



Glasgow and West of Scotland
Forum of Housing Associations

Dealing with Engagement from the Scottish Housing Regulator

**GWSF advice note for housing association
committee members**

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Dealing with engagement from the Scottish Housing Regulator

GWSF advice note for housing association committee members

This advice note is aimed primarily at committee members of housing associations in membership of GWSF. Some parts of it are especially relevant to chairs and other office bearers, but regulatory engagement with an association is obviously critical for all its committee members. GWSF members, on average, have higher levels of community involvement in the governance of the organisation, and we hope the note is read widely within the membership.

The note covers the following areas:

- What can trigger engagement from the SHR?
- Dealing with initial contact from the SHR
- Keeping a record of engagement with the SHR
- Meeting with the SHR
- Meeting with investigators
- Fair treatment of staff
- The role of co-optees
- The appointment of independent consultants
- Informal advice and support through GWSF

1 Introduction

The note aims to alert committee members to the increasing contact being made by the Scottish Housing Regulator (SHR) directly with committee members, often to the exclusion of senior staff. This in itself is not unreasonable on the SHR's part if it believes that it is not appropriate to engage with staff in the case in question. But it means that committee members can find themselves facing difficult situations which can come out of

the blue, and without the option of turning to staff for advice.

The note therefore aims to advise committee members what they might expect, what they can ask of the SHR, some potential pitfalls to avoid, and what support they might seek if they need it, including informal advice and support which GWSF can arrange confidentially.

This note does not in any way question the SHR's role in engaging with associations in any case where

investigations need to be carried out. Individual organisations and the sector as a whole need and welcome effective regulation, and associations with serious problems can represent a threat to the entire sector.

GWSF wishes to ensure, though, that in any engagement with the Regulator, due process is observed and committee members are clear what they should expect and, where necessary, demand of the SHR. The Forum is involved in discussions with SHR about how it engages with associations, and SHR intends to produce advice on this in the coming months. That guidance should complement this GWSF advice note.

2 What can trigger engagement from the SHR?

Initial contact with an association is likely to arise from one of the following scenarios:

- Some form of whistleblowing or direct complaint to the Regulator
- As a result of a submission by the association itself e.g. the ARC, or a 5 year forecast. It might also arise from a 'notifiable event' where the Regulator is unhappy with what it has been told
- An 'external' event involving the association which results in the Regulator taking an interest.

Engagement with the Regulator in practice generally takes one of three forms:

- Issuing a Regulation Plan under the Regulator's general powers

(sections 3 and 15 of the 2010 Act)

- Engagement under Part 4 of the Act, where the SHR is 'making inquiries' but before it needs to use statutory intervention powers – this is by far the most common form of contact. Amongst other things this can include asking an association to carry out an investigation
- Intervention under Part 5 of the Act, including where the Regulator makes appointments to the Board or appoints special managers – this will usually (but not always) follow more general engagement of the 'making inquiries' type.

The third category is by far the most serious but it tends to be more clear cut because, in accordance with what's in the legislation, the Regulator sets out the basis on which they are taking action and everyone will know where they stand.

It is particularly the second category – the initial engagement the Regulator may make with an association – that is often the most problematic, as the 'rules' are less clear and associations remain responsible for what happens.

This guidance is aimed at helping GWSF members, and in particular committee members, deal with many of the issues around initial engagement by the Regulator before any statutory intervention powers are used.

3 Dealing with initial contact from the SHR

Management committees should understand that where the Regulator becomes involved in 'making inquiries' about something, the committee remains responsible for running the affairs of the association. The Regulator may make proposals, they may ask the committee to co-opt additional members or appoint a consultant or interim manager, but at the end of the day it is the association itself, and the committee as governing body, that is taking such action, albeit often whilst feeling under intense pressure from the Regulator.

In such circumstances it is important that the committee as a whole, and individual members, abide by the association's Rules and Standing Orders. It is also important that the committee continues to receive its own advice and guidance on how it should deal with problems.

This is particularly important where the issue that committee must deal with relates partly or wholly to its senior officer, or where the senior officer is leaving/has left and the association may be faced with the requirement to carry out some form of options appraisal on its future.

The Regulator's February 2015 consultation signals the intention to revise the guidance on notifiable events to amend its expectations around carrying out an options appraisal on the departure of the senior officer. The current wording in the consultation suggests the change of approach will mean that where the association's

business plan is up to date and meets the Regulator's recommended practice, options appraisal is unlikely to be required.

Any matter on which the conduct or performance of the senior officer is in question, for example through a whistleblowing allegation, will have particular implications for committee members, as the committee will be the SHR's first point of contact.

If the senior officer is *not* the subject of the engagement, there is no reason for the Regulator to make direct contact with individual committee members – the Regulator can arrange to see the Chair, office bearers or the whole committee by making initial contact with the office/senior officer.

Except in cases of dire emergency or sensitive confidentiality, the SHR should rarely, if ever, need to make contact with an individual committee member. If you are contacted by the Regulator you should make sure you are completely satisfied with the SHR's explanation as to why staff can't be involved in the initial engagement from SHR.

You should check whether the SHR intends making any contact at all with the senior officer or any other staff, and what (if any) contact it is appropriate for you to make with staff – remember, as an employer you will have a duty of care to that staff member in a way that the Regulator does not.

Where the SHR wants to make direct contact with the committee this will normally be with the Chair in the first instance. If the SHR does not have contact details for the Chair, it will

normally contact the association's office. It is for individual associations to make their own arrangements about how this is handled but at the very least the Chair should be aware that any approach from the Regulator should be responded to as quickly as possible – it is reasonable to assume that the Regulator has good reason to want urgent contact with the Chair.

Where postal mail is addressed to the Chair and marked as private and confidential, staff would be expected to pass this on to the Chair unopened.

So, it is wise for all associations to have clear arrangements in place for dealing with contact from the Regulator.

GWSF advice points:

- Contact with committee members *in the first instance* should only occur where there is an issue about the senior officer. All other contact should be with the senior officer.
- Any request by the Regulator for contact details should be passed on to the Chair who can then make contact.
- Phone or email details should be sufficient. Home address details are not required – any contact from the Regulator will be official and therefore any correspondence should go through the office, marked private and confidential if necessary.

- Contact with the Chair outwith normal working hours should never occur, unless the Chair has specifically indicated that this is the easiest thing for her or him: the Chair is entitled to expect the Regulator to observe reasonable courtesy and a business-like approach.
- On any matter relating to the senior officer you, which means the committee as a whole, should take advice from your solicitor, particularly relating to issues around employment law.

All of the above should also apply to any other office bearer or committee member.

4 Keeping a record of engagement with the SHR

The Regulator will already have considered what it wants when it contacts you. It's important that you clearly understand what the contact is about and just as important that you, as an association office bearer/committee member, have a record of that contact.

Maximising written contact and minimising verbal telephone contact means that communications on what can be crucial matters are recorded. Phone conversations can all too easily lead to misunderstandings about what has been discussed and agreed.

You should ensure you are clear what contact you need to make with fellow committee members. The SHR may seek to come to an agreement with the chair that details of a situation must be

limited to office bearers, or to another specified group of committee members. You should be careful about the implications of this. Where it relates to an employment issue and some committee members may be needed for an appeal committee in the event of disciplinary action, you should always take legal advice from the association's solicitors. Where the advice is that other committee members cannot be given details of what's happening, beyond a broad indication of the overall situation, it should be made clear to them that there are sound legal reasons for this.

You should remember that unless statutory intervention powers (such as appointees) are being used, it is the association that is taking the action and not the Regulator. It is your responsibility to make sure that any actions are indeed agreed by committee and conform to your Standing Orders.

It is also really important to keep the committee united, as associations can find themselves under immense pressure when unexpected situations arise and regulatory investigations are being carried out.

The SHR should be clear with you about the nature of their concerns. For example, in the case of whistleblowing allegations, the SHR should be able to advise in writing what the allegations are without in any way compromising the confidentiality owed to the originator. If the allegations are not set down at an early stage, it can become unclear what issues stem from the allegations and what may have been raised subsequently.

GWSF advice points:

- Keep telephone conversations to a minimum and get as much as possible in writing, either in emails or by traditional correspondence.
- Make sure that any actions or agreements you enter into as an office bearer are reported to, and confirmed by, the whole committee as quickly as possible.
- Where you have had to take action regarding a staff member, e.g. suspension, make sure that the committee is kept informed and is aware of the reasons for limited disclosure.
- Take legal advice on all employment matters and make sure the rest of the committee are made aware of that advice.
- Associations should consider giving all committee members contact details of an adviser – normally the association's solicitor – as a 'go to' person in the event of a serious issue arising where it is not possible to turn to the senior officer.

5 Meeting with the SHR

Meetings with the Regulator will either involve office bearers or the whole committee. In either situation it is important that you are clear, before the meeting, what its purpose is and what issues will be discussed. You may be asked for your agreement that some matters are confidential and that they

should not be shared with the full committee. You should avoid such a situation if you can but this will not always be possible. You may be asked to attend a meeting with SHR on your own. You should never agree to this, and should seek to be joined by at least one other committee member as well as the association's lawyer or other representative able to record the meeting.

Individual committee members are ultimately responsible to the management committee as a whole (including co-optees, of course) and this extends to knowledge and information. You should not place yourself in a position in which you are keeping information from the committee, beyond legitimate confidentiality around employment issues, which your solicitor should be able to explain to the committee if this is needed.

You should always ensure that there are satisfactory arrangements in place for taking a note of meetings with the Regulator. Whether meeting with the Regulator as individual members or as a whole committee, you should always have your own advisers present – independent of the Regulator but answerable to the association. You should ensure there is a record of decisions – this should be one key task for your adviser.

If the engagement with the Regulator is not involving the use of its intervention powers under Part 5 of the Act, it should mean that there are never any matters so urgent that committee meetings involving the Regulator cannot be properly notified in accordance with your Standing Orders.

Committee meetings involving the Regulator should be treated in the same fashion as any other meeting – a minute should be taken for *your* records. This is particularly important where decisions are taken.

GWSF advice points:

- When office bearers are asked to meet with the Regulator you should have an adviser present and you should ensure you have your own record of the meeting.
- For committee meetings involving the Regulator, you should have an adviser present and you should ensure that a minute is taken, in accordance with your Standing Orders.
- Unless you are satisfied that there is good reason to do otherwise, you should ask for and expect the Regulator to provide a written paper/submission for the committee to consider, preferably in advance of the meeting.
- It should rarely, if ever, be acceptable for papers to be tabled.
- In cases where there may be confidentiality issues, always make sure you are clear about what you can and can't share with the full Committee

6 Meeting with investigators

Although investigators will normally have been appointed by the association itself – though often as a result of a strong steer from the Regulator – meeting with investigators can sometimes feel just as worrying as meeting with the Regulator.

Many of the same principles as covered in previous sections of this advice note could apply equally to situations where the Chair or other committee members are meeting with an investigator. So it should not be necessary for an investigator to meet with a Chair or other committee member alone, and if asked to do so you should avoid this if you are not comfortable about it, and make arrangements for the association's lawyer, or another third party, to accompany you.

And if you would like a third party to take a note of the meeting – rather than rely on the investigator alone to do so – you should ensure that arrangements are put in place for this to happen.

7 Fair treatment of staff

Staff who may be the subject of investigation should not remain in the dark about the nature of that investigation. Whilst each case will be different, staff have a right to know the nature of any allegations or investigation into their conduct.

As a committee member, you have a duty to act in the best interests of the association as a whole. Whilst that of course means a duty to protect the association from poor decision making

etc. that may put the organisation at risk there are also duties relating to the association's responsibilities as an employer. Your staff have rights as set down in their contract of employment and as established in employment law: ultimately it will be you, and not the Regulator, who will be accountable for the association's employment practices.

The management committee should take advice on any decision or consultant's appointment which could lead to a claim by the senior member of staff for constructive dismissal, i.e. taking action which effectively prevents a staff member doing their job. At every stage of engagement with the Regulator where there are questions about the conduct of staff you should always ensure that your solicitor is there to give advice and you should listen to that advice.

This can be a difficult and sensitive balance for committee members to achieve, and is one example of the sort of issue on which informal advice from someone on GWSF's panel of advisers may prove helpful (see section 10 below).

GWSF advice points:

- Remember you have a duty of care to staff as the employer.
- Employment matters are solely for the association to address - the Regulator is not there to look after the interests of staff and cannot give advice on employment matters. Always seek advice from your solicitor in

considering any action regarding a senior member of staff.

- Remember, you, the committee, and not the Regulator, are the employer.

8 The role of co-optees

Under the current SHR system there appears to have been a greater tendency towards co-optees rather than appointees. Co-optees are a matter for the committee, whilst appointees are put in place by the SHR. In practice, though, lines can be blurred, with the SHR often seeking to 'recommend' co-optees that they may have sounded out already. And in some cases, committees ask the Regulator for suggestions.

Committees can find themselves in a tricky situation here, as it may not be easy for them to identify potential co-optees, and there is an obvious pressure to accept those recommended by the SHR and, in some cases, to do so swiftly.

But as a committee member you can play your part in ensuring that lines of communication involving co-optees are clear. Co-optees are part of the committee and report only to the committee. Any communication between co-optees and the SHR should be through the committee or at least via appropriate representatives of the committee such as the chair, unless an agreed protocol has set in place alternative arrangements (for example an agreement that co-optees can report to the regulator on progress).

Co-optees are full members of the committee and should be treated no differently from any other member.

GWSF advice point:

- Make sure lines of communication are clear: co-optees should report only to the committee.

9 The appointment of independent consultants

Appointments of special managers under the SHR's statutory powers are a matter for the SHR alone. But the appointment of independent consultants, for example to carry out investigations or act as interim directors, is a matter for the committee to oversee.

Again this situation can put committee members in very difficult situations if they are not in a position to put forward their own nominees, or if (as has happened frequently in recent months) the SHR is unwilling to approve the committee's nominee(s). In these circumstances the pressure to go along with the SHR's preferences is significant.

Matters relating to co-optees and the appointment of consultants are another issue on which an informal adviser contacted through GWSF can offer pointers.

10 Informal advice and support through GWSF

Being contacted by the SHR on a potentially serious matter can be a challenging and unsettling experience, particularly where it is totally unforeseen. GWSF is keen for committee members to know that where you find yourself in this situation, you can get in touch with the Forum, to arrange to speak informally and confidentially with an experienced member of staff or committee from another association.

These informal advisers will have experience of the regulatory regime not just from their own association's point of view but also, in many cases, from having served as co-optees, appointees or special managers at other associations.

The intention is to provide you with some informal support and reassurance, and pointers as to what you should expect and ask for of the SHR, and how you might best handle other sensitivities such as your relationship with the rest of the committee and with the senior officer and other staff.

The advisers will normally be in a position to contrast and compare your

situation with others they may have come across. What you discuss will be entirely confidential, and where advisers refer to the experience of other associations this will not be by name.


The advice does not replace the more formal advice you may need to obtain from the association's lawyer and/or other professional advisers, but the informal advice can help you assess what more formal support you may need to get.

Equally this informal advice is not a substitute for any need there may sometimes be to make committee co-options or in some cases to appoint an independent consultant, but again the Forum's advisers may be able to provide helpful pointers on this.

The SHR is aware of GWSF's plans to establish a panel of informal advisers and is comfortable with its intended role.

Contact with GWSF should initially be through the Director, David Bookbinder, on 07936 152193 or david.bookbinder@gwsf.org.uk

EVH may also be a source of advice where there are employment-related issues and the association is in membership.



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GWSF's purpose is to promote and represent local community-controlled housing associations and co-operatives in Glasgow and the west of Scotland