



THE SCOTTISH
HOUSING
REGULATOR

GUIDANCE NOTE

To: All Registered Social Landlords (RSLs)

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

Issued by: The Scottish Housing Regulator

Ref no: SHR 15

Date: April 2008 (First issued April 2006)

Summary

Purpose

This guidance:

- a) sets out how the Scottish Housing Regulator will exercise, on behalf of Scottish Ministers, powers under Section 68A of the Housing (Scotland) Act 2001. This Section of the Act relates to the power to direct certain registered social landlords to delegate housing management functions to another RSL, where certain conditions are met; and
- b) provides details to those RSLs that may be subject to direction how matters covered by the exercise of powers under Section 68A of the Act will be conducted.

The guidance includes:

- for reference, the terms of Section 68A of the Act at appendix 1;
- for reference, the terms of the first Direction issued by Scottish Ministers at appendix 2;

- for reference, an example of the form for revoking the direction at appendix 3
- a glossary of terms used in this guidance at appendix 4.

Powers under Section 68A of the Housing (Scotland) Act 2001

Section 68A of the Housing (Scotland) Act 2001 (referred to as “the Act” throughout this guidance) gives Scottish Ministers the power to direct certain registered social landlords (RSL1) to delegate housing management functions to another RSL (RSL2) on such terms as Scottish Ministers may specify, where certain conditions are met. This power was created through legislative amendment in the Housing (Scotland) Act 2006, Section 177.

The Scottish Housing Regulator acts on behalf of Scottish Ministers. As a matter of general policy, Scottish Ministers have, therefore, delegated to the regulator, in the Regulatory Code of Practice, all aspects of the regulation of registered social landlords.

Scottish Ministers will issue the first set of directions and, thereafter, the Scottish Housing Regulator, acting on behalf of Scottish Ministers, will revoke existing directions or issue subsequent directions.

This guidance sets out how the regulator will apply the new Section 68A power on behalf of Ministers and provides details to those RSLs who may be subject to direction as to their responsibilities under the legislation. The direction, once issued, applies to the RSLs specified in the direction and they are required to comply with the terms of the direction and sign the Remodelled Management Agreement.

Application of the guidance

In applying the guidance, reviewing arrangements under existing directions and exercising powers under Section 68A of the Act the Scottish Housing Regulator will act in a way best calculated to achieve the statutory purposes underlying that provision, namely to ensure that there can be local management of houses and that ballot commitments made to tenants can be fulfilled.

The power to direct is time-limited to five years from the commencement of the legislative provision which was 29 January 2006.

Interpretation of the guidance

This guidance should be read in conjunction with all other applicable guidance as issued and amended from time to time – in particular, but not exclusively, the following:

- the consent process for any RSL wishing to transfer, amalgamate or become part of a group structure;
- the consent process for rule changes; and
- Performance Standards for social landlords and homelessness functions.

For any references to Communities Scotland (or Scottish Homes) please read the Scottish Housing Regulator.

If you have any questions about this guidance, you should direct them to:

The Scottish Housing Regulator
Highlander House
58 Waterloo Street
GLASGOW
G2 7DA
Tel: 0141 271 3810
Email: shr@scottishhousingregulator.gsi.gov.uk

1. Introduction

- 1.1 The power to direct certain RSLs to delegate functions can be exercised only in relation to the three RSL whole stock transfer organisations - Glasgow Housing Association, Dumfries and Galloway Housing Partnership and Scottish Borders Housing Association - where stock was transferred from the local authorities before the legislative amendment came into force on 29 January 2006. This guidance sets out how the power will be exercised with regard to Glasgow Housing Association and the RSLs that will be directed to carry out GHA's housing management functions.
- 1.2 The power to direct certain RSLs to delegate functions creates a legislative means to ensure that Glasgow Housing Association (GHA) is able to fulfil the ballot commitment made to its tenants that local management of housing would be devolved to the designated Local Housing Organisations (LHOs) between the first stage transfer of stock from the local authority to GHA and second stage transfers (SST). LHOs are currently registered with Communities Scotland and their relationship with GHA is governed by an Interim Management Agreement.
- 1.3 This guidance sets out the specific parameters within which the power of direction would normally be exercised. The Scottish Ministers will issue the first directions to GHA and the RSL2s as the current Interim Management Agreements come to an end. Thereafter, there may be further exercise of powers under Section 68A of the Act as and when these directions require to be revoked and new directions will be issued by Communities Scotland on behalf of the Scottish Ministers when appropriate.
- 1.4 The terms of the delegation of housing management functions can be determined by Scottish Ministers. In practice, the detail of the delegation of functions and the management of that arrangement will be based on the Remodelled Management Agreement (RMA). The direction is inextricably linked to the implementation of the RMA between RSL1 and RSL2. It will remain a matter for GHA's Board to determine the operational policies that underpin the working of the RMAs.
- 1.5 Where there are any concerns or difficulties to be worked through in the implementation of the RMA, this should be addressed in line with the provisions for such in the RMA between the RSLs involved, potentially with the assistance of other parties as provided for in the RMA. The regulator will not be involved in disputes arising from the implementation of the RMA. Any such disputes will require to be dealt with in line with the dispute resolution process set out in the RMA and the regulator will not act as

an appeal panel. Basing the delegation of functions on the RMA will ensure that the proper accountabilities are maintained. GHA, and its Board, is accountable for the standard of services delivered to its tenants and the individual RSL2s are accountable to GHA for their performance in fulfilling the terms of the RMA. In considering whether to revoke the direction, the regulator will have regard to the process which has led to the decision to request revocation.

- 1.6 For reference, Section 68A of the Act is reproduced in Appendix 1, the terms of the first Direction issued by Scottish Ministers is at Appendix 2, the proforma for the revocation of direction is at Appendix 3, and a glossary of terms used in this guidance is attached at Appendix 4.
- 1.7 The Direction will automatically terminate under two specific circumstances, either
- At the end of the term of the agreement; or
 - Where a notice of acceleration of the outstanding debt due pursuant to the Loan Facility Agreement [as defined in the Management Agreement] is given.
- These are the only two circumstances where the Direction will cease without being revoked. When the Direction ceases that terminates the RMA.
- 1.8 The RMA sets out a process for resolving disputes between GHA and LHOs, including reference of the dispute to an independent expert. This allows GHA to suspend the provision of the delegated housing management functions until such times as the independent expert makes a determination. Where GHA suspends the provision of all the delegated housing management functions, it must notify Communities Scotland's Regulation and Inspection Division, in writing, of its intention to do so, in advance of the suspension. GHA must also provide details of the proposed arrangements for delivering the functions, pending the independent expert's determination. It will not be Communities Scotland's role to prejudge the outcome of the independent expert's determination. However, where there are other regulatory concerns, Communities Scotland may consider what further regulatory support may be required at that time.

2. Revoking a direction

- 2.1 The terms under which GHA or RSL2 can request that Communities Scotland considers revoking a direction are set out in the Remodelled Management Agreement . When GHA seeks a revocation, it should advise the LHO(s) concerned. Similarly, when an

LHO seeks revocation, the LHO should advise GHA. Communities Scotland would normally revoke a direction where:

- a) GHA no longer owns the stock;
- b) either GHA or RSL2 becomes insolvent;
- c) either GHA or RSL2 has a receiver appointed;
- d) either GHA or RSL2 makes an arrangement with its creditors (not being an arrangement entered into in the normal course of business and not relating to insolvency);
- e) either GHA or RSL2 passes a resolution for voluntary winding up;
- f) either GHA or RSL2 ceases to be a registered social landlord; or
- g) the governing body or, where the LHO is a sub committee of a governing body, that sub committee, ceases to comprise a majority of tenants of the GHA and this situation remains unremedied for a period of 3 months;
- h) RSL 2 has been subject to an inquiry under Part 4 of Schedule 7 of the Housing (Scotland) Act 2001 by Communities Scotland and that inquiry has confirmed misconduct or mismanagement in the affairs of the LHO;
- i) RSL 2' s performance is poor to the extent that there is a significant and adverse effect on the financial stability of GHA in seeking to implement its approved business plan and GHA requests that the direction is revoked; or
- j) There has been a compulsory change event or voluntary change event (as defined in the RMA) and the delegated housing management functions cannot be carried out or any increased payment cannot be made, and GHA requests that the direction is revoked;
- k) RSL2 is in breach of the terms of the RMA (including a breach of a KPI), the breach is referred to the dispute resolution process of the RMA, the independent expert has made a determination that there has been a material breach and GHA or RSL2 requests that the direction is revoked;
- l) RSL2 refuses to implement a housing management policy agreed by GHA's board, following appropriate consultation and where this has a material impact on GHA's ability to deliver its approved Business Plan;

and there is no conflict with existing guidance or any law, evidence has been provided to our reasonable satisfaction, and subject to any other information being taken into account.

2.2 Communities Scotland may revoke a direction where:

- a) there are significant changes to the LHO network which affect the individual RSL2 and the direction (for example, the merger of RSL2s or more comprehensive restructuring of the LHO network); or
- b) GHA reasonably believes the continued delegation of functions to the LHO will have a significant and adverse effect on its financial stability in seeking to implement the approved business plan;

and GHA can substantiate to our reasonable satisfaction that these concerns are justified.

2.3 Communities Scotland may revoke a direction where it:

- a) has begun an inquiry under Part 4 of Schedule 7 of the Act in respect of an LHO;
- b) has significant concerns about the management, performance or governance of an RSL and believes it would be inappropriate for the LHO to perform delegated housing management functions under an RMA; or
- c) believes it is necessary or helpful to facilitate second stage transfers.

2.4 Where GHA fails to comply with a determination of the independent expert (as defined in the RMA) the RSL2 may request Communities Scotland to revoke the direction. Where the RSL2 fails to comply with the determination of an independent expert (as defined in the RMA) GHA or RSL2 may request Communities Scotland to revoke the direction and Communities Scotland would normally consent to the revocation.

2.5 GHA or RSL2 must inform Communities Scotland of a force majeure event (as defined in the RMA) which affects the delivery of the delegated housing management functions. Communities Scotland will consider revoking the direction on such terms as may be necessary to take account of the effect.

2.6. Communities Scotland will issue the revocation of direction to both parties within ten working days of the receipt of all necessary information about the revocation event. The information required will vary depending on the reasons for revocation of the direction and will be determined by the terms of the RMA. Where there is a dispute around performance, GHA and RSL2 will require to follow the dispute resolution process set out in the RMA and demonstrate to Communities Scotland that this process has been

properly followed. Communities Scotland will have regard to the evidence which demonstrates that this process has been properly followed, to be satisfied that there are grounds for the revocation of the direction.

2.7 Given that the arrangements between GHA and the LHO network are interim and are only intended to be in place until second stage transfer, then the directions will be subject to revocation as the SST process and the LHO network evolves and transfers are achieved. The power to issue directions, and hence revoke directions, however, only lasts for five years.

2.8 During this time, the existing network can change in a number of ways:

- LHOs merging with each other or with other RSLs;
- amalgamations of two or more LHOs; or
- LHOs forming part of a group structure.

Separate regulatory guidance is available about Communities Scotland's consent process for any RSL wishing to transfer, amalgamate or become part of a group structure. GHA and the RSL2 must inform Communities Scotland about the effect on the existing direction where the directed RSL2 is taking forward a transfer, amalgamation or group structure.

2.9 Where second stage transfer is about to be completed to a RSL2, GHA should inform Communities Scotland of the timescale for the SST to be completed so that the published direction can be revoked with effect from the date of the transfer.

2.10 For the avoidance of doubt, where the RMA is amended for all LHOs/RSL2s as a result of a compulsory or voluntary change event (as defined in the RMA) then there will be no requirement for the individual directions to be revoked or reissued as long as such terms have been notified to and agreed to by the Scottish Ministers.

3. Issuing new directions

3.1 Where GHA or RSL 2 requests that Communities Scotland considers revoking an

existing direction, it must notify Communities Scotland in writing at least fifteen working days in advance of when it would seek to have the direction revoked. Communities Scotland will have regard to the provisions of the RMA in relation to revocation of directions and as set out in section 2 of this guidance.

- 3.2 GHA must provide Communities Scotland with the information necessary for a direction to be revoked and, where appropriate, for a new direction to be issued. Communities Scotland will consider and determine whether a new direction requires to be issued and will, if satisfied, issue the required notification revoking the direction and, if appropriate issue a new direction to the affected parties within ten working days of receiving all necessary information.
- 3.3 In considering whether or not a new direction should be issued, GHA must demonstrate to Communities Scotland's reasonable satisfaction that:
 - a) suitable local management arrangements can be put in place;
 - b) tenants have been advised of any changes;
 - c) GHA has considered whether another existing LHO could be delegated the housing management functions; and
 - d) any alternative RSL2 is competent to undertake delegated housing management functions.
- 3.4 The delegated housing management functions shall be those set out in the Remodelled Management Agreement between GHA and individual Local Housing Organisations (LHOs). Communities Scotland on behalf of Scottish Ministers will issue a direction (Appendix 3) to GHA to authorise the specified RSL2 to exercise the housing management functions contained in the Remodelled Management Agreement attached to the direction on such terms as are specified in the RMA.
- 3.5 The direction is binding on both parties and comes into effect on the date specified in the notice and remains in force for 3 years or until a notice of acceleration of debt in terms of the Loan Facility Agreement is given or GHA no longer owns the stock or until it is revoked by Communities Scotland.
- 3.6 GHA may not, while this direction is in force, authorise any person other than the designated RSL2 to exercise the functions set out in the RMA. The notice requires RSL2 to carry out those delegated housing management functions to the terms and

standards specified in the RMA. Where GHA suspends the agreement, it must formally notify Communities Scotland's Regulation and Inspection Division before issuing the suspension.

4. Exercising Powers

4.1 Once the first set of directions have been issued, Communities Scotland's Regulation and Inspection Division will revoke existing directions and issue new directions, on behalf of Scottish Ministers. When considering the exercise of powers under Section 68A of the Act, Communities Scotland will:

- a) act in a way best calculated to achieve the statutory purposes underlying that provision, namely to ensure that there can be local management of houses and that ballot commitments made to tenants can be fulfilled;
- b) have regard to this guidance;
- c) be objective, impartial and fair;
- d) provide opportunities for all relevant parties to the direction to put their case forward;
- e) be clear and transparent in the way it makes decisions;
- f) substantiate its decisions from a sound evidence base; and
- g) rely on the findings of a robust dispute resolution process.

4.2 In making decisions in relation to the powers under the Act Communities Scotland will set out:

- a) the decision made, as clearly as possible;
- b) the reasons for the decision;
- c) the evidence taken into consideration; and
- d) any other factors relevant to the decision.

5 Challenging Decisions

5.1 If a party to the direction is unhappy about a decision taken by Communities Scotland in relation to exercising or not exercising powers on behalf of Ministers under Section 68A of the Act, it may request an appeal of the decision in writing, within 10 working days of issue of the decision, to the Director of Regulation and Inspection. This appeal would take the form of an administrative review of the decision.

5.2 The appeal should indicate:

- the decision that is being challenged;
- the basis on which the review is requested, with relevant supporting information and evidence; and
- that it has been sanctioned by the RSL's governing body, or chairperson under delegated authority.

5.3 The Director of Regulation and Inspection will review the case and provide a detailed response to the appeal within 10 working days of receipt of the written appeal.

5.4 If parties to the direction remain unsatisfied about the outcome of the first stage appeal, the RSL may make a further appeal to Communities Scotland's Regulation Board within 10 working days of receipt of the Director's decision.

5.5 The role of the Regulation Board will be to make an independent assessment of:

- a) whether the Regulation and Inspection Division reached its decision in accordance with this guidance; and
- b) whether the Director of Regulation and Inspection dealt fairly with the first stage of the appeal.

5.6 The appeal should fully explain the grounds for the appeal and why the RSL is unhappy with the outcome of the first stage appeal. The Regulation Board will consider the matter at its next available meeting and will either:

- uphold;
- overturn; or
- modify or qualify

the original decision.

5.7 The Regulation Board may, at its discretion, invite the RSL to make representations in person.. It may also invite the Director of Regulation and Inspection to clarify aspects of the decision making process. The Regulation Board will write to the RSL within 5 working days of its meeting setting out its decision. Its decision will be published in

minutes and placed on the Communities Scotland website. The decision of the Regulation Board will be final. Where any of the timescales outlined here cannot be met, appellants will be informed and new timescales set.

- 5.8 This appeals process is not intended to duplicate or replace our complaints process which should be used by people or organisations wishing to complain about the way Communities Scotland has conducted its business.

6 Review

- 6.1 Communities Scotland will liaise with GHA and affected LHOs as appropriate to discuss any issues which arise in relation to the operation of the direction, agreement and guidance.
- 6.2 Communities Scotland will review this guidance in one year and in the meantime will monitor the use of these powers to help inform this review.
- 6.3 Communities Scotland will undertake a formal review of the Direction and remodelled agreement in year 2. GHA and the LHOs will be consulted on the terms of the review. The purpose of this review will be to consider progress with SST and the continuing appropriateness of the management arrangements in place at that time. Scottish Minister will then decide whether it is appropriate to issue further directions on expiry of the duration of the Direction. The terms of the review will be set out in advance.

Appendix 1

Section 68A of the Housing (Scotland) Act 2001

Delegation of functions

68A Power to direct certain registered social landlords to delegate functions

- (1) This subsection applies where –
 - (a) a local authority has disposed of an interest in land to a registered social landlord (“RSL 1”) under section 12 of the 1987 Act before the date on which this section came into force,
 - (b) sections 191 to 193 and section 203(1) of the 1987 Act no longer apply to that local authority by virtue of an order made under section 94 of this Act,
 - (c) the Scottish Ministers are satisfied that it is appropriate for RSL 1 to authorise another registered social landlord to exercise any of RSL 1’s housing management functions if RSL 1 is to manage its houses in a manner which is consistent with the spirit of any notice served on tenants for the purposes of paragraph 3(2) or (3) of schedule 9 in relation to the disposal, and
 - (d) less than 5 years have passed since this section came into force.
- (2) Where subsection (1) applies, the Scottish Ministers may direct RSL 1 to authorise another registered social landlord (“RSL 2”) to exercise such of RSL 1’s housing management functions as may be specified in the direction in place of RSL 1 on such terms, if any, as may be so specified; and both RSL 1 and RSL 2 must comply with the direction.
- (3) RSL 1 may not, while a direction under subsection (2) remains in force, authorise any person other than RSL 2 to exercise any functions specified in the direction.
- (4) A direction made under subsection (2) must be published in such manner as the Scottish Ministers think fit.

- (5) Any authorisation given in pursuance of a direction made under subsection (2) continues to have effect for so long as the direction has effect.
- (6) A direction made under subsection (2) continues to have effect notwithstanding the fact that the power to make that direction has expired by virtue of subsection (1)(d).
- (7) In this section “housing management functions” means functions relating to the management of houses.

Appendix 2

Section 68A of the Housing (Scotland) Act 2001 – Direction

To: Glasgow Housing Association (design)

&

To:(RSL 2) (design)

Glasgow Housing Association is directed to authorise(RSL2) to exercise the housing management functions contained in the Management Agreement attached to this direction on such terms as are specified in the Management Agreement [or on such amended terms as have been notified to and agreed to by the Scottish Ministers].

This direction comes into force on [the effective date] and subsists for a period which is the shorter of –

- (i) three years; or
- (ii) until a notice of acceleration of the outstanding debt due pursuant to the Loan Facility Agreement [as defined in the Management Agreement] is given.

Glasgow Housing Association may not, while this direction is in force, authorise any person other than(RSL2) to exercise the functions specified in the Management Agreement.

.....(RSL2) must carry out those functions to the terms and standards specified in the Management Agreement.

Signed on behalf of the Scottish Ministers.

Appendix 3

Section 68A of the Housing (Scotland) Act 2001 - Revocation of Direction

To: Glasgow Housing Association (RSL 1)

&

To:(RSL 2)

This notice confirms to Glasgow Housing Association and to (RSL 2) that the direction authorising(RSL 2) to exercise delegated housing management functions with effect from is revoked with effect from

Date:

Signed:

Appendix 4

Glossary of Terms used in this guidance. Many of these terms are lifted from the Remodelled Management Agreement and are noted as such.

Communities Scotland

Means the Scottish Ministers acting through Communities Scotland having its main office at Thistle House, 91 Haymarket Terrace, Edinburgh

Compulsory Change Event (RMA)

Means the introduction, amendment, modification, or repeal after the **Start Date** of any:

- (a) **Legislation**, other than any **Legislation** that on the **Start Date** has been published in substantially the same form:
 - (i) in a draft Bill as part of a Government Departmental Consultation paper;
 - (ii) in a Bill;
 - (iii) in a draft statutory instrument; or
 - (iv) as a proposal in the Official Journal of the European Community
- (b) **Statutory Requirement, Required Consent, Applicable Law or Applicable Standards**; or
- (c) Change in interpretation of application by a **Competent Authority** of any **Statutory Requirement, Required Consent, Applicable Law or Applicable Standards**; or
- (d) applicable judgement of a relevant court of law which changes a binding precedent.

Force Majeure Event (RMA)

Means the occurrence after the **Start Date** and the consequences of:

- (a) war, civil war (whether declared or not) or armed conflict arising within and affecting any part of Great Britain; or
- (b) riot, civil commotion or any national strike or lock out other than a strike or lock out solely affecting employees of the **LHO** or the **GHA** as the case may be; or

- (c) nuclear, chemical or biological contamination unless the source or cause of the contamination is the result of any action of the **LHO** or **GHA** as the case may be; or
- (d) any other act of God or meteorological condition, provided that in any such case:
 - (i) Such event is outwith the reasonable control of the **LHO** or the **GHA** as the case may be; and
 - (ii) the **LHO** or the **GHA** as the case may be has used all reasonable endeavours to mitigate such event; and
 - (iii) the **LHO** or the **GHA** as the case may be is not obliged to insure against such event in accordance with Clause 19 (of the RMA)

GHA

Means Glasgow Housing Association

Independent Expert

Means an expert appointed jointly by the parties or nominated in accordance with the relevant procedures in each case in accordance with Clause 12 (of the RMA)

Key Performance Indicator (KPI)

Means those contract standards agreed between the parties to the RMA as the key performance indicators for the measurement of their performance in relation to the housing management functions as set in the schedule of the RMA

LHO

Means Local Housing Organisation

RSL

Means Registered Social Landlord

Remodelled Management Agreement

Means the management agreement between **GHA** and **LHO** for the delivery of Housing Management Services; based on the Interim Management Agreement

The Regulator

Means the Regulation and Inspection division of Communities Scotland

Voluntary Change Event

Means any change to the **services** requested by the **GHA** or the **LHO** in accordance with Clause 11 (of the RMA)