



## **Role of the Scottish Housing Regulator: GWSF submission to the Parliament's Local Government, Housing and Planning Committee, October 2024**

### **1 Introduction**

On behalf of our 64 members, who are community based housing associations in the west of Scotland, GWSF welcomes the opportunity to provide views to the Committee on the role of the Scottish Housing Regulator.

At all times we aim to maintain a constructive relationship with SHR, and the issues covered in this submission have been the subject of ongoing dialogue with SHR, including at our regular liaison meetings, the last one of which was as recently as 7 October.

Our views are based primarily on the feedback we receive from members about their experience of and engagement with SHR, which can vary from engagement over relatively minor or routine issues to more serious engagement where an association is facing significant challenges. SHR recognises that it is sometimes easier for membership bodies such as GWSF than it is for individual associations to raise issues, and it is helpful that they are always open to discussing things with us as they arise.

### **2 General comments on SHR**

#### *The overall nature of regulation*

Robust and credible regulation is critical to housing associations. It is reassuring for tenants and immensely important to lenders.

Arguably the housing association sector has become accustomed to what may be a more rigorous form of regulation than might come from some other regulators with more bodies to oversee: an obvious comparison would be with OSCR, which regulates thousands of charities compared to the less than 200 housing associations and council housing and homelessness functions regulated by SHR.

This is not in itself a bad thing, but does make it more important that strong regulation is also reasonable and proportionate and perceived to be so.

The nature of regulation has changed markedly in the last 25 years. Associations used to receive cyclical visits from a team of regulatory staff, which could last as long as a week in some cases, and involved in-depth discussions with staff and committee/board members. Now regulation is predominantly based on submission of data, with the Annual Assurance Statement each autumn being the most recent new requirement. This makes it more likely that challenges or potential 'failures' in particular areas of operation, finance or governance will be volunteered to, rather than discovered by, SHR.

GWSF does *not* receive a high volume of negative feedback from members about their engagement with SHR, and several members tell us that their relationship with SHR is very good. The fairly intense nature of SHR scrutiny of housing associations is widely seen as 'par for the course' nowadays and is something many senior staff and committee/board members have grown up with and become used to.

As set out below in section 3, the Committee will know from our previous submissions that we have one overriding area of concern about how SHR operates, namely around potential takeovers of troubled associations by (usually) larger regional or national associations.

This is not something affecting many associations at any one time, but is obviously a very serious issue for any association finding itself in the position of considering a Transfer of Engagements as a potential option. And more broadly, the issue is a significant one for our community based sector, which contains a greater proportion of smaller associations. Our concerns are summarised below, and some suggested ways of addressing them – constructively discussed with SHR as recently as 7 October – are also outlined.

#### *SHR's primary function of safeguarding and promoting tenants' interests*

There have been occasions on which SHR engagement with an association over a governance issue has been justified as being in tenants' best interests, without regard to what may well be a high-performing association in terms of Charter outcomes for tenants.

Each instance is of course different, but there may sometimes have been a perception of SHR using the 'tenants' interests' line as something of a cover for its actions when it may not always be entirely clear that particular SHR actions (or omissions) are indeed in tenants' best interests. We think it would therefore be beneficial for SHR to better set out what this remit means in practice.

#### *The ongoing need for a proportionate approach*

Where we do receive expressions of concern from individual member associations, it is usually around a belief that engagement over a specific issue has felt

disproportionate or excessive in relation to the seriousness of the issue in question. Relatively isolated issues notified to SHR are normally managed in a sensible, proportionate manner, but occasionally a member association will share with us a less positive experience, for example where SHR appears to be treating a specific, technical issue as some kind of failure of *governance*.

If we start to see a potential pattern developing from the membership feedback we receive, we will seek to talk with SHR to gain a greater understanding of their view of the issue, what they would like to see being done differently, and we will convey feedback from members to help SHR understand how their actions are being received and perceived.

### *Quality of SHR data*

Whilst the aforementioned submission of a substantial amount of information annually is always a challenge for associations, it does mean that SHR is able to make available much sector-wide data which is extremely useful, along with significant data on individual social landlords, accessible through SHR's generally excellent website.

Amongst other things, SHR's annual publication of data on social landlords' performance on the Scottish Social Housing Charter enables us to issue a report showing how effective and responsive community based housing associations are in comparison with larger regional and national housing associations and local authorities.

### **3 SHR's approach to takeovers of smaller housing associations**

Over the years GWSF has had many conversations with SHR about our belief that whilst there is no regulatory agenda to encourage takeovers of smaller associations, the actions – and sometimes the omissions – of some SHR staff suggest to us a sense of a culture of nudging associations towards considering takeover as an option where significant problems are being faced. From our discussions with SHR over the years, we know they do not recognise or accept this, but we believe there is ample evidence that the tendency exists, and that the recent case of Reidvale HA, provided clear indications of it, as outlined below.

We should state at this point that GWSF understands that some takeovers which have happened in the past, and some that may happen in the future, may occur out of necessity, usually where a combination of problems makes a takeover the likeliest (or even the only) way of securing the future for the stock and the tenants.

But it is critical that locally based services, local influence/control and community ownership of assets are ditched only where there is no way in which an association can continue to operate viably and sustainably for the benefit of tenants. options.

Decisions on takeovers are normally made by the disposing association, except in rare cases where SHR directs it. But SHR can influence this decision making process throughout the period of their engagement with a troubled association.

The Committee will be well aware that GWSF has expressed particular concerns about what we believe was regulatory influence over the original 2022 decision of Reidvale HA to seek a Transfer of Engagements, and over some of the processes which followed that decision, up until the eventual rejection of it by shareholding members of the Association.

The Committee will be aware that we expressed our concerns

- In a June 2023 letter to the Committee
- Our further note to the Committee of Nov 2023, ahead of SHR's session with the Committee in Dec 2023

We summarise these concerns below, *and we would want to emphasise that criticisms we have made about Reidvale HA relate exclusively to actions made and overseen by previous, not current, managers and management committees.*

#### *Recommendation of co-optees*

In its engagement with a troubled association, SHR often suggests names of people from the sector who may be willing to join a committee/board as a co-optee. This can often be helpful. In the case of Reidvale HA, however, our belief is that some such co-optees suggested by SHR and appointed by the Association appeared to be fundamentally opposed to smaller housing associations and were driving a takeover option at every opportunity.

A positive step was taken by SHR in late 2023 when it indicated to us its willingness to advise troubled associations to seek support from GWSF and other membership bodies, for example where co-optees may be needed. This came after GWSF established a volunteer support panel to offer assistance to any member association facing significant difficulties. SHR may well still make its own recommendations in such cases, but our hope is that GWSF will be the first port of call for member associations in this position. We very much welcome this commitment from SHR.

#### *Options appraisal*

Associations facing serious challenges will normally be expected to undertake a comprehensive options appraisal exercise, using external consultants, to assess future options, from survival as an independent body at one end of the scale to takeover by another (normally larger) association at the other.

It is a regulatory requirement<sup>1</sup> that such exercises must include consultation with tenants and other stakeholders ahead of any decision. Reidvale HA's options appraisal not only failed to consult tenants – it didn't even *inform* tenants that radical options were being considered. SHR would have been kept aware of the progress of the exercise yet failed to act on the clear breach of regulatory standards. One has to question why this breach was accepted when almost all other serious breaches are, rightly, raised with an association.

### *Performance of the Association during pre-ballot process*

How a housing association is run at any time is of course the association's responsibility. But the (roughly two-year) period after the decision to seek a transfer/takeover and before the tenant and membership ballots is clearly a critical one, over which it might reasonably be expected SHR would be keeping a close watching brief.

This should include being reassured that day to day services are not being overlooked, for example because of an undue focus on securing the 'right' ballot outcome. Even allowing for the impact that the pandemic had on all landlords, during 2022 and 2023 our strong sense is that at Reidvale there was a managed decline of day to day services in order to be able to better 'evidence' to tenants the need for a takeover. The way this was presented to tenants in transfer Newsletters almost gave the impression that managers were relishing the downturn in performance.

### *Comparative performance of the disposing association and preferred bidder*

It may seem almost too obvious to state, but one might assume that the respective performances of the disposing association and preferred bidder on services to tenants would feature prominently in any transfer/takeover process, both before the actual selection of the preferred bidder and then during the period after selection and leading up to the ballots.

But in the process at Reidvale, the vastly inferior performance of the preferred bidder seemed never to be referred to in information provided (by either party) to tenants. This meant overlooking the difference between – for example – Reidvale completing emergency repairs in an average of three hours and Place for People Scotland in 17 hours.

We think it is reasonable to expect SHR, in its overseeing role in any transfer/takeover process, to engage with the parties where very basic information on respective performance is not being provided to tenants.

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<sup>1</sup> Section 7.3 of the Standards of Governance and Financial Management for RSLs states that where an RSL is considering organisational or constitutional change, it must ensure adequate consultation with, and support from, key stakeholders including tenants, members, funders and local authorities.

### *Role of the preferred bidder before the ballots*

In Reidvale's case, staff from the preferred bidder (Places for People Scotland) were regularly based in Reidvale's office ahead of the ballots, and appeared to be involved in some day to day operations as well as processes associated with influencing tenants to vote for the takeover.

In some previous transfer/takeover cases, ahead of the ballots, the disposing association has entered into a service level agreement with the preferred bidder to provide certain services, including direct services to tenants. Whilst the use of a SLA may make things more transparent, we would question whether a preferred bidder should ever be providing services to the association they are bidding to take over ahead of the ballots, as this would seem to be a clear conflict of interest.

In any event, as far as we are aware, there was no service level agreement in place at Reidvale, and in relation to accepted norms of probity and transparency it seems highly inappropriate that this was happening to the extent that it was – and that SHR did not appear to question it.

It appears too that the management team in place at the time shared personal data with the preferred bidder so that the latter could contact tenants directly about their voting intentions. It is difficult to see how this was not a data protection breach.

Well before the ballots, the preferred bidder stated it had entered into a financial arrangement relating to the reopening of the community centre based in Reidvale's office building. Whilst this may have been beneficial to the community, we would question whether such an arrangement would ever be appropriate in the pre-ballot period. Apart from anything else, there could be a reluctance to fulfil the financial commitment if the takeover were to be subsequently rejected.

Our conclusion from the above has been that SHR's normally rigorous approach to the upholding of regulatory standards and to the need for probity and transparency seemed to be reduced in the circumstances of a takeover being pursued. The question of whether SHR has any sort of merger culture is not really relevant here – what matters is what happens in practice.

## **4 Addressing the challenges constructively**

We have initially discussed with SHR the progressing of work on the following fronts:

### *Reviewing SHR's approach to taking account of 'community interests'*

GWSF is not looking to see community based housing associations subject to a different or separate regulatory regime. Instead, focusing on both the Code of

Practice for Scottish Regulators<sup>2</sup>, which requires regulators to take account of 'relevant community interests', and the SHR/Scottish Government Framework Agreement (related to the National Performance Indicators<sup>3</sup>, including one on 'community'), we aim to work with SHR to give greater meaning and transparency to the existing obligation on SHR to take account of relevant community interests in the carrying out of its functions.

We believe this can best be achieved through SHR guidance outlining how it meets these existing requirements relating to community interests. Some key areas which could helpfully be addressed include what SHR's expectations would be around how the following issues are considered before and during any transfer/takeover process:

- The potential loss of local assets (stock) currently regarded as community owned
- Performance on repairs, other estate services and housing management and the implication of these no longer being provided from a local base
- The extent to which wider community work done by the existing association would or would not be replicated after any transfer
- The potential loss of local control and decision making, notably including the likelihood that no tenants or other local people will be part of the receiving association's board

As previously noted, our initial exploration of this with SHR at our meeting with them on 7 October suggests SHR is open to the idea of guidance on how it meets its requirements in this area.

#### *The role of preferred bidders in transfer/takeover processes*

Perhaps surprisingly, there is no guidance specifically on the role of a preferred bidder organisation in a transfer/takeover process. We believe this should be addressed, and that guidance should cover what would be regarded as norms in terms of the role and conduct of a preferred bidder after being appointed and up to the end of the ballot process.

#### *The role of Independent Tenant Advisers in transfer/takeover processes*

We have suggested to SHR that there is also scope for some guidance on the role of the Independent Tenant Adviser appointed by associations proposing to transfer. This could outline what should normally be covered in the brief for the ITA, covering issues such as what specific actions are expected from the ITA during its period of appointment, and what information the ITA will be given access to in order to help carry out its role.

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<sup>2</sup> [Scottish+regulators%27+strategic+code+of+practice.pdf \(www.gov.scot\)](https://www.gov.scot/publications/scottish-regulators-strategic-code-of-practice/pdf/downloads/attachments/2017/20170001.pdf)

<sup>3</sup> See the National Outcomes as listed near the beginning of the Code of Practice

We believe such guidance should be clear that the ITA's role is to respond to tenants' questions to the best of its ability but *not* to declare its support for or opposition to the proposed transfer.

## **5 Following up our submission to the Committee**

GWSF would be happy to provide any additional information the Committee may find helpful, and would of course respond positively to any invitation to appear before the Committee.