the evidence heard earlier in the meeting and agreed to consider a draft report in private at a future meeting.

[Official Report for 13 December](#)

31st Meeting, 2017 (Session 5), Wednesday 13 December 2017

5. Housing (Amendment) (Scotland) Bill (in private): The Committee considered and agreed a draft Stage 1 report and the arrangements for its publication.

Annex B - Written Evidence

Submissions received on the Housing (Amendment) (Scotland) Bill are available [online](#) from the following organisations/individuals:

- Angus Council
- Scottish Information Commissioner
- Wilson Dunlop
- South Lanarkshire Council
- North Ayrshire Council
- COSLA
- Glasgow and West of Scotland Forum of Housing Associations
- Scottish Federation of Housing Associations
- Northern Lights Regional Network (2)
- UK Finance
- Chartered Institute of Housing Scotland
- Abbeyfield Scotland Ltd
- Association of Local Authority Chief Housing Officers
- Inverclyde Council
- Glasgow City Council
- Scottish Housing Regulator

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