

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL

COMMUNITIES SCOTLAND'S RESPONSE TO THE CONSULTATION

Introduction

1. Communities Scotland welcomes the opportunity to comment on the draft Charities and Trustee Investment (Scotland) Bill. The Regulation & Inspection Division of Communities Scotland is responsible for the regulation of Registered Social Landlords (RSLs). This response to the Bill provides contextual information on the Registered Social Landlord sector regulated by Communities Scotland and sets out our approach to regulation. The response also sets out why we believe that charitable RSLs should be exempt from dual regulation by OSCR. The established regulatory regime for RSLs is strong and comprehensive and provides assurance to Scottish Ministers, lenders, tenants and the general public that those RSLs which are also charitable are already effectively regulated.

Reasons for Exempting Charitable RSLs

2. We are keen to ensure that Ministers are not put in the position of adding an additional regulation layer to the RSL sector. There are two key policy drivers here. Firstly, the desire to have a comprehensive and fair approach to every organisation in the charitable sector and secondly, the drive towards efficient and proportionate regulation. In the case of RSLs there is much stronger argument that we need to manage the increasing burden of regulation they face from a new care regulator and a new charity regulator. We believe we have a real opportunity through the Bill to be radical in cutting red tape and reducing bureaucracy by exempting RSLs – and it sends a clear signal that we are taking over-regulation seriously. We see no advantage in adding another regulator into an already heavily regulated sector.
3. We are the only regulator that OSCR will deal with that has such overlapping and parallel powers. We understand that there may be a concern that if the Bill exempts RSLs that other parts of the charitable sector will also expect to be exempt. However, we do not believe other regulators are in the same position as us in having such parallel powers. Our powers and processes overlap with OSCR in these key areas:
 - Registration and deregistration;
 - Permissible purposes of RSLs/Charitable purposes of charities;
 - Consents - to make changes to constitutions/rules, amalgamations, winding up, disposal of property, etc;
 - Investigating complaints and acting on them;
 - Getting information and making inquiries;
 - Accounting requirements;
 - Intervention
 - Directing transfers of assets etc

It is our experience to date in working with other regulators that, despite having agreements in place to outline how our respective powers might work together, we cannot fetter each other's right to exercise these powers.

4. We have had long experience of regulating charitable RSLs and taking account of that charitableness in our framework and approach. Most of the RSLs we regulate would fit within the current draft charitable purposes. RSLs are also subject to specific legislation that means that many of the issues outlined through this draft Bill have already been taken account of in housing legislation. For example, governing body members (and their close relatives) cannot, by law, enter into a business contract with an RSL and they cannot receive payments (other than incidental expenses) for their work on the governing body. The existing legal framework for RSLs needs to be examined in the context of this new legislation. We believe we can work with OSCR to make sure our policy and regulatory framework is more explicit in dealing with charitable issues.

Context – The RSL sector

2. There are 186 RSLs and 97 (52%) of these have charitable status. Some statistics (as at 31.3.03) illustrate the size and nature of the sector:
 - The RSL sector owns and manages 238,000 houses in Scotland.
 - 59% of RSL tenants receive housing benefit assistance to pay the rent.
 - Turnover in the RSL sector for 2002/2003 was almost £0.5bn.
 - Total committed lending to RSLs at 31 March 2003 was £2.2bn.
 - Over 2,000 people give their time voluntarily to work on RSL governing bodies.
 - RSLs employed just over 7,000 staff.
 - Almost all RSLs are Industrial & Provident Societies; only eight RSLs are companies limited by guarantee.
3. These RSLs are governed by voluntary bodies of members, largely elected by their membership, who receive no payment (other than travelling and subsistence payments) for their time. The RSLs play a significant role in the communities they operate in and there is a strong voluntary ethos in how they are governed.
4. The RSLs which are Industrial & Provident Societies are largely housing associations, with some co-operatives and fully mutual co-operatives, and only eight companies. Registered Social Landlord is the generic term in the housing legislation for all these housing bodies.
5. To become registered, a social landlord has to meet the eligibility criteria set out in the Housing (Scotland) Act 2001 and any other criteria established by Scottish Ministers. The Act requires that the registered body does not trade for profit and is established for the purpose of providing, constructing, improving or managing houses to be kept available for letting. RSLs are also permitted to have other related purposes such as providing land or services or providing, constructing, repairing or improving buildings for its residents either exclusively or together with other bodies. RSLs can also provide services for owners or occupiers of houses where they are intending to carry out maintenance or improvement works.

6. RSLs are significant social businesses. 28 have an annual turnover of over £5m per annum with six of these having a turnover of between £10m and £24m (Source: annual accounts for RSLs for year end 31.3.03). The sector continues to expand with the registration of new RSLs, particularly those taking on the transfer of Local Authority housing stock. For instance, the Glasgow Housing Association (GHA) is not included in these figures as it only took over the transfer of the City Council's almost 80,000 housing stock in March last year. GHA is a charitable RSL with an annual turnover of £216m.
7. Many RSLs also see that they have an important role within their communities and engage in activities which go beyond the provision of housing. Many RSLs are widening their activities to promote social and economic inclusion or improve the environment in their local communities. Wider role activity can include employment training schemes, child care and youth facilities, money and energy advice and improving access to e-business and learning with digital inclusion projects. Some RSLs involved in wider action will set up subsidiary organisations to deal with these activities; sometimes because they wish to separate any risk attached to these activities from the parent RSL, and sometimes, in the case of charitable RSLs, they will create non-charitable subsidiaries to undertake activities which are not within their charitable purposes. Of the 97 charitable RSLs, 26 have registered or unregistered subsidiaries.

The Regulation of RSLs

8. The Housing (Scotland) Act 2001 sets out the provisions for the regulation of social landlords. Scottish Ministers' powers contained in the Act are delegated to Communities Scotland so that in effect, all aspects of the regulation of RSLs are fully delegated to Communities Scotland. Communities Scotland is accountable to Scottish Ministers and through them to the Scottish Parliament.
9. Communities Scotland is required to maintain a separation between its regulatory activities and its other responsibilities. The work of Communities Scotland's Regulation & Inspection Division is overseen by a separate Regulation Board. The duties of the Regulation Board, which comprises the Agency's non-Executive Directors and the Chief Executive, is to ensure that Communities Scotland's regulatory work is free from any inappropriate influence and to ensure that the housing regulator acts in the best interests of tenants and protects the public and private investment in social housing.
10. We publish national Performance Standards which cover all regulated activities and ensure that regulated bodies observe high ethical standards, provide high quality services, and operate in an open and accountable manner. We undertake a programme of inspections designed to ensure that all regulated bodies are visited and assessed against these Performance Standards at least once every five years. The results of each inspection are published in a written report. The inspection report includes grades to reflect the quality of the inspected body's achievement of these performance standards. Where any weaknesses are identified in performance we ensure that these are followed up so that improvements are made in between inspections.

11. We also have mechanisms in place to allow the performance and risk profile of each regulated body to be assessed annually and for these assessments to be used in deciding whether or not additional contact will be required between programmed inspections. Every RSL is required to submit an annual return containing performance and statistical information which allows us to monitor performance and carry out a review of risk of individual RSLs between inspections and form a national picture of performance in the sector as a whole. This is then collated, analysed and published in an annual report which presents a range of key statistics and performance indicators for RSLs (and other stakeholders) to use to compare and benchmark their performance against peers and others.
12. RSLs are non-profit distributing social businesses which receive substantial public and private investment. Fundraising as practised by the majority of charities is not a RSL activity and is not how they generate their income. The bulk of RSL income comes from the rents paid by tenants. Further investment for new build and housing improvement is provided by Communities Scotland through what is called Housing Association Grant. RSLs also borrow substantially from the private lending sector to fund the purchase of housing stock, new build and improvements. The loans from the private funders are secured on RSLs' housing assets and are repaid from rental income.
13. We have expert financial analysts who carry out financial reviews of all RSLs every year, examining annual accounts, looking at financial performance and trends, and following up any financial issues or concerns with RSLs. RSLs are required to meet stringent accounting requirements. The Accounting Standards Board (ASB) has agreed that all RSLs across the UK, whether charitable or not, should follow the RSL Statement of Recommended Practice (SORP). These arrangements result in a clear and consistent approach to preparation of financial statements and have the support of all national Federations and housing regulators. All Federations are recognised by the ASB as the SORP-making body, and the ASB also recognises inclusion of the regulators on the RSL SORP working party. The status of OSCR as a member of the charities' SORP-making body is unclear. Any change to current arrangements must involve discussions amongst the national Federations, OSCR and the ASB.
14. RSLs receive favourable lending terms because of the confidence that private funders place in our robust financial scrutiny of the sector. The Council of Mortgage Lenders is a key stakeholder in our regulatory regime. Our regulatory approach has grown and developed to meet the needs of private lenders. It is clearly in the interests of funders that the sector regulator is one which is experienced, has an established track record, and knows and meets its requirements.
15. We also provide advice and support and publish good practice guidance for the sector to assist RSLs in improving their performance. The Housing Act provides for guidance to be issued and there is a raft of published guidance which sets out what we expect RSLs to do.
16. We follow up on issues of concern arising from complaints or whistleblowing about individual RSLs. All RSLs are expected to publish their own complaints procedures by which tenants and others can appeal or complain about any of the RSL's activities.

The complaints procedure must make it clear that the complainant may have recourse to the Scottish Public Sector Ombudsman.

17. The Housing Act requires that RSLs must ask for our consent to sell, lease or grant security on houses or other property they own. This legislative provision is an important safeguard designed to protect the RSL's assets. RSLs must also seek our consent to any changes to the rules which govern how they work. We commissioned the Scottish Federation of Housing Associations (the SFHA is the representative body for housing associations in Scotland) to publish sets of model rules for the use of RSLs. We regard an RSL's rules as fundamental to the effective governance of the organisation and carefully scrutinise any request to amend rules. Our consent is also needed if RSLs want to cease operating, deregister and transfer their business to another RSL. We ensure that charitable assets from a charitable RSL are only transferred to another charitable RSL.
18. The Housing (Scotland) Act provides Scottish Ministers with a range of powers which can be used to intervene to secure improvements in the performance of an RSL or Local Authority. These powers are delegated to Communities Scotland and the agency has published an Intervention Strategy to set out when and how these powers will be used. For RSLs these powers include being able to make appointments to the governing body of an RSL if there are concerns about weaknesses in the governance of the RSL concerned. Communities Scotland also has the power to appoint a Special Manager where there are problems which are primarily operational. In addition there is the possibility of carrying out a Statutory Inquiry and there are statutory actions which can subsequently be taken in response to suspected mismanagement or misconduct identified through the Statutory Inquiry.

Working with Other Regulators

19. Scottish Ministers expect Communities Scotland to set up effective working arrangements with other regulators and inspectorates. These arrangements should facilitate information sharing and, where appropriate, joint working on cross-cutting issues. We have entered into a Memorandum of Understanding with the Accounts Commission and the Commission for Racial Equality, and we are agreeing a further protocol with the Care Commission and updating an existing agreement with the Housing Corporation.
20. We are committed to working with other regulators and statutory agencies to reduce the burden of regulation on landlords and to streamline regulatory activities. We are committed to ensuring that we only regulate what we need to and that we work effectively with others to avoid over-regulation and duplication of effort. Recently we commissioned research into regulatory information requirements to establish how, as regulator, we can streamline the amount and type of information that RSLs are asked to provide to other regulators and statutory agencies. An RSL may be asked to provide the same information in different formats by a number of different agencies. This is time-consuming, can draw heavily on resources and is particularly problematic for RSLs that operate nationally. The social housing sector is increasingly concerned about the extent of duplication between regulatory authorities. It has become a significant burden for RSLs and in their view represents a waste of scarce public resources which would be better applied to frontline services. The research has

shown the extent of duplication and identified areas where there is potential for streamlining.

21. For many RSLs, Communities Scotland has the status of sole regulator. For some RSLs our primary regulation role is complemented by the work of other regulators such as the Scottish Commission for the Regulation of Care (the Care Commission) and the Housing Corporation (the housing regulator in England). The Care Commission is responsible for the registration, regulation and inspection of Scottish care services. It has distinct statutory responsibilities for housing support services provided by Local Authorities and RSLs. However, there are some areas where the duties of the Care Commission and those of Communities Scotland overlap. We are therefore in the process of agreeing a Memorandum of Understanding to support joint working arrangements between Communities Scotland and the Care Commission. The Housing Corporation regulates RSLs which are registered in England. Communities Scotland has a cross-border agreement with the Corporation which sets out how we will liaise closely in dealing with cross-border groups and linked organisations.
22. Through these joint working protocols we aim to provide a seamless and co-ordinated approach to regulation to avoid over-regulation and duplication of effort. The protocols ensure that each regulator can fulfil their statutory duties in the most effective way possible and that any concerns are dealt with appropriately. This ensures the targeted and best use of regulation resources to protect service users and other stakeholder interests.

Regulation in England

23. Our regulatory equivalent in England, the Housing Corporation, in its response to the Charities Bill, is making the case that RSLs which are registered charities, should have exempt charitable status. As we understand, the Housing Corporation has concerns about the potential duplication in the regulation of RSLs, particularly around governance issues. The exemption being sought by the Housing Corporation would mean that the Corporation would be the principal regulator. We also understand that the Charities Commission is very positive about this proposal.
24. There are four RSLs which are registered in England with the Housing Corporation which have subsidiary RSLs in Scotland registered with Communities Scotland. We have a regulatory agreement with the Housing Corporation which sets out how we will deal with cross-border issues regarding these linked organisations. From a regulatory perspective, and from the perspective of the linked RSL organisations working across Scotland and England, it would be helpful to have parity in the regulatory treatment and status of charitable RSLs north and south of the border.

Duplication with the Charity Regulator

25. The Minister for Communities has stated that charities in Scotland need a “modern, proportionate regulatory framework” and “a regulatory environment that supports them rather than ties them in red tape”. The current proposals in the draft Bill risk producing a system which not only adds to the regulatory burden of charitable RSLs, to no added value, but which also adds to the burden on the existing RSL regulator.

We agree that it is important to regulate and support the charity sector. However, we would argue that where parts of the charity sector are already regulated and supported by an established robust regulator then the charitable organisations subject to that existing, successful regime should be exempt from the proposals. We believe the proposals will deliver an effective regulatory framework but not a proportionate one for the charitable RSL sector.

26. Communities Scotland has had a range of very useful and productive discussions with OSCR about how our existing housing regulation can dovetail with the proposed charity regulation. We have concluded that the housing regulatory framework currently offers all the security and protection required to meet the aims of the charity regulation proposals. Therefore it is unnecessary to include charitable RSLs in the Bill.

Regulatory Impact Assessment

27. The type of working protocol required between the charity and the housing regulators would be of a different scope and intensity depending on whether Communities Scotland is accepted as the lead regulator of exempt charitable RSLs, or not. As such, if Communities Scotland is not the lead regulator then we would have to say that the Regulatory Impact Assessment does not reflect the negative effect and costs on charitable RSLs and on the housing regulator. The draft Bill contains regulatory provisions which duplicate those applied by the housing regulator. A working protocol which requires the housing regulator to satisfy the charity regulator on all of the duplicated provisions will place an additional administrative burden and cost on the housing regulator. Further, charitable RSLs would have to ensure they were able to meet the potential demands of the charity regulator which would also impose a further layer of bureaucratic regulation on an already highly regulated sector.
28. It is welcomed that the draft Bill places a duty on OSCR to co-operate with other regulators but co-operation in itself does not address the very real overlap in regulation where there are two regulatory bodies with the same regulatory responsibilities for the same organisations. This overlap can only be effectively addressed by removing the duplication of responsibilities and in this case, this can best be achieved by exempting the charitable RSLs from OSCR's legislative remit.

Charitable RSL Exemption

29. We have demonstrated the track record of a well-established, robust regulatory regime which has successfully regulated the sector for over 30 years. We have presented evidence about the scale and nature of RSLs and about the range of regulatory mechanisms which protect the interests of tenants, RSLs and other stakeholders. We have set out what we have done to avoid the burdens of duplication and over-regulation and ensure the continuation of a strong and effective regulator. This response highlights that the most effective way of addressing the issues arising from regulatory duplication is to exempt charitable RSLs from the Charities Bill.

30. We propose that:

- Communities Scotland continues as the principal and lead regulator of the RSLs in Scotland with charitable status and that these organisations are granted exempt status from the forthcoming Bill;
- OSCR includes charitable RSLs on its charity register;
- Communities Scotland provides OSCR with the details of all existing and new charitable RSLs to ensure that the charity register is kept up-to-date;
- Communities Scotland consults with OSCR about any change to the name of any existing charitable RSL and about the name of a prospective charitable RSL;
- Communities Scotland ensures that any amendments to the constitutions of charitable RSLs continue to reflect the charitable purposes to be set out in the forthcoming Act;
- Communities Scotland advises OSCR about the removal of a charitable RSL from the Register of Social Landlords so that the name can also be removed from the charity register.
- Communities Scotland provides annual information to OSCR about charitable RSLs to enable OSCR to build a comprehensive picture of Scottish.
- Communities Scotland liaises with OSCR on matters of policy to make sure a charitable dimension continues to be appropriately captured in its regulatory framework.
- Communities Scotland and OSCR will work together to agree a joint protocol to set out our respective responsibilities and particularly how we will liaise to maintain the charity register