COnsultation ResponsE

Scottish Housing Regulator (SHR) CONSULTATION on REvised Regulatory Framework and Guidance - December 2018

1. **Introduction**
   1. The SFHA welcomes this opportunity to respond to the SHR’s formal consultation on its revised Regulatory Framework and guidance. The SHR’s approach to the consultation process – which began in informally in late 2017 - has been constructive, comprehensive and inclusive.
   2. SFHA recognises the crucial role that regulation plays within the sector, providing vital assurances to tenants, service users and lenders. As the sector faces unparalleled challenges, we are keen to work with our members to “future proof” the sector and ensure it is equipped with the necessary tools it needs to meet challenges moving forward. We see regulation, and the SHR, as being a vital part of this process.
   3. Since the SFHA submitted its response to the SHR’s Discussion Paper in April 2018[[1]](#footnote-1), SFHA has used a variety of methods to gather members’ views on the proposals. Some of these were in conjunction with the SHR, including:

* A small working group of members and other key stakeholders that SHR asked SFHA to help it put together. This group met four times over the course of the summer and will meet again early in the new year to discuss the outcomes of this consultation. This has been a constructive way of drilling down into some of the detail of the proposals, and we would welcome the continuation of the group beyond the conclusion of the consultation process.
* SFHA’s own Regulation Sounding Board of members that has been instrumental in shaping this response. The SHR attended the September meeting of the group.
* Circulating the SHR’s initial Social Housing Charter Indicator proposals to its practitioner forums for comment in advance of a separate meeting between the SHR, SFHA and members of the forums in July.
* The SHR attending the initial meeting of the SFHA Chairs’ Forum in October to discuss the content of the formal consultation. SHR also spoke on the subject at our Governance Conference in September and our Finance Conference in November.
* Two free Round Table Discussion events in November (in Glasgow and Edinburgh) open to all members. These were held in conjunction with the SHR, with the Glasgow event also held jointly with GWSF.
  1. SFHA welcomes that amendments have been made to the SHR’s proposals to reflect points we outlined in our response to the initial Discussion Paper and liaison during the consultation period. These include less prescription around audit committees; revisions to proposed Charter Indicators; and an acknowledgement of a need to develop ongoing methods of dialogue between the SHR and the sector – to enhance mutual understanding.
  2. One general point that has been raised by our members is the sheer scale and scope of the consultation. Given it covers every aspect of the Regulatory Framework and its accompanying statutory guidance, this means that most time has been spent focusing on the most significant changes – e.g. assurance statements – and many RSLs have not had time to fully consider every other aspect. SFHA appreciates that the Framework is a package, but it might be helpful for RSLs if there was a way to split future reviews into specific aspects of the framework/guidance rather than consulting on every aspect at once. This would ensure that RSLs can give proper consideration to each aspect.
  3. Overall SFHA broadly supports the majority of the proposed changes to the Regulatory Framework. We do however have a number of comments relating to aspects of the new proposals and existing requirements, reflecting feedback received from our members. Where we have asked for revisions or further clarity, this is with a view to maximising the positive impact that regulation can have – further strengthening the sector so that it can continue to provide safe, secure, warm and high quality homes for tenants.
  4. Within this paper SFHA comments on:
* The identified approach to regulation, including the SHR’s relationship with the sector; the need for a more supportive role in the first year of the framework; the need for the SHR to have necessary resources; links to other regulators; and a need to acknowledge the contribution of tenant governing body members.
* Revised regulatory requirements, including concerns around the publication of governing body minutes; and where stated SHR expectations on tenant satisfaction surveys and self-assessment fit within this.
* Revised Statutory Guidance, including concerns on: the implied statutory status of Business Planning guidance; the content of SHR Treasury Management guidance; the financial returns and Regulatory Standards relating to these; and the revised Notifiable events guidance.
* Assurance Statements, focusing on the need for a fuller understanding on what would constitute “non-compliance” and what should – and should not – be declared as part of this; as well as issues around the timing of statements in the first year.
* Equalities Requirements, highlighting the need to give the sector clear guidance on these expectations; to develop a proportionate sector approach; and to ensure the crossover with GDPR is fully addressed.
* Each of the Regulatory Standards of Governance and Financial Management – and makes suggested amendments.
* Specific Charter Indicators, placing an emphasis on the importance of the revised technical guidance (and when this will be available).
* The revised approach to reporting regulatory status, including the need to make the “working towards compliance” category clearer.
* Our support for the SHR Advisory Toolkit, and the need to ensure that there is minimal duplication with guidance already produced by SFHA.
* The SHR’s approach to intervention, including the role of special managers; the role of statutory appointees; possible methods of preventing escalation to statutory intervention; and the content and timing of statutory intervention reports.
* Our continued support for a truly independent appeal process.
* Our support for SHR’s thematic work to continue, suggesting that there also be sector involvement in considering draft reports prior to publications.

1. **Approach to Regulation & Relationship with the Sector**
   1. SFHA broadly supports the approach outlined in Chapter 2 of the Framework “*How We Regulate*”. Continuing to take a risk based approach, whilst placing increased emphasis on self-assurance, is a logical and sensible method of delivering proportionate regulation. As ever, the key will be how the proposals come together in practice, and SFHA is keen to work with its members and the SHR to help the changes bed in as intended.
   2. SFHA had raised in its response to the Discussion Paper a need to develop more ongoing mechanisms for dialogue between the sector and the SHR - with the aim of developing and enhancing a mutual understanding. SFHA welcomes that this is acknowledged in the consultation document (at 3.4), and SFHA will explore methods to develop this further with SHR.
   3. SFHA has received mixed feedback from members in terms of how regularly they “informally” engage with the SHR, or how willing they would be to pick up the phone to ask for advice from the SHR about an issue. Some have a very positive relationship where they did so regularly, whereas others felt uncomfortable in doing so. There is a feeling that there is a lack of consistency with the approach adopted by different SHR staff members, and therefore the relationship an RSL has with the SHR on a given issue can be a bit “luck of the draw”.
   4. During the consultation process, the SHR has highlighted an intention to adopt a more supportive role with the sector over the first year of the framework – acknowledging that it will take time for RSLs (and indeed the SHR) to adjust. This is a helpful approach, and makes consistency across all SHR staff particularly important to ensure this culture is reflected regardless of who an RSL is in contact with.
   5. One of the concerns raised by a number of members about the emphasis on self-assurance was a potential risk that this could lead to some organisations having little direct contact with the SHR, and that serious issues might not be picked up as a result. The SHR has highlighted an intention to visit organisations it has not heard from or engaged with in a while in order to address this. Whilst this approach seems sensible, it is crucial that this does not become the equivalent of a cyclical approach and stray from the “risk-based” nature of the framework.
   6. It is welcome that the SHR acknowledges a “need to get out more” in its priorities. This will be helpful in delivering the more “supportive” role as outlined above, and in terms of enhancing a positive relationship with the sector. We realise that the SHR has limited resources, and concern has been raised by our members about whether the SHR has enough resources in light of the new requirements. We note that recently there has been some internal reorganisation and recruitment of a small number of posts by the SHR to this end. In recognition of the importance of effective regulation, the SFHA would certainly support any increased resource that the SHR might require to deliver the revised requirements, and support the sector as they bed in.
   7. Proportionality remains key as to how the new framework is delivered in practice, particularly to ensure that new requirements do not increase costs for RSLs and therefore tenants.
   8. It is welcome that SHR promotes a strong tenant voice (2.6 in the framework). This section does not however refer to the role of tenant governing body members – who play a pivotal role in RSL governance and scrutiny of performance. The role of governing body members has dramatically changed over the last decade and expectations have been raised significantly. With the SHR encouraging tenant involvement in scrutiny and to hold their landlord to account, it would be helpful to also acknowledge the contribution of tenant governing body members, and the perspective, skills and experience that they provide.
   9. It is noted that the SHR is currently seeking new members to its National Panel, and SFHA welcomes this. It is crucial, where possible, that the membership of the panel is representative of the sector, and that an even spread of RSL tenants/service users and local authority tenants/service users are members.
   10. It would be helpful if the Framework set out the ways in which the SHR intends to work with other regulators to reduce duplication of requirements. SFHA is aware of the Memorandum of Understanding in place with OSCR and the Care Inspectorate, but it would be useful to expand on this as part of the Framework. Other examples that could be covered would be the SHR’s relationship with the Scottish Public Services Ombudsman and with the Scottish Information Commissioner – which will be

particularly important with the forthcoming extension of Freedom of Information legislation to RSLs.

**3. Regulatory Requirements**

3.1 It is helpful that all Regulatory Requirements are now detailed in one place (Chapter 5 of the revised Framework). In the current Framework, these are placed throughout the document – so this is a useful addition to make it easier to reference at a glance.

3.2 Much of the feedback we have received from members – and indeed the discussion at the SHR Working Group meetings, our Regulation Sounding Board and our Regulation Round Table events – has been focused on two of the proposed new requirements: the new assurance statement requirements and expectations around Equalities and Human Rights. These are addressed in detail in section 5 and section 6 respectively within this response.

3.3 Some concern has been noted regarding the new requirement to publish the minutes of governing body meetings on websites. Within the SFHA/GWSF Model Publication Framework[[2]](#footnote-2) it is recommended that it may be more useful to publish a note of the decisions that were made at a meeting, rather than the full minutes, although it also advises that the full minutes should always be made available if requested (subject to confidentiality). It also highlights that is not a good approach to publish information that is redacted (i.e. has words and paragraphs blocked out) in order just to satisfy a requirement minutes should be published – as to publish in this form does not send out a message of openness and suggests, rather, a desire to conceal.

3.4 It would be helpful if the SHR could confirm its expectations with regards to the publication of governing body minutes, and if the approach outlined in our Model Publication Framework where notes of decisions are published would be acceptable. We also acknowledge that this document and our guidance will need to be revised once Freedom of Information legislation is extended to RSLs.

3.5 There are a number of expectations that the SHR has previously stated in guidance or thematic work that are not referred to under the requirements sections, or elsewhere within the Regulatory Framework document. For example, the SHR Guidance on Conducting Tenant Satisfaction Surveys[[3]](#footnote-3) highlights many requirements relating to such surveys, including *“the SHR expects landlords to carry out a survey of tenants and service users at least once every 3 years.”* The 2017 thematic study, Self-Assessing Against Regulatory Standards[[4]](#footnote-4) states that RSLs must “*Regularly assess your achievement of Regulatory Standards, doing so at least once every three years*.” It

would be helpful if these requirements, and the status of these documents, were outlined within the Regulatory Framework.

**4. Statutory Guidance**

4.1 It is helpful that the paper highlights which SHR guidance is statutory, and is therefore a compulsory regulatory requirement. However, the consultation paper does not list – or consult on the content of – SHR advisory guidance. It would be helpful to also make available a defined list of this advisory guidance and its status.

4.2 The difference between advisory guidance and statutory guidance, remains unclear in some cases. For instance, the SHR Business Planning guidance[[5]](#footnote-5) is given more than advisory status at several points within the framework, i.e. Regulatory Standard 1.1 states that the governing body: “agrees and oversees the organisation’s business plan to achieve its purpose and intended outcomes for its tenants and service users, having had regard to our advisory guidance on business planning”. This effectively makes the consideration of the advisory guidance compulsory even though it is not listed as compulsory guidance within the regulatory requirements.

4.3 Another example is the SHR advisory guidance on Treasury Management[[6]](#footnote-6). This states that “Our regulatory expectation is that RSLs will comply with the Chartered Institute of Public Finance & Accountancy (CIPFA) Treasury Management in the Public Services: Code of Practice and Cross Sectorial Guidance Notes (2011 Edition), (the Code).” This guidance was recently revised by CIPFA, and carries a cost of £470 to purchase for each landlord. Aside from the cost, members have also raised concerns that the CIPFA guidance is not proportionate as it does not acknowledge the different sizes and types of organisation in the sector. Whilst SHR has indicated no immediate requirement for landlords to update to the new version of the CIPFA Code, it would be helpful to understand the status of this guidance and what the SHR’s expectations will be moving forward. SFHA is keen to develop any necessary additional guidance in conjunction with the SHR to aid members, and avoid any additional cost to the sector.

4.4 Whilst the statutory guidance relating to financial returns (Financial Viability of RSLs; determination of accounting requirements; and Preparation of Financial Statements) is largely unchanged, concerns have been highlighted to us through our practitioner forums about financial returns and the revised Regulatory Standards relating to these.

4.5 SHR has proposed that the return date of the Five Year Financial Projections (FYFP) will be brought forward to May (from end of June). This is likely to make the details in the return less accurate as the accounts for the previous year may not be complete at this stage. The SHAPs valuation for each RSL’s share of assets and liabilities at the

year-end might not be known in time for preparing the FYFP, and the figures used could be materially different from the ultimate position (i.e. could be significantly inaccurate). Bringing this forward puts significant pressure on resources that are already stretched at that time of year with the Audit, and will create duplication of work if the previous year’s accounts change through the audit process.  SFHA asks that the FYFP submission is returned to the end of June.

4.6       Regulatory Standard 3.7 refers to “accuracy”, i.e. *“The governing body ensures the RSL provides accurate and timely statutory and regulatory financial returns to the Scottish Housing Regulator. The governing body assures itself that it has evidence the data is accurate before signing it off.”* Concern has been raised about how governing bodies can realistically confirm accuracy of the estimations and assumptions in the FYFP (e.g. inflation is going to be x% in two years’ time). Governing bodies could confirm the reasonableness of such assumptions, but not the accuracy.

4.7 Loan Portfolio returns are not audited, and their accuracy is therefore harder to confirm. It has also been highlighted to us that, whereas the wording of some loan covenants can run to several paragraphs, the submission form does not allow RSLs to include the exact wording – again reducing the accuracy. There is also no function within the SHR’s loan portfolio submission system which totals loan balances, which means it is not possible to carry out a simple balance check with the data inputted. SFHA asks that the loan portfolio system be updated to address these issues.

4.8 SFHA asks that Standard 3.7 be reworded to reflect the concerns highlighted above. We would suggest the following as an alternative: “*The governing body ensures the RSL provides timely statutory and regulatory financial returns to the Scottish Housing Regulator.  It satisfies itself that the assumptions used are reasonable and that the RSL has an appropriate system of financial controls to give it reasonable assurance of the reliability and accuracy of the data.”*

4.9 Of the statutory guidance highlighted under Regulatory Requirements, the Notifiable Events guide is the most significantly changed. It was helpful that SHR also provided SFHA with a tracked changes version of the document – not included within the original consultation documentation - which we provided to members via our website.[[7]](#footnote-7)

4.10 SFHA is pleased that discussions we had with SHR and members around potential new Charter Indicators (see section 9 below) have been taken into account, and that severance payments/settlement agreements are included as notifiable events (rather than adding these to the ARC submission as previously considered).

4.11 Appendix 2 goes into depth regarding the revised notification requirements now that the consents regime has been removed as a result of the Housing (Amendment) Scotland Act 2018. The notification requirements in this regard seem broadly in line with the legislation, but we have asked Scottish Government to confirm that they are comfortable that these revisions are in keeping with the ONS’ reclassification of RSLs

as private bodies. We have asked for similar assurances in regards to Regulatory Standard 7 (see section 7 below).

4.12 There has been some concern raised by members – particularly our practitioner forums – about the requirement to notify the SHR if there are *“concerns raised by a local authority in relation to the RSL’s contribution to providing accommodation for people who are homeless whether or not committed to writing.”* The wording of this is rather vague – as “concerns” could range from a conversation about one applicant, to something that is a more formal dialogue. This phrasing also suggests that there could be an issue in terms of the RSL’s homelessness contribution, but not the local authority’s contribution. The wording needs to be revised to reflect that an issue could be raised by either party. It is important to note that the homelessness function and the social landlord function in local authorities are separate – and this needs to be captured.

4.13 It would be helpful to provide accompanying guidance outlining the steps that should be undertaken by either party if there is dissatisfaction in terms of lets to people experiencing homelessness, and at what point this becomes a notifiable event for either the RSL or local authority. The requirement as currently phrased is too vague and suggests early escalation to the SHR when most issues can be resolved with more informal conversations. It would also be helpful to understand more about how the SHR would approach any notification of dissatisfaction in this regard.

4.14 Under the Requirements for RSLs within the draft framework on page 8 (and within the consultation package on the SHR website) one piece of statutory guidance appears to have been omitted, i.e. ‘[Tenant Consultation and Approval](https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Tenant%20Consultation%20and%20Approval%20-%20Statutory%20Guidance%20-%20Draft.pdf)’. This has perhaps been confused with the separate statutory guidance ‘[Consultation where the regulator is directing a transfer of assets](https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Consultation%20where%20the%20Regulator%20is%20directing%20a%20transfer%20of%20assets%20-%20Statutory%20Guidance%20-%20Draft.pdf)’, as it is this guide to which the hyperlink on page 8 of the Regulatory Framework – “Consulting tenants where tenant consent is required” – is linked. It is important that all relevant statutory guidance is highlighted within this section, and that the language is consistent with the title of the document to avoid confusion.

**5. Assurance Statements**

5.1 As one of the most significant changes proposed, Assurance Statements have generated the most discussion during the consultation process. Whilst SFHA broadly supports this new requirement, the most pressing concern that has been frequently raised by our members is the need for greater clarity on what would constitute “non-compliance”.

5.2 Chapter 5 of the Framework and the separate Annual Assurance Statement guidance are helpful in terms of identifying what the content of the statement should be, without being overly prescriptive about layout or wording. However, more examples around what represents a “material” breach, and what should (and should not) be declared as non-compliance are essential to helping RSLs meet this new requirement.

5.3 One example the SHR highlighted (during our consultation events and various working group meetings) was that if - for a valid reason - only one member of the governing body had not had their annual appraisal during that year, then the governing body would likely not see that as significant enough to highlight as part of the Assurance Statement. However, if the entire governing body had not had an appraisal then this would clearly be more significant and absolutely should be highlighted. This kind of example is helpful in terms of judging the materiality of any non-compliance, but is not included within the current draft guidance.

5.4 The SHR highlighted its intention to expand on what is and what is not material in an advisory online Toolkit – and it will work with the sector to develop a range of questions that should be asked (by April) as part of this Toolkit. SFHA appreciates that it will not be possible to cover everything or be overly prescriptive, as whether something is material may depend on the circumstances of the individual organisation, but it will be helpful to include as many contextual examples as possible. SFHA will be involved in the development of this Tool Kit, and has expanded on this at Section 10.

5.5 Concern has been raised by members that it might make the SHR view an RSL in a harsher light should something not be declared (as it was not thought to be material), that the SHR later decided was actually material. Some RSLs have indicated that this would leave them in a position of feeling the need to declare everything, however immaterial, just in case.

5.6 Equally, there is some apprehension about how the SHR will view any declaration of non-compliance and that this could generate a disproportionate response. Some concern has also been indicated that declaring any non-compliance could be misconstrued by tenants, lenders and other stakeholders – even if appropriate steps are in place to address the issue.

5.7 For these reasons, it is particularly welcome that the SHR has indicated throughout the consultation process a need for it to be more supportive in the first year whilst these changes bed in, and that it understood that the first year would not be the absolute benchmark. The SHR will produce a feedback/lessons learned document produced following the first tranche of statements, which will be particularly helpful in determining what further guidance and tweaking of the process (if any) is required thereafter.

5.8 The nature of the assurance that the governing body should seek is also crucial, and one key point that the SHR has stressed, is that the annual assurance statement should not be a once-a-year exercise. It should instead build on existing mechanisms of ongoing assurance and self-assessment – with internal audit highlighted as one aspect of this. SFHA is keen to amend its existing guidance publications to reflect these new requirements – especially those relating to Self-assessment against the Regulatory Standards[[8]](#footnote-8) and Internal Audit[[9]](#footnote-9). We wish to ensure that this guidance complements the SHR’s Toolkit and does not simply duplicate.

5.9 Whilst SFHA appreciates that it should not be a one-off exercise, the timing in the first year of submission has been highlighted as potentially problematic. Given the requirement will not officially be in place until April 2019, with submission required in October 2019, this is going to provide a much shorter time frame to develop than there will be in subsequent years. SFHA understands that this is to coincide with the SHR’s risk assessment process, but this short time frame again places emphasis on the need for the SHR to be more supportive in the first year and to be proportionate in its assessment of the first statements submitted.

**6. Equalities and Human Rights**

6.1 It is welcome that the current requirement in the Social Housing Charter to submit data to the SHR regarding ethnic origins and disability details of service users, staff and governing body members will be removed, as submitting this data did not serve any clear purpose for either RSLs or the SHR.

6.2 The revised requirements mean that RSLs will be required to collect data relating to each of the protected characteristics for existing tenants, new tenants, people on waiting lists, governing body members and staff – and show how they are using this data to shape decisions, policies and service delivery. Many concerns have been raised during the consultation period by SFHA members in relation to this, largely around the logistics of what this means in practice, and in terms of crossover with other legislation – such as the General Data Protection Regulations.

6.3 The SHR has highlighted its intention to cover this requirement as part of the advisory Toolkit, and SFHA definitely welcomes priority being placed on this guidance. It is helpful that the Equality and Human Rights Commission is keen to be involved in the development of this aspect of the Toolkit, and - whilst we appreciate the SHR does not want to be overly prescriptive - it would be helpful to identify some form of sector approach for clarity and consistency. This would of course have to recognise that not one size fits all.

6.4 Smaller organisations will find it more difficult to keep responses anonymous, as it would be easier to identify individuals through process of elimination. The same is also true of governing bodies. At one of our consultation events, the SHR highlighted that there are thresholds beneath which data should not be made available – and this would certainly be helpful guidance to include within the Toolkit.

6.5 Concern has been raised by members about how the SHR might view poor response rates, and it was highlighted that tenants, applicants, staff and governing body members could choose not to answer personal questions. All would have the right not to disclose this information, and this needs to be reflected in the requirement and SHR expectations. There was also concern that if this data was sought as part of a tenant

satisfaction survey, it might discourage responses to the whole survey. More clarity was requested about how frequently data needed to be updated, and good practice examples requested about how to use the data once gathered. All of these points could helpfully be addressed as part of the guidance.

6.6 Our members have highlighted how critical it will be to have a different approach when collecting data for this purpose to collecting data that is held about individuals on housing management systems for the purposes of submitting the ARC. This is so that equalities information is not connected to specific tenants and is instead held as general overarching aggregate data. The need to be able to collect anonymously is also crucial.

6.7 Whilst the SHR has stated it will no longer routinely collect any data regarding equalities, it has also highlighted that it will expect landlords to have it should the SHR request it. From a GDPR perspective this is unlikely to pose any issues if the SHR is requesting an overall, aggregate overview based on anonymised data. Where this would be more problematic is where the SHR requests data linked to individuals – as this then requires a “processing basis” to be identified. If not collecting anonymously, this also creates specific requirements about the type of consent that needs to be gained under GDPR in order to process the data, i.e. this would most likely require specific consent from each individual.

6.8 Data concerning protected characteristics is regarded as “special category” data under GDPR, and therefore there requires a lawful processing basis and a special category data processing basis to lawfully process. The most likely appropriate special processing basis are:

* Explicit consent;
* Carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;
* Processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;
* Processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

6.9 The public interest ground in terms of Schedule 1, Paragraph 8, “*Equality of opportunity or treatment*” of GDPR, provides that the specific data is *“necessarily processed for*

*identifying or reviewing the existence or absence of equality of opportunity or treatment with a view to enabling equality to be promoted/maintained.”*  Arguably, this could be the special processing ground for gathering such information, but as noted if this information is fully anonymised it is not personal data and therefore not subject to GDPR.

6.10 It is crucial that the interplay between GDPR and this new requirement is fully addressed in any accompanying guidance to ensure that there are no issues in this regard. Whilst anonymising will potentially deal with most GDPR issues, the SHR expecting landlords to have the data should it request it at some point could perhaps be made clearer. As outlined, to process special category data there requires to be both a general processing basis and a special processing basis. If the SHR could make it clear within the requirement both the reasons for requiring RSLs to collect the information, and the reasons why the SHR might ask for the information, this could fully address any potential GDPR issue by providing RSLs with a clearer processing basis.

6.11 It is welcome that SHR has stated during our consultation events that it expected to play a supportive role in this regard to this requirement in the first year. The proposed thematic study on equalities will also be helpful in terms of identifying good practice. SFHA is keen to discuss further with members and the SHR any additional guidance it might helpfully produce in order to complement the Toolkit as this is developed.

**7. Regulatory Standards**

7.1 The table at Appendix 1 summarises SFHA comments on each of the individual Regulatory Standards. Whilst SFHA broadly agrees with the majority of the Standards, we have suggested some amendments to wording, and also highlighted some points where we are seeking further clarification.

7.2 We are particularly keen to ensure that the new Standard 7 meets the requirements of the Housing (Amendment) (Scotland) Act and does not in any way compromise recent ONS Reclassification. Concern has been raised to SFHA around Standard 7.10, which places a restriction on RSLs providing a security in relation to staff pensions. Whilst we are not aware of any RSLs who are seeking to do so, our concern is more around if this restriction represents more control than is allowed for under the terms of the Act. We have asked Scottish Government for a view on this to ensure that it is not an issue.

7.3 SFHA would highlight that Standard 7 might more appropriately be reflected as statutory guidance rather than a standard. As the standard only applies when an RSL considering “*organisational or constitutional change, or acquisition or disposal of land or assets”,* this means that no RSL can demonstrate compliance unless it is considering one of these activities. If it were instead reflected as guidance, this would also allow each of the different aspects to be covered separately as appropriate.

7.4 It is welcome that at Standard 4.5, requirements around audit committees are not compulsory as originally suggested within the Discussion Paper. SFHA is keen to update its Internal Audit guidance and our guidance on Self Assessment against the Regulatory Standards to reflect revised standards. As highlighted earlier in this

response, we wish to ensure that this is complementary to any guidance produced as part of the SHR’s advisory Toolkit.

7.5 The table at Appendix 1 also highlights where there is some crossover between standards, and consideration could be given to consolidating to reduce duplication. We have suggested that standards 7.4 and 7.6 be removed to streamline the new standard 7, as these restate earlier requirements, or (in the case of 7.6) refer to OSCR requirements rather than those of the SHR.

7.6 SFHA broadly welcomes the minor revisions to the Constitutional Standards, and we will be reviewing our Model Rules for members when the new Framework is finalised in early 2019. SFHA is already in discussions with TC Young and the SHR regarding this. One aspect of the review will be to ensure that all Constitutional Standards match up both with requirements under both the Co-operative and Communities Benefits Societies Act 2014, the General Data Protection Regulations and equalities and human rights legislation.

7.7 This is in particular reference to concerns that have been raised about the pre-existing constitutional requirement to make members’ names publically available (Constitutional Standard 26). SFHA is taking this forward with the SHR and is suggesting that this requirement be narrowed to reflect the wording of the Co-operative and Community Benefits Societies Act, and instead state: *“names of the members must be accessible to any other member or anyone with an interest in the RSL’s funds”*

**8. Charter Indicators**

8.1 It was helpful that SHR shared with SFHA its initial Social Housing Charter Indicator proposals in July this year. We were then able to circulate these to our practitioner forums for comment in advance of a separate meeting between the SHR, SFHA and members of the forums that month.

8.2 SFHA welcomes that a number of points raised in that meeting have been taken on board in the revised indicators, e.g. there is no longer a proposal for an indicator on ratio of planned to reactive maintenance; and there is no longer an indicator on compromise agreements (there is instead an additional regulatory standard relating to this).

8.3 Another amendment SFHA broadly welcomes was to the anti-social behaviour indicator (indicator 15 in the revised list). In July, it was proposed that this would be amended to state *“% of tenants satisfied with how landlord handles ASB cases.”* This would have been an inaccurate measure of performance as only those who receive the outcome they desired would be satisfied - and this is often not the case. Instead, this has now been revised to state: *“Percentage of anti-social behaviour cases reported in the last year which were resolved.”* This removes reference to “*within locally agreed targets*” that is in the current indicator. Whilst there will never be a perfect measure in this area, this is an improvement and simplifies the indicator.

8.4 SFHA broadly supports the reduction of the number of indicators from 74 to 44, although it is noted that 12 of these will still be submitted as part of the organisational details section of the Portal. Some organisations have indicated that they will continue to collect some of the data that will be removed from the ARC, for their own internal purposes, including:

* Indicator 9 “percentage of tenants satisfied with the standard of their home when moving in”;
* Indicator 14 “percentage of repairs appointments kept”;
* C9 “types of tenancies granted for lets during the reporting year”;
* C10 “housing lists”;
* C12 “number of notices of proceedings and court action initiated”; and
* C13 “average number of reactive repairs completed per property”.

8.5 The new Indicator 22 regarding homelessness for RSLs only, i.e. “*the percentage of referrals under Section 5 that result in an offer, and the percentage of those offers that result in a let*” is helpful in that this will also reflect when offers are turned down. However, Section 5 was never intended to be a performance indicator on homelessness – and this indicator will not be an effective measure in areas with common housing registers that do not use Section 5 referrals – such as Edinburgh.

8.6 The indicator that SFHA has received most feedback regarding is Indicator 10: *“Percentage of reactive repairs carried out in the last year completed right first time.”*  This has consistently been one of the most unpopular indicators with RSLs since the inception of the ARC, due to this being extremely difficult to measure. Whilst SFHA understands that there is a direct reference to “right first time” within the Charter, it does not appear that this indicator is providing a meaningful measure of performance. Ideally, SFHA would like to see this indicator removed, but at the very least some more in depth guidance to ensure consistency of approach would be welcomed.

8.7 SFHA is concerned about the revisions to Indicator 13 “*Percentage of tenants satisfied with the neighbourhood they live in”*. This has amended the previous wording that referred to satisfaction with *“the management of the neighbourhood they live in”.* SFHA disagrees with this change, as satisfaction with the neighbourhood is often out with the RSL’s control. Even with the previous wording, responsibility for many neighbourhood management services lie with the local authority – e.g. bin collection, litter uplift. It would be helpful if this indicator focused only on the aspects of neighbourhood management within the RSL’s control.

8.8 Indicator 16 “*Percentage of new tenancies sustained for more than a year, by source of let,” is* unchanged but is another that we received a number of comments regarding. This is not an accurate measure of RSL performance, as it does not take into account the reason for the tenancy ending. This could include positive reasons such as moving in with a partner, mutual exchanges or transfers, or reasons beyond anyone’s control such as death. It would be helpful if this could be reflected in the indicator.

8.9 Indicator 18 “*number of households currently waiting for adaptations to home*” and “*Total cost of adaptations completed in the year*”, could helpfully be split so that they look at both major and minor adaptations. Clearly the cost and time taken to complete will vary significantly depending on the complexity of the adaptation.

8.10 With all of the indicators, especially those that are new or revised, the accompanying technical guidance will be essential to ensuring consistency of collection across the sector. The SFHA looks forward to inputting to this as it is developed, but concern has been highlighted that RSLs will have little time between the technical guidance being finalised and when RSLs have to begin collecting on the revised indicators. It would be helpful if the SHR could indicate a likely timeframe for the revision of this guidance, and ensures that this is finalised well in advance of April 2019.

**9. Engagement Plans and Regulatory Status**

9.1 SFHA welcomes that an Engagement Plan will now be published for all landlords. Whilst it is acknowledged that many Engagement Plans might be relatively similar – with the SHR having some standard requirements of all landlords – we understand that it is important to ensure each landlord is aware of what it required of them by the SHR.

9.2 The current system of only publishing regulation plans for those that are assessed as “medium” or “high” engagement creates a false perception that there is “something wrong” at these organisations – when in most cases the level of engagement does not relate in any way to performance. For instance, those organisations categorised as “systemic” will always be at least medium engagement. The new approach of publishing an Engagement Plan for every RSL, and abolishing the “low”, “medium” and “high” engagement labels will go some way to addressing this issue.

9.3 SFHA also broadly supports the proposal to publish a separate regulatory status for each organisation, of either “compliant”, “working towards compliance”, or “statutory intervention”. SFHA understands that the vast majority of landlords will be assessed as “compliant”, but it is the second category, “working towards compliance” that has generated most comment from our members during the consultation period.

9.4 More clarity around when and how an organisation would be assessed in this way would be welcomed. The SHR has indicated that very few landlords would currently come under this category, estimating approximately 10-15, and that this category would be reserved only for organisations where there are serious issues that need to be resolved. Whilst this is helpful, it is important that the regulatory status categories are framed in a way that is fully understood by tenants, lenders and RSLs themselves. It is essential that the SHR is proportionate in its assessment of regulatory status, and the reasons that any RSL should fall under this category are clearly material in nature.

9.5 It has been highlighted by the SHR that lenders are more comfortable with this approach than the previous approach. Lenders felt that low engagement organisations appeared on the surface to have little regulatory oversight – especially as their regulation plan was not published. However, the “working towards compliance” category is also potentially quite vague and more difficult to describe – which we hope

would not be problematic with lenders. Whilst we appreciate that falling under this category would mean the RSL had serious issues to address, we would be keen to ensure that having this regulatory status would not be interpreted as a breach in loan covenants.

9.6 At 5.27 in the Framework, it is highlighted that where the SHR has new information and requires to review the regulatory status of an RSL – it will attach an “Under Review” indicator to the status. This might create the wrong impression publically, particularly if it is only minor assurance that the SHR requires. We would suggest that the regulatory status of the RSL remains unchanged during any such review, and that the assurance requested is instead reflected in the RSLs published engagement plan.

9.7 It is noted that the term “systemic organisations” will remain, and these RSLs will be subject to the same extra submission requirements and continual engagement. During the consultation process, SHR had asked for suggestions to replace the term “systemic”. Whilst SFHA acknowledges that the term is not a perfect one, it is now well established and recognised within the sector. We therefore would suggest retaining the term at this time.

**10. SHR Toolkit**

10.1 As highlighted throughout this response, it is welcomed that the SHR will be producing a Toolkit comprising of advisory guidance for the sector. SFHA will be involved in its development, and would agree that the Assurance Statement requirements, and requirements around Equalities, should be early priorities as part of this.

10.2 It is essential that there is direct RSL involvement in the development of this guidance, and the existing small Working Group of members and stakeholders would be a helpful forum for this. This group would perhaps benefit from input from other sectors, such as those where Assurance Statements are already established. This could help to illustrate existing good practice, as well as demonstrating how such statements can be beneficial for an organisation.

10.3 Whistleblowing, Business Planning and board skills assessment are also highlighted in the consultation document as potential areas that will be developed as part of this. The SHR Business Planning guidance dates back to 2015, and the Whistleblowing fact sheets back to December 2015 - so both may benefit from an update and inclusion of good practice examples (where appropriate) within the Toolkit.

10.4 There will unquestionably be a crossover between guidance SFHA has (and is intending) to produce, and that which will be contained in the Toolkit. It is helpful that the SHR has highlighted an intention as part of this Toolkit to sign post to existing guidance – including SFHA’s. We have produced a comprehensive series of [governance guidance](https://www.sfha.co.uk/our-work/policy-category/governance-and-regulation/sub-category/governance) for our members in recent years, which would all be relevant for this purpose. This includes:

* + SFHA Model Rules
  + Internal Audit guidance
  + Self-Assessment Against Regulatory Standards
  + Governing body member Succession Planning and Recruitment guidance
  + Governing body member review guidance
  + Role Descriptions for governing body members
  + Code of Conduct for governing body members
  + Code of Conduct for staff
  + Model Entitlements Payments and Benefits Policy

10.5 As stated earlier in this response, we are keen to ensure that there is limited duplication and repetition between SFHA guidance and that developed by the SHR within the Toolkit, so that our current and future guidance will complement this.

**11. Taking Action**

11.1 Section 6 of the revised Framework – outlining the basis and nature of regulatory intervention – remains largely unchanged, but SFHA has received a number of comments from members relating to this part of the Framework. These largely follow on from points we raised in our Discussion Paper response earlier in April 2018.

11.2 The cost of intervention is an area that continues to concern members. To ensure transparency and make this clearer, it would be helpful if all associated costs with any intervention could be outlined clearly. This would include a breakdown of costs for any statutory managers or appointees; as well as any costs associated with breaches of loan covenants resulting in intervention. This could potentially form part of the final Statutory Intervention report, but it would be more helpful if methods could be explored to estimate costs at the onset of any intervention.

11.3 In regard to statutory managers, it would be helpful to have a more tightly defined role description and outline of the nature of the appointment at the onset for every specific appointment. Through this, it may therefore be possible to more accurately estimate the term and cost of the appointment at that stage. It was also felt that the criteria to be a statutory manager is too restrictive and does not allow capable and willing individuals from within the sector to be eligible for the role.

11.4 Within the Housing (Amendment) (Scotland) Act 2018, the reasons that a statutory manager can be appointed are limited to cases where a failure has occurred, and the appointment can *“only be for so long as is necessary to rectify the failure which gave rise to the manager’s appointment*.” SFHA is keen to ensure that this is reflected in practice, and would be keen to see this stated in the Framework. This was one of the key points in securing the reversal of the ONS reclassification decision.

11.5 Whilst we do not suggest that any statutory intervention was unnecessarily prolonged, it clearly has to be managed carefully and sensitively, in order that any perceived conflict of interest in terms of the length of a statutory manager appointment is managed appropriately and transparently. We would recommend that the role and appointment of a statutory manager is reviewed on a case by case basis, to reduce the associated

costs, including the use where possible of local consultancy expertise or HAs with the required expertise and capacity.

11.6 Whilst there is information on the SHR website about the experience and skills required to be a statutory manager – including a list of approved statutory managers – there is little similar information regarding statutory appointees. This would be a helpful addition to the Framework to ensure transparency. A list of approved appointees would also have the added benefit of providing a potential source for organisations seeking to co-opt to their governing body or seeking peer support. It is noted that the SHR has drafted an Information Note for statutory appointees - which it has shared with SFHA, asking for comment by early January 2019 – and SFHA will be pleased to provide feedback on this document.

11.7 As we highlighted in our response to the discussion paper, the cost of non-statutory engagement with RSLs, can also be costly to the tenant. For instance, when the SHR instructs an investigation, this can be extremely expensive. The aims of any engagement must also have clear and measurable objectives at the onset, and there must be a consistent approach. We would like to see this reflected within the Framework.

11.8 It is highlighted in the Framework that the SHR also retains powers to require an Improvement Plan or to issue an Enforcement Notice to an RSL. SFHA suggests that these powers could potentially be used prior to escalation to appointing a statutory manager/appointee. This might be one method of reducing cost. However, prior to using any intervention powers, it would be appropriate for the RSL to be given a clear and transparent opportunity to rectify the issue where possible. This would be the equivalent of a “final warning” stage prior to intervention, whereby the RSL is made aware if they do not make the improvements required it will result in intervention.

11.9 The timing of Statutory Intervention reports can be problematic, as it comes many months after the issues have been resolved, and publically re-opens old wounds. This leaves the organisation having to deal with press enquiries and tenant concerns all over again, having already taken the necessary steps to move forward. SFHA asks that this report be published as close to the conclusion of the intervention as possible.

11.10 In terms of content, the intervention reports could usefully focus on what RSLs should be asking themselves in order to ensure that they could never end up in a similar situation. We also suggest at 11.2 that this outline cost of the process where possible. The recent Lessons Learned from Statutory Intervention[[10]](#footnote-10) issued by the SHR is useful in that it brings together some common themes emerging from interventions, but it may be helpful to explore this theme in more depth.

11.11 It is noted that this section briefly outlines the SHR’s approach to whistleblowing but does not refer to its previously published [whistleblowing fact sheet](https://www.scottishhousingregulator.gov.uk/publications/whistleblowing-factsheets). SFHA recognises

that the SHR is intending to include further guidance on whistleblowing within its Toolkit, but it would be helpful to have clarity on the status of this document.

**12.** **Appeals and Reviews**

12.1Since the onset of the independent SHR in 2012, SFHA has argued for a truly independent (of SHR) appeals process. We acknowledge that, in order to achieve this, legislative change would be required, which places any meaningful change in this regard out with the SHR’s gift.

12.2 SFHA is aware that the appeals process has recently been used for the first time, and that this appeal was to challenge a statutory intervention by the SHR. It is helpful that the appeals panel decision was published, but it might be useful to expand on this, especially if the SHR could take a view in terms of how the process worked in practice, and if any tweaks are necessary at this stage.

12.3 As noted at 11.8, it would be helpful if it were possible to have some form of “final warning” stage prior to intervention, whereby the RSL is made aware if they do not make the improvements required it will result in intervention. In addition to this, at the moment there is no point where an RSL could appeal intervention, until the intervention has already began. We suggest that this needs to be built into the appeal process, and the RSL given an opportunity to lodge an appeal when it is informed of the intervention, and prior to it beginning.

**13. Thematic Work**

13.1 Chapter 7 outlines that the SHR will continue to carry out thematic studies, and particularly references equalities as an area that it will prioritise as part of this. SFHA supported the continuation of thematic work as part of its response to the discussion paper, and continues to do so. These represent an excellent method of identifying good practice examples throughout the sector, as well as any areas for improvement. Equalities would be an appropriate topic to explore in this regard, particularly in light of the new requirements.

13.2 We would suggest that drafts of thematic study reports are considered by a working group of RSLs, including those involved in the study, as appropriate.

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**December 2018**

1. SFHA (April 2018) SFHA Response to Scottish Housing Regulator discussion paper, available [here](https://www.sfha.co.uk/mediaLibrary/other/english/22726.pdf) [↑](#footnote-ref-1)
2. SFHA and GWSF (Sep 2016) Open All Hours? A Model Publication Framework for Housing Associations and Co-operatives, available [here](https://www.sfha.co.uk/mediaLibrary/other/english/2467.pdf) [↑](#footnote-ref-2)
3. IPSOS Mori (2016) Conducting Tenant Satisfaction Surveys – A Guide, available [here](https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Charter%20-%20Ipsos%20Mori%20work%20-%20updated%20survey%20guide%20-%20FINAL%20-%20FOR%20WEB.pdf) [↑](#footnote-ref-3)
4. Scottish Housing Regulator (Aug 2017) Self-assessing Against Regulatory Standards – A Thematic Inquiry available [here](https://www.scottishhousingregulator.gov.uk/publications/self-assessing-against-regulatory-standards-thematic-inquiry-august-2017) [↑](#footnote-ref-4)
5. Scottish Housing Regulator (Dec 2015) Recommended Practice: Business Planning, available [here](https://www.scottishhousingregulator.gov.uk/publications/recommended-practice-business-planning-december-2015) [↑](#footnote-ref-5)
6. Scottish Housing Regulator (Aug 2015) Recommended Practice: Treasury Management, available [here](https://www.scottishhousingregulator.gov.uk/publications/treasury-management-%E2%80%93-revised-regulatory-guidance-2015) [↑](#footnote-ref-6)
7. Scottish Housing Regulator (Nov 2018) Notifiable Events Guidance (Tracked Changes), available [here](https://www.sfha.co.uk/mediaLibrary/other/english/30952.pdf) [↑](#footnote-ref-7)
8. SFHA (June 2018) Self-Assessment Against Regulatory Standards, available [here](https://www.sfha.co.uk/our-work/policy-category/governance-and-regulation/sub-category/governance/policy-article/sfha-self-assessment-guidance-now-available) [↑](#footnote-ref-8)
9. SFHA (March 2018) Internal Audit Guidance, available [here](https://www.sfha.co.uk/our-work/policy-category/governance-and-regulation/sub-category/governance/policy-article/sfha-internal-audit-guidance-now-available) [↑](#footnote-ref-9)
10. Scottish Housing Regulator (Dec 2018) Lessons Learned From Statutory Intervention, available [here](https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Lessons%20from%20Statutory%20Intervention.pdf) [↑](#footnote-ref-10)