



THE SCOTTISH
HOUSING
REGULATOR

Directing the delegation of housing management functions under Section 68A of the Housing (Scotland) Act 2001

Consultation Response

March 2009

Introduction

1. The Scottish Government asked us to carry out a review of directions issued by Scottish Ministers to Glasgow Housing Association (GHA) and local housing organisations (LHOs) under Section 68A of the Housing (Scotland) Act 2001. In January 2009, we issued a consultation paper which set out the proposed terms of the review. We invited feedback from GHA, the LHOs and other interested parties.
2. This report outlines the feedback we have received. Many respondents told us they did not understand what the alternative tenant empowerment arrangements being developed by GHA would mean for tenants or their organisation. So, we have decided that it would not be appropriate to implement our original proposals. Instead, we have agreed with Scottish Ministers that we will issue new directions to GHA for all LHOs. Ministers have asked us to carry out a further review during 2010, before the new directions end.

Background

3. Section 68A of the Housing (Scotland) Act 2001 gives Scottish Ministers the power to direct certain registered social landlords (RSLs) to delegate housing management functions to another RSL, on such terms as Scottish Ministers may specify. This power was created through legislative amendment in the Housing (Scotland) Act 2006, Section 177 and was time-limited for five years.

4. Between April and September 2006, Scottish Ministers directed GHA to delegate a range of housing management functions to 63 LHOs, on terms set out in the Remodelled Management Agreement (RMA). The purpose of the directions was to ensure that the local management arrangements that were already in place could continue for a limited period, to fulfil the promise made to tenants at transfer. As well as setting out the agreed management arrangements, the RMA also incorporates the concept of LHO 'preferred bidder status'. This means that an LHO can seek Second Stage Transfer (SST) for the stock it manages, without having to compete against others (for the duration of the RMA). The current individual directions will come to an end for each LHO between April and September 2009.

5. As a matter of general policy, Scottish Ministers' powers under the Housing (Scotland) Act 2001, including the power to issue new directions, are exercised by The Scottish Housing Regulator. In November 2008, the Scottish Government asked us to carry out a review of the directions. We agreed with the Scottish Government the contents of a consultation paper which set out proposals for the future management of directions. This was issued to GHA, the LHOs and other interested parties in January 2009. We asked them to give us their views on the proposals by 27 February.

Consultation response

6. We received a good level of response to the consultation by the closing date, with replies from representatives of all key stakeholders:
 - 18 community controlled housing associations (CCHAs), covering 28 LHOs
 - 25 management-only organisations, including four management-only subsidiaries of CCHAs
 - The Glasgow and West of Scotland Forum (GWSF)
 - A private individual
 - Glasgow City Council
 - Glasgow Housing Association

7. Currently, 62 LHOs manage stock on behalf of GHA. Overall, we received 53 responses covering 85% of all LHOs- 82% of CCHA LHOs and 89% of management-only LHOs:

- 51 LHOs submitted their feedback on the consultation response form we had provided. One CCHA LHO wrote to us to confirm its support of the GWSF response. And one management-only organisation returned the form uncompleted, as it said it did not have sufficient detail about GHA's proposals for future tenant empowerment to enable it to answer the questions.
- 24 CCHA LHOs who returned their response forms confirmed that they are pursuing SST. Two confirmed that they are not pursuing SST and one response stated that the future of a particular LHO's stock is still uncertain.
- The management-only LHO returns show that two of these organisations are pursuing SST (these are management-only subsidiaries of existing RSLs); 20 are not pursuing SST; and two responses indicated that they are keen to move forward with SST but cannot meet the valuation at the moment and are considering their options.

8. We also received a late response from GHA's LHO Chairs' Forum, which we consider later in this report.

Overview of responses received

9. There are some recurring themes within the detail of the LHO consultation returns, which are supported by the responses from other key stakeholders. These include:

- The future of tenant empowerment and the adequacy of the consultation carried out by GHA in relation to this;
- GHA being able 'to unilaterally end the RMA';
- Management of the current SST programme and timescales for transfer;

- The role of the regulator in issuing new directions; and
- The operation of the RMA.

LHOs that are proceeding with SST

10. We proposed that we would issue new directions to LHOs that are proceeding with SST, and that these would fall either when SST is achieved, or when GHA's Board decides that the LHO is no longer part of the SST programme.

11. Section B of the consultation response form asked for feedback from LHOs proceeding with SST. Section B was completed by 24 CCHA LHOs and three management-only subsidiaries of CCHAs (one of which is unclear as to whether it can proceed with SST). A summary of the answers received is provided below.

12. We asked LHOs that are pursuing SST whether they are content that a new direction will be issued to them when their current direction comes to an end. Of the 27 responses received, 26 LHOs confirmed that they are content with this. One respondent indicated that they could not answer this question until they had seen the detail of the new direction.

13. We then asked whether there are any issues for these LHOs around the proposed grounds for expiry of the direction. Nineteen respondents answered 'yes' to this question and seven answered 'no'. One respondent answered 'no', but stressed that while they feel that the direction should end if they are no longer pursuing SST, this would need to be agreed by both GHA and the LHO.

14. The main issues raised were as follows;

- Strong objections to the idea that a decision by GHA's Board about the future of an RSL's SST proposal would be the trigger for ending the direction and RMA.
- A number of the returns asked us to issue a programme of SSTs with our guidance. Respondents have suggested that there is no credible SST

programme and that any new direction has to allow for sufficient time to progress discussions.

- The importance of preferred bidder status is also reinforced by a number of the returns. The overriding view is that LHOs must continue to have preferred bidder status and this must be enshrined in the RMA.

15. We also asked the LHOs pursuing SST whether they are comfortable with the RMA being extended on its current terms (with the exception of a limited number of clauses). Twenty-four LHOs said that they are comfortable with this aspect of the proposals. One LHO said that it was not comfortable with this and two of the respondents felt it was unclear whether the RMA was being extended on its current terms.

16. Some additional specific comments were as follows:

- One RSL called for the RMA to be revised to make the delegation of management responsibility more meaningful. And two others raised concerns about the current operation of the RMA.
- One response stated that they were confused about the difference between the direction and the RMA.
- Two LHOs put forward a view that only Scottish Ministers should decide whether to extend the existing arrangements.

Glasgow and West of Scotland Forum (GWSF)

17. The concerns of these prospective SST purchasers are also expressed in the Glasgow and West of Scotland Forum's (GWSF) response to the consultation. A number of LHO respondents have also stated that they support the Forum's position.

18. The GWSF is particularly concerned about an LHO losing preferred bidder status if its RMA falls following a GHA Board decision on SST. Its view is that the RMAs should remain in place until SST is achieved, and that a programme for future transfers should be attached to the Section 68A guidance. We do not believe it is our role as regulator to devise a programme of SSTs. This is for GHA and prospective purchasers to agree.

19. The Forum's response also questions whether it is appropriate for the regulator to issue the new directions, and whether the consultation proposals are in line with Scottish Ministers' policy objectives. We had agreed the contents of our consultation paper with the Scottish Government before issuing it in January. And we have sought the agreement of Scottish Ministers to our recommended course of action, in light of the consultation responses.

LHOs that are not proceeding with SST

20. We proposed that new directions would not be issued to LHOs that are not proceeding with SST. The current directions and RMAs would therefore fall and GHA would put in place its new management arrangements, following its reviews of purpose and governance.

21. Section A of the consultation response form asked for feedback from LHOs that are not proceeding with SST. Section A was completed by 20 management-only organisations and two CCHAs which had confirmed they are not pursuing SST. This part of the form was also completed by two management-only LHOs and a CCHA LHO that are unclear whether they are able to move forward with SST. A summary of the answers received is provided below.

22. We asked these LHOs whether they are content with the proposals they have discussed with GHA in relation to future empowerment options for tenants. A significant number of respondents have raised concerns about GHA's future tenant empowerment model. Of the 25 responses received, 16 LHOs said that are not content with the discussions they have had with GHA. There is a strong sense that these LHOs do not feel they have been consulted properly and do not fully understand what the implications of GHA's proposals are for them. Only

eight LHOs said that they are content and one respondent did not answer either way.

23. Generally the returns said that LHOs want more information about the detail of GHA's new proposals and how they will work in practice. A number of the management-only LHOs also expressed disappointment that GHA's proposals mean they would be de-registered and would lose their status as a constituted body. And many of them are worried about the potential loss of experienced committee members and loss of local identity if the LHO's decision-making role is diminished. Some express a view that this is not in accordance with the commitments made to tenants as part of the original transfer.

24. The importance of the relationship and alignment between staff and local committees was also emphasised in the returns, with calls for this to remain intact.

25. Some of the specific comments were as follows:

- One LHO confirmed that two senior committee members have already resigned in principle because the LHO is not proceeding with SST.
- A number of LHOs want to continue with the same level of tenant involvement and control as they currently hold. They are uncertain about how the relationship with GHA will be managed without the RMA, particularly if they are not a registered body.
- One LHO commented that our proposals do not address a potential situation where some of the stock in an LHO area is subject to an SST proposal but the remaining area is not.

26. We then asked whether these LHOs are comfortable with the implications of our proposals for their organisation. Eleven LHOs said they are comfortable. But 13 answered 'no' to this question and one respondent did not answer either way.

27. We also asked the LHOs to identify any key issues for their organisation in relation to transitional arrangements. Twenty-one of the LHOs responded to this question and set out a range of concerns relating to the issues identified above. In general, the LHOs felt that they needed further information about what GHA's transitional arrangements would look like. For example, they want to know whether service delivery would be interrupted, what form the new decision-making structures would take and what the impact would be on the LHO's status and staffing arrangements. And a number of them asked us to provide further information about the de-registration process.

Private individual

28. We received one response from a private individual who queried what will happen if a management-only organisation is de-registered and then becomes able, for whatever reason, to pursue SST. This individual also expressed a view that GHA's proposals for future tenant empowerment do not meet the transfer commitments made to tenants.

Glasgow City Council

29. Glasgow City Council's response raises concerns about GHA's future empowerment model. The Council said that the RMAs should be continued and not time-limited. The Council states that these local arrangements form part of the structure and ethos of the original transfer, and should remain in place regardless of whether LHOs are proceeding with SST. It suggests that a further review of the directions and RMAs should be undertaken in 2013.

Glasgow Housing Association

30. Overall GHA told us that it was content with the terms of the proposals and it was willing to meet our expectations as laid out in the consultation paper.

LHO Chairs' Forum

31. We received a letter from GHA's LHO Chairs' Forum, two weeks after the consultation period, which expresses its dissatisfaction about the way that our consultation exercise was carried out. It states that respondents found the questions misleading or difficult to answer and that the consultation period was

not long enough. It also raises issues about whether all of the LHO Chairs had seen the consultation response form.

32. The returns we received did not raise any of these concerns with us directly. And overall, 85% of LHOs responded to our consultation. Only one LHO said that it needed more time to consider the return. We were happy to accommodate this and the LHO submitted its response two weeks after the deadline. We can also confirm that the majority of the responses we received were submitted in the name of the Chairperson or on behalf of the Management Committee. So we are satisfied that the responses accurately reflect the views of key stakeholders.

Our response to the consultation

33. We are particularly concerned about the feedback we have received in relation to GHA's future tenant empowerment model. GHA had told us that the LHOs (particularly the management-only LHOs) that are no longer part of the SST programme were supportive of its proposals on tenant empowerment and would support our proposals on reviewing the directions. But our findings do not reflect this view.

34. GHA plans to complete its governance review by September 2009 and to implement its new arrangements after that. We will require it to demonstrate that its consultation around the governance review has been carried out in a meaningful way and that the promise of local control and tenant empowerment will continue to be met. The Council will have a key role to play in these discussions, given the commitments made in the original transfer agreement. It would seem inadvisable at this time for us to allow the current management arrangements to fall, when LHO committee members, tenants and other stakeholders do not believe that they have been adequately consulted.

35. We also recognise that prospective SST purchasers are concerned about progress with the transfer programme. This is not an issue that needs to be addressed by the Section 68A directions and RMA. Purchasers need to discuss their concerns with GHA, with a view to resolving them, and it is for the parties themselves to agree timescales for delivering SST. But we expect GHA to be

open and transparent about the way in which it takes these decisions and to move forward at a reasonable pace. And we expect GHA to give us additional assurances around this.

Revised approach

36. In light of the feedback we have received, we have decided to revise our proposals for the management of future directions. As Ministers issued the first set of directions and some respondents have questioned the legitimacy of us issuing new directions, and because of the need to significantly revise our approach, we have set out the consultation findings and our recommended course of action for Ministers. Ministers are content with our revised approach. And they are content that these powers should continue to be exercised by us, in accordance with the Ministerial Code of Practice.

37. We have decided to issue new directions to all LHOs when their current arrangements fall. We understand that GHA intends to complete its current SST programme by the end of October 2010, so the new directions will be time limited to cover the period from expiry of the current directions until then. This approach should provide:

- enough time for GHA to fully consult stakeholders on its future management arrangements;
- time for prospective SST purchasers to develop their SST proposals;
- assurance that prospective SST purchasers will continue to manage the stock and have preferred bidder status for the next 18 months; and
- parity of treatment across the whole LHO network.

For the avoidance of doubt, the direction and RMA will not automatically fall if GHA's Board decides that an LHO is no longer part of the SST programme.

38. Scottish Ministers' power to direct is time limited to five years, from 29 January 2006. While the power to direct ends in January 2011, directions and RMAs already in place can continue beyond this date. This means that Ministers would have the option to issue further directions before the January 2011 cut-off point

(i.e. in October 2010). Ministers have asked us to carry out a review during 2010, to decide whether further directions need to be issued when the new ones end. Amongst other things, the future use of Section 68A will depend upon GHA's progress with its reviews of purpose and governance and the way in which it responds to the feedback it has received from its stakeholders. We will continue to engage with GHA in relation to this.

39. The new directions will fall in the following circumstances (prior to 31 October 2010):

- Where SST is achieved;
- Where the LHO no longer wishes to proceed with SST and Scottish Ministers are satisfied that GHA has put appropriate alternative arrangements in place for management of the stock and has carried out adequate consultation with tenants and other stakeholders; or
- Where GHA or the LHO asks Scottish Ministers to revoke the RMA, or Scottish Ministers decide that it should be revoked, in accordance with section 14 of the current RMA. For example this applies where GHA or the LHO becomes insolvent, where the LHO has materially breached its obligations in relation to performance, or where continued delegation would have a significant and adverse effect on GHA's financial stability.
- Where a notice of acceleration of the outstanding debt pursuant to the Loan Facility Agreement is given (i.e. if GHA's lenders notify it that they intend to call in the outstanding debt due to them).

40. A flowchart showing the grounds for expiry of the new directions is provided at Appendix 1.

41. We recognise that prospective SST purchasers are concerned that the current SST programme is not progressing quickly enough to allow completion by

October 2010. And they want their preferred bidder status to continue beyond this point.

42. A situation may arise where an LHO has produced a viable business plan for SST, and GHA's Board has agreed to proceed with the statutory consultation and tenant ballot, but the LHO is unable to achieve transfer before October 2010. It would not be sensible for the LHO's management arrangements to fall, or for us to have to issue a new direction. So, we plan to build sufficient flexibility into the direction expiry date to allow the arrangements to continue in these circumstances. And as discussed above, Ministers could issue further directions before January 2011, if circumstances require this.
43. Prospective SST purchasers see the preservation of preferred bidder status as critical. The section of the RMA which relates to preferred bidder status will be extended on its current terms, so this will continue for the duration of the new directions. Stakeholders will be keen to see how GHA plans to deliver the tenant promises of local management and control in future. And GHA needs to reflect on ways to deliver its proposed new structures without ruling out the possibility of future stock transfer.
44. In our consultation paper, we said that we do not propose to carry out a comprehensive review of the terms of the RMA because it will only be in place for a limited period. A small number of the LHO consultation responses suggested that the terms of the RMA should be revisited. We remain of the opinion that it would not be appropriate to make changes to the RMA at the current time, so it will be extended broadly on its current terms (with the exception of a limited number of clauses).
45. A number of management-only respondents have asked questions about the principle of de-registration and the de-registration process. Our guidance note SHR 8 sets out criteria for de-registration. Given that we are issuing new directions to all LHOs, we do not think it is necessary to provide additional guidance on the de-registration process at this time. We will consider whether we need to issue further guidance on this when we review the directions next year.

Conclusions

46. The consultation feedback we have received shows that the majority of LHOs do not understand what GHA's proposed tenant empowerment model would mean for them, and that key stakeholders such as the Council are not content with its proposals. So, we think that this revised approach presents the most appropriate way to proceed at this time. It also gives a fixed time period in which GHA and prospective purchasers should be encouraged to move forward with the current SST programme.

47. We are currently drafting the new directions and schedule of RMA amendments. This drafting will be shared with GHA and the LHO network as soon as possible. The first set of directions falls on 13 April, so new directions will be issued the week beginning 6 April. We will contact these LHOs individually to make arrangements for issuing the directions and executing the amendments to the RMA.

