

Consultation on Extending Coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords

Interim Report

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Overview of Consultation

The Freedom of Information (Scotland) Act 2002 ('the Act') provides a statutory right of access to information held by Scottish public authorities. The provisions of the Act can be extended to bodies that appear to the Scottish Ministers to exercise functions of a public nature or which provide, under a contract with a Scottish public authority, a service which is a function of that authority.

Over a 12 week period the Scottish Government consulted on proposals to extend coverage of the Act to Registered Social Landlords (RSLs) on the basis that RSLs undertake functions of a public nature.

Published responses to the consultation are available on the relevant Scottish Government webpage¹.

A clear majority of consultation responses – including from tenant organisations and the local authorities which replied - favoured extending coverage to RSLs. Organisations including the Scottish Council for Voluntary Organisations, Unite the Union, Unison Scotland, the Scottish Information Commissioner and the Campaign for Freedom of Information in Scotland also supported the proposals.

Responses from the RSLs (and their representative organisations – the Scottish Federation of Housing Associations and Glasgow and West of Scotland Forum of Housing Associations) ranged from those supporting the consultation proposals to those (the majority) against. Neither the Chartered Institute of Housing Scotland nor the Council of Mortgage Lenders favoured extending the Act to RSLs.

Most individuals who responded to the consultation supported extension of coverage to RSLs.

A summary of consultation responses forms part of this interim report.

This report also provides a brief overview of the key issues coming out of the consultation exercise as well as the proposed next steps prior to a formal response to the consultation.

¹ <https://consult.scotland.gov.uk/freedom-of-information/foi-social-landlords/>

Key Issues

As the consultation paper noted, there has been considerable discussion around extending Freedom of Information legislation to RSLs since before the legislation originally came into force in 2005.

For many respondents, the question was one of principle – that of establishing equity with local authority landlords. In this respect, one response considered that RSLs were effectively a ‘proxy’ local authority housing department with another referring to the ‘unjust imbalance’ in the lack of RSL public accountability in comparison with local authorities. In other words, non local authority RSL tenants should have the same information access rights as local authority tenants.

However, for others, including many RSLs, it was a question of practical effect, both in terms of business impact and whether more information would be made available.

Function

Central to the issue of extending coverage is ‘function’ – that the function undertaken by a public authority becoming subject to the Act must be of a public nature. While ‘functions of a public nature’ is not defined in the legislation the consultation paper set out a number of criteria which could contribute to defining the term.

Many of the criteria put forward were reflected in consultation responses, such as the extent of public funding, the statutory duties placed on RSLs and the degree of regulation and oversight. No specific weighting of the criteria was proposed and the full range of factors will be taken into consideration prior to a decision on extending coverage being made.

Multiple responses noted the fact that RSLs, both historically and currently, received significant amounts of public funding, for example, grants to build in order to meet Scottish Government affordable housing targets. Therefore, in the interests in effect of ‘following the public pound’ RSLs should be covered by the Act. Others, such as Falkirk Council, identified particular statutory functions undertaken by RSLs – such as homelessness obligations, offering Scottish Secure Tenancies and consulting tenants on affordable rents.

A number of responses including from individuals simply considered that the provision of social housing – as the overarching and core ‘public’ function of RSLs – was sufficient justification in itself for extending the Act to RSLs.

Many responses also drew parallels with local authority housing provision – the Association of Local Authority Housing Officers noting that RSL tenants signed the same form as those renting from local authorities. There was therefore no justification for offering RSL tenants fewer rights in respect of access to information from their landlords than those renting from Councils.

Some responses qualified support for extension. The Scottish Council for Voluntary Organisations (SCVO) supported extension on the basis of specific *functions* of a public nature not to *all* activities. A similar point was made by the Scottish Federation of Housing Associations (SFHA) in stating an order would need to focus specifically on housing services of a public nature only. Glasgow and West of Scotland Forum of Housing Associations (GWSF) also considered that on the fringes there might be some functions undertaken by an RSL not appropriate for inclusion. As an example, GWSF suggested it would not be appropriate to include a small factoring service run by an RSL. This would maintain consistency with factoring services outwith the legislation and also because of the robust legislative obligations already around factoring services and the type and quality of information which must be provided to owners.

We note that a number of other responses also made reference to factoring. For example, Wyndford Tenants Association supported including RSL property factors within scope - highlighting situations where a property factor was compulsory with the RSL being able to decide who the factor should be. The Association suggested this in effect created a monopoly (the effective monopoly of service provision by an RSL also being an issue for another respondent). The Glasgow Homeowners' Campaign also considered factoring services should be within the terms of an order as their management fees and surpluses etc were used for public purposes – such as community play areas. A further response commented that factors should be accountable as any other kind of organisation.

Care functions were also identified as an issue, for example, Blackwood Homes and Care considered that if the Act were extended a 'level playing field' should be created to ensure that any organisation commissioned to provide a care service was also within scope. This would avoid any organisation providing both housing and care being commercially disadvantaged compared to other private care providers.

In contrast to the tenor of most other responses and while supporting the principle of extending freedom of information to RSLs, Wheatley Housing Group (WHG) expressly did not agree with the assessment that RSLs undertook functions of a public nature. Reasons for this included the inconsistency of arguing that the provision of Scottish Secure Tenancies justified the conclusion that RSLs undertook statutory functions but that no equivalent argument was made in respect of Scottish Private Residential Tenancies; that public funding was not the dominant source of RSL income; that in terms of social role RSLs should be considered as partners of government rather than agents of government, and that regulation should be seen as being in the interests of tenants rather than in context of state control over an RSL.

Some other responses also noted that, even if providing a public service, RSLs were private companies taking commercial decisions. Another, opposed to extending coverage, considered that RSLs were responsible to their tenants and service users rather than residents and taxpayers.

Clearly, the core function of RSLs is the provision of social housing - as acknowledged in a significant number of consultation responses. However, we also note reference to other activities - primarily the provision of care and factoring services - in some responses.

Any order must describe the functions within its scope and it is clearly important that its terms are easily understood – in the interests of potential requestors and RSLs as well as the Scottish Information Commissioner who has responsibility for both promoting and enforcing the legislation. Indeed, the consultation response from the Scottish Information Commissioner noted difficulties arising around descriptions used in previous such orders.

Given issues raised around certain functions including whether – and how – they might be included within scope of an order, as well as in the interests of ensuring that any order has as much clarity as possible, we consider it necessary to undertake further work on the terms and scope of an order, including stakeholder engagement.

Subsidiaries

The consultation exercise did not include proposals to extend the Act to RSL subsidiaries (other than those RSLs which were themselves subsidiaries of a parent RSL). From Scottish Housing Regulator data, approximately half of RSLs have a subsidiary, with a small number having more than one. These subsidiaries are responsible for performing a range of functions and services, for example, factoring services, provision of Mid-Market Rent (MMR) housing (which must be provided via a subsidiary), community workshops, nurseries etc.

The consultation took the view that subsidiaries, as effectively commercial organisations undertaking essentially ‘private’ activities in competition with the private sector - and not directly related to their core housing activities and statutory functions - would not be appropriate to include within scope of the proposed order.

However, views were invited in terms of whether their functions should be considered to be ‘of a public nature’, assessed against the factors set out in the consultation paper.

Few comments were received making specific reference to subsidiaries. GWSF noted that a significant majority of their members agreed that the activities of housing association subsidiaries should be excluded from any extension of FOI on the grounds that they were separate organisations undertaking mainly commercial activities and which have separate boards. GWSF specifically identified MMR and factoring as functions to be excluded from an order – the former being designed to be more in competition with the private rented sector than the social rented sector and the latter due to the robust legislative obligations around factoring services and the type and quality of information which must be provided to owners.

However, responses from both the Campaign for Freedom of Information in Scotland (CFoIS) and the James Reid Foundation (JRF) considered that too little information was available on which to make an informed decision. The Scottish Information Commissioner also expressed concern about whether RSLs would hold information about subsidiaries in which the public had an interest and whether sufficient safeguard existed ensuring information rights continued to apply in the event of public functions being delivered by means of subsidiaries.

We note the comments raised in respect of RSL subsidiaries - including by those who considered it not possible to come to an informed opinion. While the focus of this consultation remains on RSLs, as part of further consideration of responses we also intend to explore wider issues concerning the role and functions of RSL subsidiaries - including any potential impact regarding obligations under the Environmental Information (Scotland) Regulations (EIRs) in the event of the Act being extended to RSLs.

Accessing Information

Similarly to previous experience, few responses to the current consultation provided evidence of difficulties in obtaining information from RSLs.

Shelter Scotland made reference to rare occasions where tenants were struggling to access information from their housing associations. The CfOIS in their response highlighted an instance where the Scottish Housing Regulator had intervened against an RSL – seeing this as an illustration of how an enforceable right to access information would have been of benefit to the wider community as well as individual tenants.

Conversely, many responses – particularly from RSLs – emphasised the open and transparent manner in which they operated – including ‘in the spirit of the Act’. For example, Manor Estate Housing Association referenced the long and proud history in the RSL movement of stakeholder engagement, transparency and openness.

Several RSLs made specific reference to the Scottish Social Housing Charter (‘the Charter’), Link Group noting that an open, transparent, regulated and highly scrutinised social housing sector already existed in Scotland – demonstrated by the very detailed statistical information submitted to the Scottish Housing Regulator. Shire Housing Association contended that there was no need to extend the Act, in part given the high levels of tenant satisfaction with the provision of information about decisions and services.

The Charter was also referenced, among others, by the Chartered Institute of Housing Scotland (CIH Scotland) and GWSF, the latter confirming the importance to their members of making high quality, accessible information available, including through Charter performance.

GWSF also noted the joint publication in autumn 2016 of a Model Publication Framework - in the interests of promoting proactive publication and best practice. The Framework provides guidance for GWSF and SFHA members about the kinds of information it is recommended organisations proactively make available through their websites.

The response from Rural Stirling Housing Association suggested as an alternative to extending the Act that the Charter be revised to incorporate increased requirements relating to responsiveness to information requests.

Conversely, some responses, both from individuals and organisations, contended that voluntary codes or operating 'in the spirit of the Act' were not suitable alternatives to formal extension of the Act – and that without 'full rights' the Act's true purpose was not served. Indeed, one response considered that extension of the Act would encourage tenants to continue to engage with Tenant Participation.

Shelter Scotland acknowledged that RSLs returned a significant amount of information to the Scottish Housing Regulator and that many RSLs regularly published further information and documentation such as minutes and reports. However, Shelter also considered that the possibility of making an FOI request would promote good practice – without proving overly burdensome.

Similarly, while the Scottish Information Commissioner viewed the Charter favourably, her view was that it fell far short of the rights that exist under the Act in failing to preserve the general rights of any person, and the benefits of enforcement through an independent appeal route.

Regulation and Oversight

In addition to the scrutiny and enforcement role of the Scottish Housing Regulator, a number of responses observed that RSLs were subject to considerable additional regulation and oversight.

Shire Housing Association noted their compliance with the Scottish Public Service Ombudsman (SPSO) model approach to service complaints – including complaints concerning dissatisfaction with the quality of information shared with tenants. Several references (primarily put forward as a reason not to extend coverage) were also made to other regulation, for example, by the Office of the Scottish Charity Regulator (OSCR) and the Care Inspectorate.

In referencing OSCR and the SPSO, Rural Stirling Housing Association suggested that using existing regulatory arrangements for justifying extension of the Act actually demonstrated that extension was not necessary. Similar emphasis on the breadth and extent of existing regulation was also made by, among others, Port of Leith Housing Association and SFHA.

Reclassification

The recent reclassification by the Office for National Statistics (ONS) of RSLs as public non-financial corporations was raised in several responses – particularly in context of discussion around 'function'.

For example, Link Group noted that the planned reversal of the ONS reclassification of RSLs as public bodies was liable to cause confusion. Similarly, Shire Housing Association considered it to be somewhat confusing that, for the purposes of the Act, RSLs could be regarded as 'public bodies' while at the same time legislating to classify them as 'private' organisations. The SFHA also highlighted the inherent contradiction in simultaneously seeking to define RSLs as 'public authorities' for the purposes of Freedom of Information (FoI) while seeking to redefine RSLs as private for the purposes of ONS classification.

The review of the status of RSLs was undertaken to establish whether RSLs and housing associations (alongside those in Wales and Northern Ireland) should continue to be recorded as private non-financial corporations in ONS economic statistics. This followed a similar review into private registered providers (PRPs) of social housing in England.

As ONS noted, the review's outcome was a statistical matter without a direct bearing on the management structure, ownership or legal status of the organisations in question. However, in order to avoid confusion on the public/private status of RSLs – and confirming their status as private entities – as stated in the consultation paper it is the Scottish Government's intention to bring forward a Bill to this effect. It is currently anticipated that this Bill will be introduced in September.

Given the clear intention of the Scottish Government to confirm by means of legislation the private status of RSLs we do not consider the proposal to extend Freedom of Information legislation to RSLs to cast any further doubt on the status of RSLs as private bodies.

Moreover, while we understand the potential for confusion on the question of public functions being undertaken by private bodies we would observe that this is not an uncommon circumstance in legislation. For example, as noted by the Scottish Information Commissioner, RSLs are subject to investigation by the SPSO. And as organisations recognised as performing public functions, RSLs are also required to comply with the Human Rights Act 1998.

Section 4 Order

We note the suggestion from the Scottish Information Commissioner that bringing RSLs within scope of the Act by means of an order under section 4 of the legislation 'would be a more nimble route'.

However, the purpose of section 4 is to add to schedule 1 of the Act bodies that are either a part of the Scottish Administration or a Scottish public authority with mixed functions or no reserved functions.

We do not consider that these criteria apply to RSLs – particularly given the specific legislative intention to confirm their private status.

Business and Regulatory Impact

A full Business and Regulatory Impact Assessment (BRIA) (along with other associated impact assessments) will be published at the same time as the final response to the consultation – taking into account issues raised in the 'BRIA' section of the consultation paper.

Clearly, the practical impact of extension raises significant concerns for RSLs. These relate both to ensuring that sufficient and appropriate training, systems and guidance etc are in place from day one of the Act coming into effect and also the financial cost of extension. SFHA summarised the key concern as being the lack of understanding of what the impact on RSLs might be – noting that any increased costs associated would have to be met through tenants' rents.

The direct correlation between the costs of extending coverage being met from increased tenants' rents was made in several responses. For example, CIH Scotland noted that while information could be requested by any member of the public this was ultimately resourced by tenants through rental income. Blackwood Homes and Care considered that, without any budget for implementation, costs would be passed on to their customers through rents.

Several RSLs made similar points with Weslo Housing Management noting the pressure to provide value for money and enhanced services at a time of reduced funding while keeping rents affordable. North View Housing Association in their response commented that, while tenants would meet the RSLs' costs of extending coverage, any increase in funding to the Scottish Information Commissioner would be met by the taxpayer.

A number of responses discussed the potential costs of responding to information requests with some referencing research commissioned by SFHA and GWSF looking at the potential impact of extension. CIH Scotland noted the estimate (based on local authority data) of housing related requests in the region of 60-90 per year. In cross-referencing their research with Scottish Government cost data, SFHA suggested that estimated annual costs for RSLs could be up to £20,790 (without taking into consideration training, setting up systems etc.).

Several other respondents also offered estimated costs for complying with the Act, for example, North View Housing Association estimated 'start up' costs between £10,000 - £15,000 and thereafter costs around £3,600 per annum. Based on the research, Weslo Housing Management suggested the sector might incur costs of £2 million. Wheatley Housing Group, for planning purposes, considered costs would increase by between £100,000 and £200,000 (noting this was equivalent to between £2 and £4 per household).

However, a number of responses - in support of extending coverage – cited reasons why becoming subject to the Act might not be as significant a change of culture or practice as some anticipated. For example, as noted by the CFoIS, RSLs are already covered by the EIRs. They should therefore have processes in place to identify requests that should be answered under the EIRs. A number of respondents also commented that RSLs would respond to requests for information as part of ordinary business - there would therefore be little or no work to do to make themselves ready for FOI coverage.

Indeed, as previously noted, several respondents referred to RSLs operating 'in the spirit of FOI' though, as SCVO observed, not all provided information as readily as others. GWSF also observed that while many associations had developed an as open as possible approach to making information available this was a far cry from the rigorous bureaucracy of complying with such things as the Model Publication Scheme and submitting quarterly returns to the Scottish Information Commissioner.

Reference is also made here again to the Model Publication Framework which in many respects mirrors the Model Publication Scheme of the Scottish Information Commissioner. As such, while the Framework is advisory, as noted by the Commissioner, compliance with it is likely to go some considerable way in satisfying a central requirement of the legislation. Similarly, Weslo Housing Association,

considered that adoption of the Framework could mitigate the number of requests made and assist in cost implications.

We also note that evidence from earlier orders extending coverage clearly suggests that adequate preparation is critical prior to an organisation becoming subject to Freedom of Information legislation. As is clear from the response from the Scottish Information Commissioner, in the event of the Act being extended to RSLs, the Commissioner's office anticipates putting in place, as before, a comprehensive training programme.

Given that RSLs will already be responding to information requests - including in terms of the EIRs, and that training and guidance will be in place prior to any order coming into effect, we consider that considerable reassurance can be provided to RSLs on the impact of extension.

However, given the clear concerns voiced by many RSLs, particularly on the financial costs of extension and the indirect – if not direct – impact on services and rents, this is one aspect of the proposed order where we consider further information is required.

Commencement

Given the importance of training and adequate preparation, it is clearly in all parties' interests to allow sufficient time ahead of the Act coming into force (the Commissioner considers nine months to be the minimum time required from the date that the order is approved).

The consultation paper proposed a commencement date of 1 April 2018. While the majority of responses considered this appropriate most of those from RSLs believed this to be an inadequate timescale – in part due to budgetary implications. Many of the RSLs favoured a later commencement date of 1 April 2019 in the event of an order being made as this would help in addressing concerns about financial and practical administrative considerations (including preparation for the General Data Protection Regulations in force from May 2018).

In further engaging with RSLs (and their representatives) on the proposals to extend coverage of the Act to RSLs, we will therefore include discussion on the optimum commencement date in the interests of as effective implementation as possible – for both organisation and applicant.

Summary of Responses

All responses are considered as part of the consultation process. Organisational responses are summarised below.

Regional Tenant Organisations (RTOs)

In support of the proposals, the RTOs variously highlighted that RSLs were in receipt of public subsidy/grants to build homes and for community projects, that they were social housing landlords and that there should be no restrictions in terms of making information available (other than for certain sensitive information) for RSLs who must abide under the same law as Councils.

Support for the proposals also came from tenants groups including the **Argyll Tenants' Panel** and the **Wyndford Residents' Association**. The latter considering that making RSLs subject to the Act could help solve some of the problems experienced by their members – with specific reference being made to property factors and instances of monopolistic behaviour in the provision of this particular service. Further support for extending coverage and making housing associations and co-ops truly open, transparent and accountable was given by the **Glasgow Homeowners' Campaign**. The Campaign also supporting including factoring services - given surpluses were used for public purposes.

Local Authorities

The local authorities who responded identified a range of issues in support of the proposals. For example, **Dumfries and Galloway Council** (among others) noted the public funding RSLs received, as well as the services they delivered to a range of vulnerable people; **Falkirk Council** listed a broad range of functions underpinned by statute (for example, homelessness duties, provision of Scottish Secure Tenancies and the accountability of both local authority landlords and RSLs to the Scottish Housing Regulator in terms of listed 'housing activities'); both **South Lanarkshire** and **North Ayrshire Councils** drew comparison between the rights to information available to local authority tenants but not to RSL tenants; **Orkney Islands Council** noted the close working relationship, primarily to deliver the Local Housing Strategy, between the Council and Orkney Housing Association Ltd; **Glasgow City Council** noted, since stock transfer to Glasgow Housing Association (GHA) in 2003, their reliance on RSLs in housing supply; finally, the **Association of Local Authority Planning Officers** also wrote in support, noting that in signing the same form of contract as local authority tenants, RSL tenants, other than in respect of the right to access information from their landlords, have the same rights as local authority tenants.

Registered Social Landlords

Argyll Community Housing Association in support of extension considered that as a body in receipt of public funds and providing services to families and communities there was a logic to extending the Act.

Blackwood Homes and Care considered that if they did not provide the service they did, a public authority would need to perform it – probably in most cases by commissioning other providers. While opposing extension, Blackwood Homes and

Care also considered that in the event of the Act being extended, it should apply to any organisation commissioned to provide a care service. This would ensure there was no competitive disadvantage where care providers not subject to the Act could obtain commercial information from those who were subject to the Act. However, if concerns about administrative and commercial impact were addressed, extension of the Act would fit with the organisation's values and principles.

Cassiltoun Housing Association in opposing extension noted the small size of many RSLs and also the range of information that could be found on their website, along with published accounts, newsletters and the data provided to the Scottish Housing Regulator.

Castle Rock Edinvar Housing Association noted that only a certain amount of development work was publicly funded (rather than privately), only a small number of lets were in respect of statutory duties regarding the homeless, and the extent of regulation and existing rights to information for tenants. While opposing extension, Castle Rock Edinvar considered that in the event of a decision to extend this should be limited to the RSL – and not subsidiaries.

Grampian Housing Association also opposed extension of coverage to RSLs.

Knowes Housing Association in opposing extension noted that RSLs were already required to provide significant levels of information to the public, for example through the Charter and considered extension would be of no benefit to those requiring information.

Link Group while supporting extension and agreeing RSLs did carry out 'functions of a public nature' considered that this would bring limited benefits to its customers. Link Group also noted confusion around the ONS classification question. In addressing the various factors identified in the consultation paper Link Group highlighted the extent of reporting and regulation that already existed as well as the wide range of information provided to customers and the level of detailed statistical data submitted to the Scottish Housing Regulator. Link Group were also doubtful as to the extent that loss of information rights following stock transfer would have adversely affected tenants – given most RSLs operated in the spirit of the Act.

Lister Housing Association while opposing extension, acknowledged that RSLs undertook functions of a public nature.

Manor Estates Housing Association noted that while RSLs were undoubtedly private sector organisations their functions were 'public', for example, the provision of affordable housing and the development and maintenance of sustainable communities. In opposing extension Manor Estates also noted that adequate direct and indirect provision of information already existed without increasing the burden on RSLs – ultimately borne by tenants via rent payments.

North View Housing Association in supporting extension agreed that the provision of social rented houses and flats was a function of a public nature.

Port of Leith Housing Association emphasised their commitment, as a business with a very clear social purpose, to openness, transparency and accountability – underpinned by existing regulatory regimes, such as the Scottish Housing Regulator,

OSCR, the Care Inspectorate etc. In opposing extension Port of Leith considered that while they undertook a number of duties to comply with legislation their primary identity and purpose was derived from their incorporation as an independent company and registered charity.

Rural Stirling Housing Association acknowledged that RSLs undertook functions of a public nature – and noted that they had already decided to adopt the SFHA and GWSF’s Model Publication Framework. However, Rural Stirling considered that both existing regulation and tenants’ views should be taken into account in a decision on extension of the Act. In opposing extension Rural Stirling observed that RSLs were already subject to regulation by, among others, the Scottish Housing Regulator and OSCR. As an alternative to extension, the Charter could be revised to incorporate increased requirements relating to responsiveness to information requests. Rural Stirling also noted their very high ‘tenant satisfaction’ rating.

Shire Housing Association did not consider a reasonable case could be made for extending the Act to RSLs emphasising that RSLs were not ‘public bodies’ and believing that extension could jeopardise RSLs’ strong tradition of community engagement and transparency. Shire noted that they had received very little public funding over the last decade and also observed their very high satisfaction levels regarding the information they provided to their tenants.

Weslo Housing Management in supporting extension and the principles of the Act, noted the information already provided through the Charter, and in agreeing that RSLs did undertake some functions of a public nature, specifically the provision of housing for those in need, expressed concern about the potential cost implications of extension.

Wheatley Housing Group (also representing their RSLs), while supporting the principle of extending the Act to RSLs, did not accept that RSLs undertook functions of a public nature. WHG noted that while the consultation was based on the current regulatory context, changes to the way in which the RSL sector was regulated would potentially affect the basis of the consultation.

WHG contended that providing Scottish Secure Tenancies did not justify the conclusion that RSLs undertook statutory functions – and was inconsistent given that private tenants also benefitted from protections set out in statute (under the Private Housing (Tenancies) (Scotland) Act 2016). WHG also downplayed the importance of the requirement on RSLs to consult tenants on rent setting as the actual decision-making was for RSL Boards. In addition, WHG did not agree that the existence of legislative obligations equated to an organisation performing functions of a public or statutory nature.

In respect of public funding WHG highlighted that public funding was not the dominant source of RSL income – with the public funding that RSLs did receive used to lever in private finance. WHG also considered themselves as partners of government in delivering a social function - rather than an agent of government. In terms of regulation WHG contended that the regulatory environment was designed to ensure tenants’ interests were being served – rather than the state prescribing how RSLs operated (noting that there were no plans to extend the Act to other regulated sectors such as utilities and financial services). Finally, WHG noted the already extensive availability of information, for example, via the Scottish Housing Regulator.

Other organisations

Campaign for Freedom of Information in Scotland: Welcomed the proposals considering that RSLs provided a service ‘of a public nature’, for example, given their functions would require to be performed by a public authority; the degree of state regulation, oversight or control; the issue of lost rights to access information and their collective public benefit - for example, with regeneration programmes.

The CFoIS sought an assurance that the 20 days’ response time would apply equally across RSLs and also for the provision of more information in respect of RSL subsidiaries. The CFoIS (who offered training services to RSLs, tenants and requestors) did not consider that coverage would impose a significant administrative burden on RSLs given their existing responsibilities – including in terms of the EIRs. The CFoIS also commented extensively on developments in Human Rights legislation in context of access to information rights. **Unison Scotland** wrote in support of the CFoIS’s response.

Chartered Institute of Housing Scotland: Agreed with the principles of transparency and that RSLs should share information with tenants, customers and the public – noting that CIH Scotland played an active part in promoting tenant scrutiny in partnership with the Scottish Government. The primary concern was the potential burden of the legislation – to be ultimately resourced by tenants through rental income.

CIH Scotland noted that the Charter already placed a duty on all social landlords to communicate with their tenants and other customers – with the data required to be collated and submitted to the Scottish Housing Regulator publicly available and allowing for direct comparison of landlords’ performance.

Council of Mortgage Lenders (CML): Did not agree with the proposal as 1) information rights already well served; 2) disproportionate to any benefit; 3) would consume substantial RSL resource; 4) inconsistent to define as public authorities while at the same time legislating to ensure they remain private bodies for accounting purposes (with reference to the de-regulatory intentions behind the proposed Housing (Amendment) (Scotland) Bill).

CML acknowledged that recipients of Housing Association Grant must be accountable for their activities when spending from the public purse and also that some stock transfer tenants had lost information rights. However, CML considered that information rights could be just as well served, if not better, by the existing regulatory and reporting arrangements on RSLs (though if necessary more could be done for stock transfer tenants in terms of awareness of what information was available from existing sources).

Glasgow and West of Scotland Forum of Housing Associations: Writing on behalf of its 68 member associations, GWSF noted that the issue of access to information was taken very seriously – and that housing associations had a good track record of making high quality, accessible information available, whether through their websites or publications such as reports on annual Charter performance.

Few members were convinced of the case for extension - or that extension would put right any significant injustice. The GWSF reported a more even spread of views on the practical question of whether extension should go ahead, with a slight majority of members indicating opposition (with some also considering that extension was in any case a *fait accompli*). GWSF therefore formally opposed extension.

In noting the importance of information provision for RSLs, GWSF noted the Model Publication Framework jointly published with SFHA – informed by discussions with the Scottish Information Commissioner.

GWSF recognised FoI was about a wider public than tenants alone but noted RSL tenants already felt significantly better informed by their landlord than did local authority tenants. GWSF also observed that, unlike with local authorities, it would specifically be RSL tenants who would bear the costs of compliance. GWSF also considered that undue emphasis had been given to the issue of stock transfer and the resultant loss of information rights – disregarding the huge benefits that stock transfer normally brought to tenants.

The majority of GWSF members agreed with the consultation paper's arguments that many of the mainstream services provided by housing associations were of a public nature – even if provided by organisations which were quite distinctly different from most public bodies.

A significant majority of GWSF members agreed that the activities of housing association subsidiaries should be excluded from any extension on the grounds that they were separate organisations undertaking mainly commercial activities and having separate boards.

GWSF recognised that some activities such as MMR were sometimes publicly funded (and must be run through a subsidiary). However, GWSF contested that as MMR fell outwith the Scottish Secure Tenancy regime and, to an extent, was more in competition with the private rented sector than with the social rented sector, MMR provision should not be subject to the Act.

GWSF were also of the opinion that there may be certain functions undertaken by RSLs which it would not be appropriate to include in a potential order, for example, where a relatively small factoring service is run by the core association and not through a subsidiary. Exclusion of a factoring service would ensure consistency of approach to what is or is not subject to FOI, GWSF also noting the now robust legislative obligations around factoring services and the type and quality of information which must be provided to owners.

GWSF, in part referencing research jointly commissioned by themselves and SFHA, identified a wide range of factors to be taken into consideration when assessing the practical impact of extending coverage to RSLs, including staffing arrangements, training and data management systems.

Inclusion Scotland: In respect of 'functions of a public nature' noted the provision of social housing – and that given that several Local Authorities had transferred their entire housing stock to RSLs it made little sense to compel Local Authorities to comply with FOI but not Housing Associations. This made building a comprehensive picture of housing policy across Scotland difficult with RSLs in receipt of public money not being subject to basic levels of scrutiny.

James Reid Foundation: Supported the proposal considering that a class description setting out the functions considered to be covered was the simplest way to proceed. JRF considered that the access to information rights currently held by council house tenants should match the rights given to RSL tenants. Similarly to the CFoIS, the JRF sought assurance that a response time of 20 working days would apply to all RSLs. The JRF also sought further information on RSL subsidiaries.

Scottish Council for Voluntary Organisations: Supported the extension of the Act to include the provision of all public services, irrespective of whether those services were provided by public, private or third sector organisations. However, SCVO opposed extension of the Act to individual third sector organisations per se or in their entirety as this would represent a disproportionate burden and discriminate against them in respect of their non-government and non-public service work.

SCVO also advocated the insertion of FOI clauses into all contractual relationships between government and public service providers that are limited to that contract.

SCVO supported the extension of the Act to RSLs provided the focus was on the public functions delivered rather than the organisations themselves. SCVO considered that opening up RSLs to FOI could help to ensure public services were delivered to a high standard. For the SCVO the key question centred on the balance of promoting tenants' rights to information versus the potential cost burden of extending the Act and the precise standing of third sector organisations.

SCVO noted a potential consequence of a decision to extend the Act to RSLs might be the removal of RSLs from the remit of the Lobbying Act, thereby creating an inconsistency with regards to information rights between RSLs and other non-public bodies.

SCVO considered that based on the characteristics outlined in the consultation paper RSLs did fulfil functions of a public nature and also an important social role in forming a central pillar of social housing provision. However, SCVO noted that the Act should only be extended to organisations to cover the specific *functions* of a public nature they were delivering, not *all* activities. Only functions completed on behalf of a local authority - not those delivered in assistance to local authority functions - should be included.

In discussing those criteria appropriate to include, SCVO considered that receipt of money alone could not be seen as a valid reason in itself for coverage. In addition, SCVO were opposed to attempts to extend coverage to charities based on 'public benefit' – a term not synonymous with public function.

SCVO also noted that, while RSLs might act in the spirit of FOI, extending coverage would bring the information access rights of RSL tenants up to the level of local authority tenants, creating consistency.

Scottish Federation of Housing Associations: SFHA noted the concern in the sector that extension may already be a forgone conclusion – and wished to ensure that all arguments were properly considered. The key concern raised by SFHA was the acknowledged lack of understanding of what the impact on RSLs might be, and that any increased costs associated would have to be met through tenants' rents. SFHA was aware of tenant opposition to extension due to such concerns.

SFHA stated that RSLs were open and transparent organisations who provided a range of information to their tenants and service users. SFHA and GWSF had also jointly published guidance in the form of a Model Publication Framework – to be reviewed in September.

Moreover, RSLs were subject to regulation from the Scottish Housing Regulator, OSCR (when charities) and the Care Inspectorate (when providing support/care services). Complaints about RSLs could also be made to the SPSO. SFHA also noted the high levels of satisfaction expressed by RSL tenants (assessed against the 'communications' outcome in the Charter) in comparison to local authority tenants.

SFHA acknowledged that the Charter only extended to tenants and service users of RSLs, whereas FOI extends to the public in general. SFHA considered that given the high level of tenant satisfaction with RSL performance in keeping them informed and the apparent lack of evidence in support of extension from tenants and tenant groups within the sector, this ultimately indicated that tenants would not be the beneficiaries of extension.

With respect to the decision of the ONS to classify RSLs as 'public non-financial corporations' for the purposes of the national accounts, SFHA highlighted the inherent contradiction in simultaneously seeking to define RSLs as public for the purposes of one piece of legislation and seeking to redefine RSLs as private for the purposes ONS classification.

SFHA acknowledged that, in terms of the definitions given in the consultation paper, it was clear that RSLs performed some services of a public nature. SFHA comprehensively highlighted the potential impact of extension on RSLs – noting its own commissioned research on this – particularly the concerns about extension on landlords of 1000-3000 units.

SFHA supported the proposal not to include RSL subsidiaries within scope of the Act given their activities were undertaken on a commercial basis and were not of a public nature. Any resulting order should focus specifically on RSL housing services of a public nature only.

Scottish Information Commissioner: Considered that, on balance, RSLs should be subject to FOI. In the Commissioner's view, RSLs were undertaking functions of a public nature and the case for them becoming subject to FOI was persuasive.

The Commissioner briefly discussed both the 'rights based' approach to extending coverage and the 'factor based' approach to extending coverage. In context of the former, the Commissioner argued that loss of rights should be a key consideration – noting the 15,000 households where FOI rights had been lost as a result of local authority housing stock transfer.

The Commissioner provided broad general support for those factors identified in the consultation paper as being central to whether RSLs undertook functions of a public nature, for example, the statutory underpinning of certain functions, the considerable extent of public funding, the degree of state regulation and the collective benefit provided by RSLs. The Commissioner also suggested that further enquiry should be made in terms of establishing the extent RSLs may act as a monopoly. Again, particular emphasis was placed on parity of rights to information provided by the universal right of Freedom of Information (for example, in comparison with the Charter or the Model Publication Framework developed by SFHA and GWSF).

The Commissioner cautioned against giving disproportionate weight to burden arguments – especially when balanced against the positive benefits of the universal right. In particular, the Commissioner commented that RSLs will already be responding to requests for information and the lack of evidence that other bodies brought within scope of the Act have experienced significant increase in request/enquiry numbers.

The Commissioner also made reference to other factors considered relevant to RSLs, including the extent that their activities were enmeshed with the relevant public authority and that extending coverage would support increased civic engagement and parity of rights.

In respect of subsidiaries, the Commissioner identified two concerns about excluding subsidiaries from the scope of an order 1) whether RSLs would hold the information about their subsidiaries that the public want to access and 2) whether there is sufficient safeguard to ensure that FOI continues to apply to the delivery of public functions (in the event of RSLs divesting public functions to subsidiaries).

In respect of the timing of an order, the Commissioner noted that nine month's preparation time (from the date the order is approved) *as a minimum* was needed.

Shelter Scotland: Acknowledged the significant amount of information returned to the Scottish Housing Regulator and the many good examples of good practice in transparency and information sharing in the sector. Shelter Scotland considered that, in addition to the provision of information via the Charter, the possibility of being able to make FOI requests may also promote good practice in information sharing.

Shelter Scotland noted that on rare occasions tenants had made contact because they were struggling to access information from their housing association. However, Shelter Scotland would not want FOI requests to place an additional financial burden on RSLs and interfere with the delivery and quality of their core activities - though did not consider that cost was a significant consideration for expanding FOI requests to RSLs. On balance, the value of FOI to tenants, prospective tenants and those acting on their behalf would be worthwhile.

Unite the Union: Highlighted the change in public service delivery models since the Act came into force. Unite considered that RSLs provided a service 'of a public nature', for example, given their functions would require to be performed by a public authority; the degree of state regulation, oversight or control; the issue of lost rights to access information and their collective public benefit - for example with regeneration programmes.

Next Steps

As highlighted above, the consultation has raised a number of issues which we consider it necessary to explore further before formally responding, for example, in respect of the terms of an order, the role and nature of subsidiaries, and the financial and resource impact on RSLs of extending coverage of the Act.

Following further engagement including with key stakeholders, the Scottish Government therefore intends to formally respond to the consultation on extending Freedom of Information legislation to RSLs in the autumn.

In the event of a decision to extend the Act to RSLs, an order would be laid before the Scottish Parliament and subject to the usual Parliamentary scrutiny process.



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