

**MEMORANDUM OF UNDERSTANDING BETWEEN THE OFFICE OF THE
SCOTTISH CHARITY REGULATOR AND THE SCOTTISH HOUSING
REGULATOR**

Purpose of the Memorandum of Understanding

The purpose of this memorandum of understanding is to set out the powers and responsibilities of the Office of the Scottish Charity Regulator and the Scottish Housing Regulator under the Charities and Trustee Investment (Scotland) Act 2005 and the arrangements for exercising these powers with Registered Social Landlords in Scotland.



**THE SCOTTISH
HOUSING
REGULATOR**

1. Context

- 1.1 Under section 1 of the Charities and Trustee Investment (Scotland) Act 2005 'the Act', the Office of the Scottish Charity Regulator 'OSCR' is responsible for an effective regulatory framework including the granting of charitable status, maintenance of a public register of charities, the investigation of apparent misconduct and facilitation and monitoring of compliance with the Act.
- 1.2 Scottish Ministers have set up the Scottish Housing Regulator (SHR) to exercise the regulatory powers in the Housing (Scotland) Act 2001, and to operate at arm's length from Ministers. The SHR regulates registered social landlords (RSLs) and the landlord and homelessness services of local authorities. Under section 38(1) of the Act, Scottish Ministers have delegated OSCR's functions under sections 28, 29 and 31 to 35 to the SHR, relating to enquiries, suspensions and directions and enquiry reports in respect to charitable RSLs and bodies controlled by them and persons acting for such charities or bodies. Chapter 10 Decisions: Notices, Reviews and Appeals applies to decisions made by the SHR under sections 28, 29 and 31 of the Act.
- 1.3 This Memorandum of Understanding aims to support joint working arrangements between OSCR and the SHR which satisfy the statutory responsibilities of each body.

2. Objectives of the memorandum

- 2.1 The primary objectives of the Memorandum are to:
 - ensure that OSCR and the SHR can fulfil their statutory duties in the most effective way possible;
 - minimise the burden of regulation for RSLs in Scotland registered as charities;
 - set out the circumstances in which OSCR and the SHR will share information and collaborate operationally where a common regulatory approach is required.

3. Statutory responsibilities – joint working

OSCR and the SHR have agreed that the following areas are relevant for collaboration and co-operation:

- 3.1 **Monitoring** – To enable the SHR to fulfil its responsibilities under sections 28,29 and 31 to 35 of the Act, OSCR will provide the objectives and operational details of any monitoring programme that will be conducted under section 28. This will include the monitoring return and supporting guidance, the exception reporting methodology and the charity SORP accounts compliance checklists. Participation in OSCR internal training will be available to appropriate SHR staff.

3.2 **Complaints** – As the SHR is the regulator for RSLs any complainants who contact OSCR will, in the case of a complaint between an individual and an RSL, be referred to the appropriate RSL and its complaints procedure, which should lead ultimately to the Scottish Public Services Ombudsman (SPSO). If the complaint is of a very serious nature and represents a significant risk to an RSL or the sector generally, the complainant will be directed to the SHR; OSCR will record the matter and discuss with the SHR. Any complaint relating to an RSL’s charitable status will be dealt with by OSCR in consultation with the SHR where appropriate.

3.3 **Enquiry and Intervention** – If there are preliminary enquires by either body as a result of any type of complaint, discussions about this enquiry may take place between OSCR and the SHR. Furthermore to enable the SHR to fulfil its responsibilities under sections 28 to 35 of the Act (excluding section 30), OSCR will provide details of the OSCR enquiry and intervention policy and investigation procedures. Participation in OSCR internal training will be available to appropriate SHR staff.

Attached as Appendix 1 are full details of the SHR responsibilities under section 28 to 35 (excluding section 30) of the Act.

3.4 **Enquiry reports** – OSCR will provide templates for the report style for section 33. Any reports drawn up by the SHR under section 33 in respect of a charitable RSL will be published by OSCR in the same manner as any report written by OSCR in respect of other charities would be under section 33(5)(b). In addition, the SHR may also publish such a report under section 33(5) (b).

3.5 **Directions** – When applying directions under section 28(3), 31(5) to (9) or notice under section 31(4) under the provisions of section 72(1) of the Act the SHR will follow OSCR guidance to ensure the consistency of such directions given. The SHR will also inform OSCR of any directions given under these sections to enable OSCR to apply the review and appeal process as necessary and to make the appropriate entry in the Register.

3.6 **Reviews and Appeals** – Under section 74 of the Act OSCR is responsible for the review of the SHR decisions to give a direction and any subsequent appeal lodged with the Scottish Charities Appeal Panel. To accommodate the tight review timescale, the SHR will, when requested, provide to OSCR within three days all documentation and explanations relevant to the decision being reviewed.

3.7 **Communications** - The regulators will collaborate on external communications or handling external media interest where there is a matter of mutual interest.

3.8 **Reporting** - OSCR requires to report annually on the exercise of its functions under the Act. The SHR will provide OSCR with details on the exercise of its delegated functions for charitable RSLs for inclusion in OSCR's Annual Report in the format agreed. The SHR may also include details of this activity in its own published Annual Report.

4. **Information provision in support of RSL compliance with the Act**

To minimise the regulatory burden on RSLs, OSCR and the SHR have agreed the following matters for cooperation:

4.1 **Annual Return** – All RSLs are required to complete annual returns for both the SHR and OSCR. OSCR and the SHR carry this out differently and with differing timescales, therefore to ensure compliance with the Act, attached at Appendix 2 is an outline of the process to be followed. RSLs will not require to complete an OSCR supplementary monitoring return.

4.2 **Charitable Status Application** – The responsibility for application of charitable status by way of an entry on the Register under section 4 of the Act rests directly with an individual RSL and the application form must be signed and approved appropriately. Existing RSLs that wish to apply for charitable status must also get consent from the SHR to change their constitution. Applications for changes to an RSL's constitution to the SHR should include confirmation that the RSL's application to OSCR for charitable status would be successful. OSCR will only confirm the RSLs charitable status once the proposed change to the constitution has been agreed by the SHR and also the Financial Services Authority, where appropriate. Organisations that wish to become charitable RSLs also need the consent of both regulators and early consultation on draft constitutions should be encouraged

4.3 **Rolling Review** – OSCR is under an obligation to review entries in the Register under section 3(6) as well as to remove from the Register a charity which no longer meets the test (section 30). OSCR will consult the SHR on the methods of gathering information from each individual charitable RSL. The review of a charitable RSL against the new charity test, which is the essence of the rolling review process, will be an exchange between OSCR and each individual charitable RSL.

4.4 **Notifications & Consents** – RSLs retain individual responsibility for the consents and notifications required under sections 11, 16 and 17 (and, if applicable, sections 39-42) of the Act. Most matters requiring such consent or notification will also require consent from the SHR. Where the SHR provides a notification to OSCR on behalf of a RSL, for example an address change, this will be an acceptable way to notify OSCR of a relevant change.

4.5 The process of applying for consent will be an exchange between the individual RSL and OSCR. For all section 16 consents that require the

consent of both OSCR and the SHR, OSCR will grant consent first and this consent will be conditional on the SHR also granting its consent where applicable. It will be recognised however that the requirements that determine whether consent can be granted by each regulator are different, and that each regulator needs to make its decision based on its respective legal framework.

4.6 Under section 11 of Act (consent to a name change), RSLs must apply to OSCR for consent and also to any other applicable regulator (e.g. Financial Services Authority).

4.7 **Reviews and appeals** – Requests for reviews and appeals against decisions made either by the SHR under delegated powers or by OSCR should be lodged directly with OSCR in accordance with agreed procedures.

4.8 **Communication with RSLs**

The SHR has issued a briefing note to ensure RSLs are aware of the procedures agreed by OSCR and the SHR. This note includes information on what has been agreed within this MOU and what this means in practice for RSLs.

5. **Consultation and liaison**

5.1 As regulators of charitable RSLs OSCR and the SHR will work together to ensure that the relevant law is interpreted and applied in a way that achieves consistency of decision making and a seamless regulatory regime that promotes effective regulation without imposing an unnecessary burden on RSL charities.

In order to achieve this, representatives of OSCR and the SHR will meet at least twice a year to discuss progress on the implementation of their functions under the Act and their application to RSL charities.

5.2 In order to ensure that matters are handled at the appropriate level, contact between OSCR and the SHR should be established between designated points of contact (see Appendix 3). Where they consider it appropriate, designated points of contact may delegate ongoing liaison to members of their staff.

5.3 Where either OSCR or the SHR plans to amend existing regulatory expectations or introduce new regulatory requirements, each will formally consult the other regulator.

6. **General**

6.1 Whilst it is intended that the arrangements in this Memorandum should apply generally, it is recognised that some circumstances will require

- 6.2 Any disagreement arising from the interpretation of this Memorandum will be referred to the Chief Executives of OSCR and the SHR, who will endeavour to resolve it within the spirit implicit in the co-operation arrangements. The Memorandum will be amended if necessary to reflect the agreed outcome of the referral.
- 6.3 OSCR and the SHR will keep the working of the Memorandum under review and update it regularly.

Jane Ryder
Chief Executive
Office of the Scottish Charity Regulator

Michael Cameron
Acting Chief Executive
Scottish Housing Regulator

Signed January 2010

Appendix 1 – Powers Delegated under Section 38 - Sections 28-35 (excluding Section 30) of the Charities and Trustee Investment (Scotland) Act 2005

28 Inquires about charities etc.

(1) OSCR may at any time make inquires, either generally or for particular purposes, with regard to-

- (a) a charity,
- (b) a body controlled by a charity (or by two or more charities, when taken together),
- (c) a body which is not entered in the Register which appears to OSCR to represent itself as a charity (or which would, but for section 14, so appear),
- (d) a person not falling within paragraph (a) to (c) who appears to OSCR to act, or to represent itself as acting, for or on behalf of-
 - (i) a charity, or
 - (ii) a body falling within paragraph (b) and (c),
- (e) a person who appears to OSCR to represent a body which is not entered in the Register as a charity,
- (f) any particular type of charity, of body falling within paragraph (b) or (c), or of person falling within paragraph (d) or (e).

(2) OSCR may make inquires under subsection (1) of its own accord or on the representation of any person.

(3) OSCR may direct any charity, body or person with regard to which it is making inquires under subsection (1) not to undertake activities specified in the direction for such period of not more than 6 months as is specified in the direction.

(4) A direction under subsection (3) given to a person falling within paragraph (d) or (e) of subsection (1) may be given only in relation to activities which that person undertakes for or on behalf of the charity or body which the inquires relate.

- (5) A direction under subsection (3) –
- (a) may be revoked at any time,
 - (b) may be varied, but not so as to have effect for a period of more than 6 months from the date on which it is given.
- (6) A person who, without reasonable excuse, refuses or fails to comply with a direction under subsection (3) is guilty of an offence.
- (7) A person guilty of an offence under subsection (6) is liable on summary conviction to a fine not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3 month, or to both.

29 Power of OSCR to obtain information for inquires

- (1) OSCR may by notice require any person to provide to it-
- (a) any document, or copy of or extract from any document,
 - (b) documents of any type, or copies of or extract from any documents,
 - (c) any information or explanation,
- which OSCR considers necessary for the purposes of inquires under section 28.
- (2) The notice must specify –
- (a) the documents, type of documents, copies, extracts, information or explanation which the person is to provide to OSCR,
 - (b) the date (which must be at least 14 days after the date on which the notice is given) by which the person must do so, and
 - (c) the effect of subsection (6).
- (3) Subsection (1) does not authorise OSCR to require the disclosure of anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

- (4) OSCR must not disclose any document, information or explanation provided in response to a requirement under subsection (1) except for the purposes of the inquires in connection with which the requirement was made.
- (5) OSCR may pay to any person a sum in respect of expenses reasonably incurred by the person in complying with a requirement under subsection (1).
- (6) A person who, without reasonable excuse, refuses or fails to comply with a requirement under subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3 month, or to both.

31 Powers of OSCR following inquires

- (1) Subsection (4), (6) and (7) apply where it appears to OSCR, as a result of inquires under section 28 –
 - (a) that there has been misconduct in the administration of –
 - (i) a charity, or
 - (ii) a body controlled by a charity , or –
 - (b) that it is necessary or desirable to act for the purpose of protecting the property of a charity or securing a proper application of such property for its purposes.
- (2) Subsections (5) and (7) apply where it appears to OSCR, as a result of inquires under section 28 –
 - (a) that a body which is not a charity is being or has been represented as a charity, or
 - (b) that a charity which is not entitled to refer to itself in either of the ways described in section 13(2) is being or has been represented as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland.

- (3) Subsections (8) and (9) apply where it appears to OSCR, as a result of inquires under section 28, that there is or has been misconduct by a person falling within section 28(1)(d) in any activity which the person undertakes for or in behalf of the charity or body referred to in that provision.
- (4) OSCR may, by notice, suspend any person concerned in the management or control of the charity or body where it appears to it to –
- (a) have been responsible for or privy to the misconduct,
 - (b) have contributed to, or facilitated, the misconduct , or
 - (c) be unable or unfit to perform that person’s functions in relation to the property of the charity or body.
- (5) OSCR may direct-
- (a) the body representing itself as a charity,
 - (b) the person representing the body as a charity,
 - (c) the charity representing itself as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland, or, as the case may be
 - (d) the person representing the charity as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland,
- to stop doing so.
- (6) OSCR may give a direction restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body without OSCR’s consent.
- (7) OSCR may direct any relevant financial institution or other person holding property on behalf of the charity or body or of any person concerned in its management or control not to part with the property without OSCR’s consent.

- (8) OSCR may direct the person-
- (a) to cease acting, or representing itself as acting, for or on behalf of the charity or body in any activity specified in the direction,
 - (b) to pay to the charity or body, within such period as the direction may specify, any sums which it has collected for the charity or body and which are held by it or by any relevant financial institution or other person on its behalf, after deducting any sums payable to the person or any other person under an agreement with the charity or body.
- (9) OSCR may direct any relevant financial institution or other person holding property which OSCR considers to be, or to represent, sums collected for the charity or body not to part with the property without OSCR's consent.
- (10) OSCR's powers to suspend a person by giving notice under subsection (4)(a) or (b) does not apply if OSCR considers that the person has acted honestly and reasonably in relation to the misconduct concerned and ought fairly to be excused.

32 Suspensions and directions: procedure

- (1) A suspension under subsection (4) and a direction under any of subsections (5) and (9) of section 31-
- (a) has effect for such period of not more than 6 months as is specified in the suspension or direction,
 - (b) may be revoked at any time,
 - (c) may be varied, but not so as to have effect for a period of more than 6 months from the date on which the suspension or direction first has effect.
- (2) Where such a suspension has been made or direction has been given, a further suspension or direction may be made or given under section 31 but the further suspension or direction ceases to have effect on the same date

as the original suspension or direction (unless stated to cease to have effect earlier).

- (3) A copy of the notice given under section 72 in respect of a-
 - (a) suspension under subsection (4) of section 31, or
 - (b) direction under subsection (5)(b) or (d) or (8) of that section,
must be given to the charity or body in question.

- (4) A copy of the notice given under section 72 in respect of a direction under subsection (7) or (9) of that section must be given to the person directed.

- (5) A person who, without reasonable excuse-
 - (a) contravenes a suspension under subsection (4) of section 31, or
 - (b) refuses or fails to comply with a direction under any of subsections (5) to (9) of that section,is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on that standard scale or imprisonment for a period not exceeding 6 month, or to both.

Section 33 Reports on inquires

- (1) OSCR must prepare a report on the subject matter of inquires made under section 28 if-
 - (a) as a result of the inquires it-
 - (i) gives a direction, or remove a charity from the Register, under section 30,
 - (ii) suspends a person under subsection (4) of section 31, or
 - (iii) gives a direction under any of subsections (5) to (9) of that section,
or
 - (b) in any other case, it is requested to do so by the person in respect of whom the inquires where made and it has not previously prepared a report of the subject matter of those inquires under this subsection or subsection (2).

- (2) OSCR may prepare a report of the subject matter of any other inquires under section 28.
- (3) A report prepared under this section may relate to two or more inquires.
- (4) Apart from identifying the person in respect of whom inquires were made, a report under this section must not –
 - (a) mention the name of any person, or
 - (b) contain any particulars which, in OSCR's opinion-
 - (i) are likely to identify any person, and
 - (ii) can be omitted without impairing the effectiveness of the report, unless OSCR considers it is necessary to do so.
- (5) OSCR must-
 - (a) send a copy of a report prepared under subsection (1) to the person in respect of whom the inquires were made, and
 - (b) publish a report prepared under this section or such statement of the result of inquires made under section 28 as OSCR thinks fit in such a manner as OSCR thinks fit.

Powers of the Court of Session

34 Powers of Court of Session

- (1) Where, on application by OSCR, it appears to the Court of Session-
 - (a) that there is or has been misconduct in the administration of –
 - (i) a charity, or
 - (ii) a body controlled by a charity (or by two or more charities, when taken together), or
 - (b) that it is necessary or desirable to act for the purpose of protecting the property of a charity or securing a proper application of such property for its purposes,
 the court may exercise any of the powers set out in subsection 5(a) and (c) and (g).

- (2) Where, on application by OSCR, it appears to the Court of Session that a body which is not a charity is or has been representing itself as a charity, the court may exercise any of the powers set out in subsection (5) (b) to (g).
- (3) Where, on application by OSCR, it appears to the Court of Session that a person is or has been representing a body which is not a charity as a charity, the court may exercise any of the powers set out in subsection 5(f) to (h).
- (4) Where, on application by OSCR, it appears to the Court of Session that a charity which is not entitled to refer itself in either of the ways described in section 13(2) is being or has been represented as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland, the court may exercise any of the powers set out in subsections (5) (f), (g) and (i).
- (5) Those powers are power to –
- (a) interdict (whether temporarily or permanently) the charity or body from such action as the court thinks fit,
 - (b) interdict (whether temporarily or permanently) the body from representing itself as a charity or from such other action as the court thinks fit,
 - (c) appoint a judicial factor (whether temporarily or permanently to manage the affairs of the charity or body,
 - (d) where the charity or body is a trust, appoint a trustee,
 - (e) suspend or remove any person concerned in the management and control of the charity or body,
 - (f) order any relevant financial institution or other person holding property on behalf of the charity or body or of any person concerned in its management or control not to part with the property without the courts consent,
 - (g) make an order restricting the transactions which may be entered into, or the nature or amount of the payments which may be made,

in the administration of the charity or body without the courts consent,

(h) interdict (whether temporarily or permanently) the person from representing the body as a charity or from such other action as the court thinks fit,

(i) interdict (whether temporarily or permanently) the charity or, as the case may be, the person from representing the charity as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland or from such other action as the court thinks fit.

(6) Where the court appoints a trustee in pursuance of subsection (5)(d), section 22 of the Trust (Scotland) Act 1921 (c.58) applies as if the trustee has been appointed under that section.

(7) The power in subsection (5)(g) applies despite anything in the constitution of the charity or body.

(8) Subsection (9) applies where, on application by OSCR, it appears to the Court of Session that there is or has been misconduct by a person falling within section 28(1) (d) in any activity which the person undertakes for or on behalf of the charity or body referred to in that provision.

(9) The court may –

(a) interdict (whether temporarily or permanently) the person from acting, or representing itself as acting, on behalf of the charity or body,

(b) order the person to pay the charity or body any sums which it has collected for the charity or body and which are held by it, any relevant financial institutional or other person holding more money on its behalf, after deducting any sums payable to the person or any person under an agreement with the charity or body,

(c) order any financial institution or other person holding property which the court considers to be, or to represent sums collected for the charity or body not to part with the property without the court's consent.

- (10) The court may -
- (a) recall the suspension of a person in pursuance of subsection (5)(e),
 - (b) vary or recall an order in pursuance of subsection (5) (f) or (g) or under subsection (9) (b) or (c).

35 Transfer schemes

- (1) The Court of Session may, on application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by Scottish Ministers for the transfer to a charity specified in the scheme of any assets of –
- (a) another charity,
 - (b) a body which is controlled by a charity (or by two or more charities, when taken together),
 - (c) a body which is not a charity but which is or has been representing itself as a charity.
- (2) The Court may approve a scheme in relation to a charity only if it is satisfied –
- (a) that there is or has been misconduct in the administration of the charity,
 - (b) that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application of such property for its purposes, and
 - (c) that the charities purposes would be better achieved by transferring its assets to another charity.
- (3) The court may approve a scheme in relation to a body falling within paragraph (b) if subsection (1) only if it is satisfied. -
- (a) that there is or has been misconduct in the administration of the body or any of the charities which control it,
 - (b) that it is necessary or desirable to act for the purpose of protecting the property of the body or any such charity, and

- (c) that the transfer provided for by the scheme is reasonable.
- (4) The court may approve a scheme in relation to a body falling within paragraph (c) of subsection (1) only if it is satisfied
 - (a) that the body falls within that paragraph, and
 - (b) that the transfer provided for by the scheme is reasonable.
- (5) The court may approve a scheme under this section subject to modifications.
- (6) A charity receiving property in pursuance of a scheme approved under this section may apply that property for its purposes as it thinks fit.

Appendix 2 – Annual Return Process

Both the Scottish Housing Regulator (SHR) and OSCR require RSLs to complete annual returns that provide essentially the same details and accounting information. However, both carry this out to different timescales and have therefore agreed the following process in order to reduce the burden of regulation on RSLs, while collecting the information both regulators need.

For RSLs with an end of year 31 March:-

- **April - May** - SHR online annual performance and statistical return system made available to RSLs to submit data.
- **End July** – SHR to forward relevant RSL details to enable OSCR to pre-populate forms (excluding financial information). OSCR sends out annual returns.
- **End September** – Deadline for RSL submission of Annual Accounts of SHR.
- **November** – SHR to forward electronic version of scanned RSL Annual Accounts to OSCR.
- **December** – Deadline for completed annual returns to OSCR. All RSLs will only be required to check and confirm the information contained in the pre-populated return, insert gross income figure and sign as authorised by the Trustees.

For RSLs with an end of year other than 31 March:-

- **April - May** - SHR online annual performance and statistical return system made available to RSLs to submit data.
- **End July** - SHR to forward relevant RSL details to enable OSCR to pre-populate forms (excluding financial information).
- **Dates as appropriate** - OSCR sends out annual returns to ensure returns within 9 month timescale.
- **Dates as appropriate** – SHR to provide OSCR with copies of Annual Accounts as received. An electronic scanned copy will also be provided in November along with the 31 March year end accounts.
- **Dates as appropriate (9 months after year end)** – Deadline for completed annual returns to OSCR. RSLs will only be required to check and confirm the information contained in the pre-populated return, insert the gross income figure and sign as authorised by the Trustees.

Appendix 3 – Designated Points of Contacts

Area of Liaison	Scottish Housing Regulator	OSCR
Development of Strategic Policy and Legal Framework	Chief Executive	Chief Executive
Register: Statutory Responsibilities for Joint Working / Information Provision in Support of RSL Compliance with the Act	Head of Support and Intervention	Head of Charity Services
Monitoring & Compliance: Statutory Responsibilities for Joint Working / Information Information Provision in Support of RSL Compliance with the Act	Head of Support and Intervention	Head of Enquiry & Investigation