

HOUSING (AMENDMENT) (SCOTLAND) ACT 2018

EXPLANATORY NOTES

THE ACT

Regulatory intervention by Scottish Housing Regulator

Section 1

– Managers appointed by, or on the requirement of, the Scottish Housing Regulator

11. The Regulator has a number of powers under the 2010 Act that allow it to appoint a manager, or to require a social landlord (including an RSL) to appoint a manager.

Section 57 – Appointment of manager for housing activities

12. Under section 57, the Regulator can appoint a person as manager if the Regulator considers the social landlord is, or is at risk of, failing in a number of respects (including that the landlord is failing to achieve a standard or an outcome set out in the Scottish Social Housing Charter¹ or that the landlord is failing to comply with an enforcement notice²) and that a person needs to be appointed to ensure that the social landlord provides housing services to an appropriate standard. While the person can be appointed to manage the social landlord's housing activities generally, or just aspects of its activities, there is no express link between the failure which led to the manager's appointment and the activities the person will manage, nor is there any express provision limiting the period of the manager's appointment (although there is provision in section 59(1) for the Regulator to determine that period).
13. [Section 1\(2\)](#) of the Act amends section 57(1)(b) and (2) so that a person can be appointed as a manager but only to ensure that the social landlord rectifies the failure which the Regulator has identified.
14. [Section 1\(2\)](#) also amends section 57(1)(a) so that a manager can be appointed only where the social landlord has failed or is failing to achieve a standard or outcome set out in the Charter, or in some other respect, rather than where the landlord is only at risk of so failing.
15. In addition, section 1(4) amends section 59 by inserting a new subsection (1A) to limit the period of the manager's appointment to the period necessary to rectify that failure.

Section 58 – Appointment of manager for financial or other affairs

16. Section 58 of the 2010 Act relates to RSLs (and, unlike section 57, not all social landlords) and allows the Regulator to appoint a person as manager where it considers

¹ Prepared and published by the Scottish Ministers under Part 3 of the 2010 Act.

² Issued by the Regulator under section 56 of the 2010 Act.

this is necessary to ensure the RSL manages its financial or other affairs to an appropriate standard.

17. As is the case with section 57, while the person can be appointed to manage the RSL's financial or other affairs generally, or just aspects of those affairs, there is no express link between the failure which led to the manager's appointment and the matters the person will manage, nor is there any express provision limiting the period of the manager's appointment.
18. **Section 1(3)** amends section 58 by inserting a new subsection (1). This replaces the existing subsection and provides that the manager may be appointed only where the RSL is failing or has already failed to comply with a statutory duty (imposed on it by the 2010 Act or by other legislation) or where the RSL has failed or is failing to comply with a requirement imposed on it by the Regulator. Examples of the latter would include where the RSL has failed or is failing to comply with the Regulator's requirement to address a failure to achieve standards of financial management and governance set out in the code of conduct under section 36 of the 2010 Act, or the Regulator's requirement to achieve financial management or governance targets set by the Regulator under section 37 of the 2010 Act.
19. The test for appointing a manager is that the appointment is necessary to rectify the failure identified by the Regulator.
20. New subsection (1A), inserted into section 59 of the 2010 Act by section 1(4), also has the effect of limiting the period of the manager's appointment under section 58 to the period necessary to rectify that failure.

Section 59 – Appointment of managers: supplementary

21. Section 59 of the 2010 Act makes provision about the appointment of managers under sections 57 and 58. In particular, section 59(4) provides that such a manager has a duty to comply with directions about the performance of the manager's functions given to the manager by the Regulator and may be removed if the manager fails to comply with those directions.
22. There is, as before, no express link between the failure that led to the manager's appointment and the functions in relation to which the Regulator may give the manager directions.
23. **Section 1(4)** replaces section 59(4) with new subsections (4) and (4A). While retaining the power of the Regulator to give directions, the duty of the manager to comply with those directions and the Regulator's power to remove a manager who fails to do so, these new subsections provide that the directions can relate only to rectifying the failure that led to the manager's appointment. Subsection (4A)(b) also clarifies that it is the Regulator who can remove a manager who fails to comply with a direction, even where the manager was appointed by the RSL under section 57 or 58 (rather than having been appointed directly by the Regulator).

Section 87 – Manager of registered society: extra powers

24. Part 7 of the 2010 Act covers the Regulator's powers where an RSL is about to become insolvent and includes provision imposing a moratorium on the disposal of an RSL's land³ and giving the Regulator power to appoint, or require the RSL to appoint, an interim manager under section 79 of the Act to manage the RSL's affairs during the moratorium. During the moratorium, the Regulator may make proposals for the future

3 See section 75 of the 2010 Act.

ownership and management of the RSL's land⁴ and may also appoint a manager to implement those proposals under section 85 of the Act.

25. Section 87 of the 2010 Act provides for certain extra powers exercisable by such a manager where the RSL is a registered society,⁵ including the power to make and execute instruments providing for the amalgamation of the society and for transferring the society's engagements.
26. **Section 1(5)** of the Act amends section 87(3) and (4) to update references to sections of the Co-operative and Community Benefit Societies and Credit Unions Act 1965 with references, instead, to the equivalent sections of the Co-operative and Community Benefit Societies Act 2014, which has replaced the 1965 Act. The Act replaces and updates a number of such references to the 1965 Act to ensure that the provisions in the 2010 Act work as they should.⁶

Section 2

– Registered social landlords: removal, suspension and appointment of officers etc.

27. The Regulator has a number of powers under the 2010 Act in relation to the removal and suspension of officers of RSLs, as well as power to appoint replacement and additional officers. In this context, an “officer” of an RSL is generally a person exercising management and control of the RSL (as defined in section 165 of the 2010 Act).⁷
28. Section 60 of the 2010 Act gives the Regulator a general power to remove an officer of an RSL for a number of reasons, including that the officer is impeding the proper management of the RSL because of the officer's absence or other failure to act, which make it inappropriate for the person to be an officer of an RSL.⁸
29. Under section 61 of the 2010 Act, the Regulator has power, when carrying out an inquiry into an RSL, to suspend a “responsible individual” where the Regulator considers one or more of a number of failures have occurred or are occurring. “Responsible individual” is defined by section 63 of the 2010 Act as an officer or agent of the RSL who appears to the Regulator to be responsible for the failure. The failures which may lead to the Regulator suspending a responsible individual include where there has been misconduct or mismanagement of the RSLs financial or other affairs and where the interests of the RSL's tenants need to be protected.⁹
30. The Regulator has power to remove a responsible individual under section 62 of the 2010 Act. The grounds for removing a responsible individual are the same as the grounds for suspension under section 61 of that Act.¹⁰ The Regulator may remove, under section 62, a person suspended under section 61 (although the person need not have been first suspended before being removed under section 62)).

⁴ See sections 80 to 90 of the 2010 Act.

⁵ Section 165 of the 2010 Act defines “registered society” as a society registered under the Co-operative and Community Benefit Societies and Credit Unions Act 1965 (but see now section 6(16) of the Act which amends that definition).

⁶ See, for instance, sections 2(7) and 7(4) of the Act. Although there is provision in the Co-operative and Community Benefit Societies Act 2014 which will “translate” references to repealed provisions into references to the equivalent provisions in the 2014 Act (see schedule 5, paragraph 3), the Government considers it is more helpful to the user of the 2010 Act to update these references in this Act.

⁷ The meaning of “officer” as defined in that section depends on the type of body the RSL is. In the case of an RSL that is a company, “officer” includes a director, manager or secretary of the company (see section 1173 of the Companies Act 2006). In the case of an RSL that is a registered society, “officer” includes a treasurer, secretary or member of the management committee of the society (see section 149 of the Co-operative and Community Benefit Societies Act 2014).

⁸ See section 60(1)(e) of the 2010 Act. Other grounds for removing an officer are set out in section 60(1)(a) to (d) of the 2010 Act and include that the officer is an undischarged bankrupt or is disqualified from being a charity trustee.

⁹ The full grounds for suspension are listed in section 61(1)(a) to (d) and the procedure for and effect of suspending the responsible individual are set out in section 61(2) to (4). Under section 61(5) and (6) it is an offence for a person suspended under section 61 to take, without the Regulator's consent, any action in relation to the management or control of the RSL or any other RSL.

¹⁰ See section 62(1)(a) to (d). The procedure for removal is set out in section 62(2). And section 62(3) and (4) make it an offence for a person removed under section 62(1) to take any action in relation to the management or control of the RSL or any other RSL without the consent of the Regulator.

*These notes relate to the Housing (Amendment) (Scotland) Act 2018 (asp 13)
which received Royal Assent on 6 July 2018*

31. Section 64 of the 2010 Act provides a right of appeal to the Court of Session for a person removed under section 60 or 62 or suspended under section 61.
32. Under section 65 of the 2010 Act, the Regulator has power to appoint an individual as an officer of an RSL either to replace an officer removed under section 60 or 62, where there are no officers, where there are insufficient officers or where the Regulator considers an additional officer is necessary for the proper management of the RSL's financial or other affairs.¹¹
33. [Section 2\(2\)](#) of the Act replaces the ground in section 60(1)(e) for suspending a responsible individual (that, through absence or failure to act, the individual is impeding the proper management of the RSL) with a ground that, because of the individual's absence or failure to act, the RSL is failing to comply with any duty imposed on it by the 2010 Act or with any other statutory duty or is failing to comply with a requirement imposed on the RSL by the Regulator.¹²
34. [Section 2\(3\)](#) amends section 61(1) of the 2010 Act, replacing the grounds for suspension in paragraphs (a) to (c)¹³ with a new ground that the RSL has failed or is failing to comply with its statutory duties, or with any requirement imposed on it by the Regulator, as a result of the responsible individual.¹⁴ That leaves one other ground for the suspension of a responsible individual – that, during a moratorium on the disposal of the RSL's assets under section 75 of the 2010 Act triggered by a person taking a step towards the insolvency of the RSL,¹⁵ the responsible individual is obstructing the Regulator or that the individual is not co-operating with the implementation of proposals about the future ownership and management of the RSL's assets.¹⁶
35. [Section 2\(4\)](#) makes a very similar amendment to section 62, replacing the grounds for removing a responsible individual set out in subsection (1)(a) to (c) with a new ground based on failure by the RSL to comply with statutory duties or with requirements imposed by the Regulator (which the responsible individual has been responsible for, has facilitated or otherwise contributed to, or has been privy to).¹⁷
36. As a result of the changes to sections 61 and 62, the references in section 63 to “misconduct” and to “mismanagement” need to be removed as those terms are no longer used in those sections. Section 2(5) makes this change.
37. [Section 2\(6\)](#) makes a number of changes to section 65 of the 2010 Act. The main change is to replace section 65(1)(d) – which allows the Regulator to appoint an officer of an RSL where the Regulator considers this is necessary for the proper management of the RSL's financial or other affairs – with a new ground for appointing an officer – that it is necessary to rectify a failure by the RSL to comply with a statutory duty or with a requirement imposed on it by the Regulator (such failure in either case relating to the RSL's financial or other affairs).
38. [Section 2\(6\)\(c\)](#) inserts a new subsection (2A) into section 65. This has the effect of limiting the period of appointment of an officer appointed by the Regulator under new section 65(1)(d) to the

11 There are “insufficient officers” where there are currently not enough officers to validly appoint more officers under the RSL's constitution and the constitution does not provide for a way for more officers to be appointed – see section 65(1)(c).

12 Such a requirement imposed by the Regulator may include a requirement to appoint a manager under section 57 of the 2010 Act or a requirement imposed under section 66(2) of that Act directing the RSL not to undertake particular transactions during an inquiry.

13 Those grounds being that there has been misconduct or mismanagement, that the interests of the RSL's tenants need protected and that the RSL's assets need protection.

14 See section 61 as read with section 63.

15 See section 73 of the 2010 Act.

16 See sections 80 to 85 of the 2010 and, in particular section 84(2).

17 Again, see section 62 as read with section 63.

period necessary to rectify the failure which led to the appointment. This change mirrors the change made by section 1 of the Act to section 59 of the 2010 Act.¹⁸ A consequential amendment of section 65(2) is made by subsection (6)(b) and subsection (6)(d) and (e) make consequential amendments so that any reappointment of an officer appointed under new section 65(1)(d) is also limited to the period necessary to rectify the failure which lead to the appointment.

39. Subsection (7) of section 2 updates the definition of “officer” in section 165 of the 2010 Act so that it refers to section 149 of the Co-operative and Community Benefit Societies Act 2014 (the 2014 Act having replaced the pre-existing law on registered societies).

Disposal of land etc. by registered social landlords

Sections 3 and 4

– Disposal of land or other assets by registered social landlord and Special procedure where disposal results in change of landlord

40. Sections 3 and 4 of the Act amend Part 9 and Chapter 1 of Part 10 of the 2010 Act.

Part 9 of the 2010 Act

41. That Part and that Chapter currently make provision about the circumstances in which an RSL can dispose of its land or other assets. In a number of cases, the disposal can proceed only where the RSL has obtained the consent of the Regulator to the disposal.¹⁹ Where that consent is not required, the RSL must notify the Regulator of the disposal.²⁰ And in some of those cases, the RSL must also consult its tenants before making the disposal and must inform the Regulator of the result.²¹

Chapter 1 of Part 10 of the 2010 Act

42. Where a disposal that requires Regulator’s consent would result in a tenant under a Scottish secure tenancy ceasing to be a tenant of the RSL making the disposal, Chapter 1 of Part 10 applies.²²
43. Under this Chapter, the Regulator may refuse consent under section 114 or direct the RSL to consult its tenants in accordance with section 115. Section 115 requires the RSL to carry out a two-step consultation process with its tenants. Following that consultation process, the Regulator may either refuse consent or, subject to “tenant authorisation” being obtained, give conditional consent to the disposal.²³ “Tenant authorisation” is obtained where the Regulator directs the RSL, under section 116(2), to either—
- ballot the tenants who would be affected by the disposal, or
 - seek the written agreement of those tenants to the disposal, and where the majority of those tenants agree to the disposal.

¹⁸ See paragraph 15 above.

¹⁹ See section 107(1) of the 2010 Act. See also section 108 which lists disposals in relation to which the consent of the Regulator is not required.

²⁰ See section 109 of the 2010 Act.

²¹ See section 110 of the 2010 Act.

²² See section 113 of the 2010 Act.

²³ See section 116 of the 2010 Act.

44. Section 118 governs the conduct of the ballot and section 119 how the RSL goes about seeking the written agreement of its tenants. Section 120 makes further provision about the tenants who need to be balloted or whose agreement needs to be sought, in that it provides that the RSL need not ballot or seek agreement from “unaffected tenants” – tenants who will have vacated their houses before the proposed disposal is made.
45. Where the majority of affected tenants agree to the disposal (either by ballot or by agreeing in writing), the Regulator must approve the disposal. See section 121. Where there is no such majority, the Regulator must withdraw its conditional consent²⁴ and the disposal cannot proceed.

Amendments of Parts 9 and 10 of the 2010 Act

46. Essentially, the amendments to Part 9 and Chapter 1 of Part 10 of the 2010 Act made by sections 3 and 4 of the Act have the effect of removing any requirement for Regulator’s consent to a disposal of land or another asset by an RSL, while retaining various existing duties to give the Regulator notice of disposals, to carry out consultation with tenants and, in cases where the disposal would result in a tenant under a Scottish secure tenancy ceasing to be a tenant of the RSL making the disposal, requiring the RSL to seek the agreement of tenants affected by the disposal. The RSL can proceed with the disposal only where the affected tenants agree.
47. [Section 3\(3\)](#) replaces section 107 with a new version of that section. This section covers two types of disposal of land by an RSL.
48. Section 107(1) and (2) provide that an RSL may dispose of land, which isn’t a disposal by way of granting security over the land, and isn’t a disposal by virtue of which a tenant under a Scottish secure tenancy will cease to be a tenant of the RSL, provided the RSL complies with section 110. That section, as amended by section 3(8) of the Act, requires the RSL to consult the tenants of any houses included in the proposed disposal and such other persons as the Regulator directs, before making the proposed disposal. Under section 110(2)(b), the RSL must inform the Regulator of the results of the consultation. Under section 110(3), as inserted by section 3(8)(c) of the Act, the Regulator must issue guidance to RSLs about the tenant consultation under section 110(2) and, under new section 110(4), RSLs must have regard to any guidance issued by the Regulator.
49. In addition to consulting tenants before the disposal, the RSL must also notify the Regulator as soon as reasonably practicable after the disposal under section 109(1) (as substituted by section 3(6) of the Act).
50. Section 107 covers another type of disposal, namely, a disposal of land which will result in a tenant under a Scottish secure tenancy ceasing to be a tenant of the RSL. See section 107(4).
51. An RSL may make such a disposal only if the RSL has complied with sections 115 to 120 of Chapter 1 of Part 10 of the 2010 Act (as amended by section 4 of the Act) and if the majority of the affected tenants agree to the disposal taking place. The RSL must also give notice to the Regulator of the actual disposal as soon as reasonably practicable after it has taken place and, in any case, no later than 28 days after that event (see section 109(1)).²⁵
52. Finally, section 107(5) provides that section 107 does not apply to a disposal of a type mentioned in section 108, as is currently the case under section 107(1)(b) of the 2010 Act.
53. [Section 4](#)

²⁴ See section 116(1)(b) as read with section 121(1)(b) of the 2010 Act.

²⁵ Although section 109(2)(b) of the 2010 Act (as amended by section 3(6) of the Act) allows the Regulator to extend this period of 28 days.

of the Act amends Chapter 1 of Part 10, which currently applies where an RSL proposes to dispose of land and where the disposal will result in a tenant under a Scottish secure tenancy ceasing to be a tenant of the RSL (that is, in the circumstance now defined in section 107(4)).

54. The current role of the Regulator is largely removed so that consent is no longer required. Section 4(2) makes the necessary changes to section 113 of the 2010 Act to reflect these changes. As the Regulator no longer consents to the disposal, and no longer makes an initial decision, section 114 is no longer necessary and is repealed by section 4(3) of the Act.
55. Section 115 – the two-fold consultation with tenants on the proposed disposal – is retained but amended by section 4(4) to remove references to directions given by the Regulator under section 114. In addition, section 115(2)(a)(ii) is removed as objections by tenants no longer serve a purpose. Previously they would have been communicated to the Regulator and may have had an influence on the Regulator’s decision under section 116 of the 2010 Act.
56. As the Regulator’s role is being largely removed from Chapter 1 of Part 10 of the 2010 Act, and the RSL will now be required to seek the agreement of affected tenants to the disposal in all cases, section 116 no longer serves a purpose and is repealed by section 4(6) of the Act. The reduced role for the Regulator also means that the power in section 117 of the 2010 Act to require information from the RSL before the Regulator makes a decision is no longer needed and is also repealed.²⁶
57. [Section 4\(5\)](#) of the Act inserts two new sections into Part 10 of the 2010 Act. Section 115A makes provision for the ballot of tenants and for seeking their written agreement. This replaces sections 118 and 119 which are repealed by section 4(6) of the Act. Section 4(5) also inserts new section 115B, which makes provision for guidance under this Chapter.
58. Section 115A(1) requires the RSL to conduct a ballot or seek the written agreement of its affected tenants. The decision is left to the RSL but the Regulator may issue guidance about this under section 115B by virtue of section 115B(2)(c). Under section 115A(2), the RSL must inform the Regulator of the result of the ballot or, where written agreement is sought, of the number of agreements sought and given.
59. Section 115B(1) requires the Regulator to issue guidance about tenant consultation under section 115 and about seeking tenant approval by ballot or written agreement under section 115A. An RSL must have regard to any such guidance when complying with its duties under sections 115 and 115A.
60. Section 120 of the 2010 Act makes provisions for when the RSL need not consult certain tenants under section 115 and need not ballot them or seek their written agreement to a proposed disposal under new section 115A. Section 4(7) amends section 120 to make changes necessary in consequence of other amendments of Chapter 1, although the effect of section 120 is essentially unchanged.
61. [Section 4\(8\)](#) of the Act repeals sections 121 and 122 of Chapter 1 of Part 10. Section 121 is no longer necessary given that the Regulator can no longer refuse or give consent to a disposal under this Chapter. Section 122 of the 2010 Act currently provides that any failure by the Regulator or an RSL to comply with a provision of Chapter 1 of Part 10 does not invalidate the Regulator’s consent to the disposal. Regulator’s consent is no longer required. And the consequences of a failure by the RSL are dealt with by section 107 and 111 (as amended by section 3 of the Act). So section 122 is no longer necessary and is repealed.

²⁶ See section 4(6) of the Act.

62. Turning back to the amendments made by section 3 of the Act, section 107(3) makes clear that the RSL has no power to dispose of land where doing so would result in a tenant under a Scottish secure tenancy ceasing to be a tenant of the RSL, unless the RSL has complied with sections 115 to 120 of the 2010 Act and a majority of the affected tenants agree to the disposal taking place.
63. In addition, section 111 of the 2010 Act covers the situation where a disposal has nevertheless gone ahead. Under this section as currently in force, the disposal is void if the Regulator did not consent. But the removal of the need for Regulator's consent means different provision has to be made. Section 111 affects a third party who has transacted with the RSL as well as affecting the RSL that made the disposal. The amendments of this section made by section 3(10) of the Act make clear that, in the case of a disposal to which section 107(2) applies, the disposal will be void if the RSL failed to consult its tenants and others under section 110(2)(a). In the case of a disposal to which section 107(4) applies, failure by the RSL to comply with all the provisions of sections 115 to 120 will not make a subsequent disposal void. Instead, only failure to comply with the most important of those provisions – consultation with tenants under section 115 and the seeking of agreement from the affected tenants under section 115A(1) – will result in the disposal being void. In addition, failure to obtain the agreement of the affected tenants to the disposal will also result in that disposal being void.
64. Finally on section 3 of the Act, subsection (2) amends section 78 of the 2010 Act in consequence of the changes made to Part 9 of the 2010 Act and the removal of the need for Regulator's consent and, in particular, as a consequence of the changes to section 108 made by section 3(4) of the Act.

Organisational changes affecting registered social landlords

Section 5

– Change of name, office or constitution by registered social landlord

65. Under section 92 of the 2010 Act, an RSL must notify the Regulator of any change in its name or to the address of its registered or principal office with 28 days of that change. Under section 93 of the 2010 Act, an RSL cannot make any other change to its constitution²⁷ unless the Regulator consents. Sections 94 and 95 make further provision about the Regulator's consent under section 93.
66. **Section 5** of the Act removes the need for the RSL to obtain the Regulator's consent to changes to its constitution by inserting a new section 92 providing that the RSL need only notify the Regulator of all such changes (rather than just changes of name or address) within 28 days of the change being made. As a consequence of the removal of the requirement for Regulator's consent, sections 93 and 95 are no longer needed and so are repealed by section 5(3).

Section 6

– Restructuring, winding up and dissolution of registered social landlord

67. Part 8 of the 2010 Act makes provision about various changes to RSLs, including about the restructuring, winding up and dissolution of RSLs that are registered societies²⁸ as well as about the restructuring of RSLs that are registered companies,²⁹ about the conversion of such companies into registered societies, about voluntary arrangements

²⁷ Section 165 of the 2010 Act defines what is meant by the "constitution" of an RSL: where the RSL is a registered company, its constitution is its articles of association; where it is a registered society, its constitution is the society's rules; in any other case, the RSL's constitution is the instrument which establishes it and states its purpose. See also footnote 7 for the meaning of "registered society".

²⁸ As defined by section 165 of the 2010 Act: see also footnote 7.

²⁹ i.e. companies registered under the Companies Acts: see section 165 of the 2010 Act.

entered into by such companies under the Insolvency Act 1986 and about the voluntary winding up of such companies.

68. In the case of some of these organisational changes, the Regulator’s consent is required and the RSL must obtain the agreement of its affected tenants to the change under Chapter 2 of Part 10 of the 2010 Act (which applies Chapter 1 of that Part, on disposals of land under Part 9, to organisational changes under Part 8). In other cases, Regulator’s consent is required and there is a requirement for the RSL to consult its tenants in relation to the change (but there is no requirement for the agreement of the RSL’s tenants affected by the change).
69. **Section 6** of the Act amends these provisions in Part 8 to remove the requirement for the Regulator’s consent and makes consequential changes as a result. It also repeals Chapter 2 of Part 10 of the 2010 Act (see paragraphs 108 to 110 below).

Restructuring of registered societies

70. Section 96 of the 2010 Act makes provision for the restructuring,³⁰ winding up and dissolution of RSLs that are registered societies. Section 96(2) applies Chapter 2 of Part 10 to certain restructurings of a registered society as mentioned in section 97 of the 2010 Act. Chapter 2 applies the provisions of Chapter 1 of Part 10 (on disposal of land) to society restructurings to which section 97 applies. But restructurings where the RSL is converting into a registered company are not covered (see section 123(2)(a)).
71. Section 96(3) provides that the Regulator must not give consent in the following cases unless the society has consulted its tenants, namely—
- the winding up of a registered society (under section 98), and
 - the dissolution of a registered society (under section 99).
72. Section 97(1) (and Chapter 2 of Part 10) applies to certain restructurings, namely those that will result in a tenant under a Scottish secure tenancy ceasing to be a tenant of the society but not those where the RSL is converting into a registered company (see section 123(2)(a)). It provides that the Financial Conduct Authority (“the FCA”) may register the special resolution relating to the restructuring only if the Regulator consents to the special resolution and the RSL sends a copy of that consent to the FCA with the copy special resolution. Chapter 1 of Part 10 governs the obtaining of Regulator consent. See paragraphs 42 to 45 for an explanation of the operation of Chapter 1.
73. In addition, section 97(1) applies to restructurings where the RSL is converting into a registered company. In such a case, Chapter 2 of Part 10 does not apply (and so Chapter 1 of that Part does not apply either). The FCA may register the special resolution only if the Regulator consents and the society sends a copy of that consent with the copy special resolution.
74. Section 97(2) applies to all restructurings and provides that a new body created, or to whom an RSL’s engagements are transferred, by virtue of a restructuring is to be included in the register of registered social landlords.³¹
75. Section 96 is amended by section 6(2) of the Act. That subsection repeals subsections (2) and (3) of section 96. These repeals are consequential on the removal of the need for Regulator’s consent. In addition, what was Chapter 2 of Part 10 is repealed (by section 6(15) of the Act)³² as the requirements it imposed are now imposed directly

30 The “restructurings” to which sections 96 and 97 of the 2010 Act apply are amalgamations of registered societies, the transfer of engagements between registered societies and the conversion into or amalgamation of a registered society with a registered company – see the definition of “restructuring provision” in section 97(1). See also the amended definition, updating references to the Co-operative and Community Benefit Societies and Credit Unions Act 1965 to references to the Co-operative and Community Benefit Societies Act 2014, in section 6(3) of the Act (see new section 96A(4)).

31 Established under Part 2 of the 2010 Act and maintained by the Regulator.

32 See also paragraphs 108 to 110 below.

in new section 96A and in the new version of section 97 (inserted by section 6(3) and (4) of the Act). In addition, the tenant consultation requirements are now incorporated directly into sections 98 and 99 (see further below).

76. **Section 6(3)**
inserts a new section 96A into Part 8 of the 2010 Act. This new section applies where a registered society proposes to restructure³³ and, as a result of that restructuring, a tenant under a Scottish secure tenancy will cease to be a tenant of the society. This new section imposes a duty on the society to comply with sections 115 to 120 of Part 10 of the 2010 Act (as those sections are amended by section 4 of the Act). Those sections, which apply to certain disposals of land by an RSL, are applied to the restructuring of an RSL that is a registered society by virtue of section 96A(3) with the modification in that subsection.³⁴ Those sections require the RSL to consult the tenants affected by the restructuring and to then seek their agreement to it, either by ballot or by written agreement.³⁵
77. **Section 6(4)**
substitutes for section 97 of the 2010 Act a new version. This section applies to all restructurings by RSLs that are registered societies, not just those covered by section 96A.
78. Section 97(2) provides that, where an RSL proposes a restructuring to which section 96A applies,³⁶ the FCA may register the special resolution relating to the restructuring only if the RSL confirms it complied with its duty to consult its affected tenants under section 115, that it sought the agreement of those tenants under section 115A(1) and that a majority of these tenants agreed to the restructuring (see new section 97(3)).
79. In the case of all restructurings, and not just those to which section 96A applies, the RSL must also give the Regulator notice of the special resolution sent to the FCA. Where section 96A applies, that notice must be given no later than 28 days after the copy special resolution is sent to the FCA.
80. Section 97(5) re-enacts the provision in section 97(2) of the 2010 Act which provides that a new body created, or to whom an RSL's engagements are transferred, by virtue of a restructuring is to be included in the register of registered social landlords.

Voluntary winding up of registered societies

81. Section 98 of the 2010 Act covers the voluntary winding up of RSLs that are registered societies and provides that a resolution relating to the winding up is not valid unless the Regulator consents and the society sends a copy of that consent to the FCA with the special resolution. By virtue of section 96(3) of the 2010 Act, the Regulator can give consent only where the RSL has consulted its tenants.
82. **Section 6(5)**
of the Act replaces section 98 of the 2010 Act with a new version. Under this new section 98, the need for the Regulator's consent is removed. Instead, the RSL is obliged to consult its tenants on the proposed voluntary winding up. In addition, the resolution for the winding up is valid only if the RSL confirms to the FCA that it consulted its tenants when sending the copy resolution to the FCA.
83. Subsections (4) to (6) of new section 98 make provision additional to that currently made by section 98. Section 98(4) places the RSL under a duty to notify the Regulator of the voluntary winding up. Section 98(5) gives the Regulator a duty to issue guidance

³³ But "restructure" here does not include the conversion of the registered society into a registered company.

³⁴ The modification relates to when notice of the results of the tenant ballot or the seeking of tenant's written agreement is to be given to the Regulator under section 115A(2).

³⁵ See paragraphs 53 to 61 above for a full explanation of Chapter 1 of Part 10 and the amendments made to it by section 4 of the Act.

³⁶ And which therefore requires the RSL to seek the agreement of affected tenants.

about tenant consultation under this section. And section 98(6) requires the RSL, when consulting its tenants, to have regard to that guidance.

Dissolution of registered societies

84. Section 99 of the 2010 Act covers the dissolution of RSLs that are registered societies and provides that the FCA may register an instrument of dissolution and advertise the dissolution only if the Regulator consents and the society sends a copy of that consent to the FCA with the instrument. As for section 98, the Regulator can give consent only where the RSL has consulted its tenants on the dissolution (by virtue of section 96(3)).
85. [Section 6\(6\)](#) replaces section 99 of the 2010 Act with a new version. Under this new section 99, the need for the Regulator's consent is removed. Instead, the RSL is under a duty to consult its tenants on the proposed dissolution. In addition, the FCA may register the instrument of dissolution and advertise the dissolution only if the RSL confirms to the FCA that it consulted its tenants when sending the instrument to the FCA.
86. As for new section 98, subsections (4) to (6) of new section 99 make provision additional to that currently made. Section 99(4) places the RSL under a duty to notify the Regulator of the dissolution. Section 99(5) gives the Regulator a duty to issue guidance about tenant consultation under this section. And section 99(6) requires the RSL, when consulting its tenants, to have regard to that guidance.

Restructuring of companies

87. Section 100 of the 2010 Act makes provision for the restructuring and winding up of RSLs that are registered companies (so serves a similar purpose to section 96 for RSLs that are registered societies). Section 100(2) applies Chapter 2 of Part 10 to the restructuring of a registered company as mentioned in section 101 of the 2010 Act. Chapter 2 applies the provisions of Chapter 1 of Part 10 (on disposal of land) to company restructurings to which section 101 applies.
88. Section 100(3) provides that the Regulator may not give consent in the following cases unless the society has consulted its tenants, that is—
- the conversion of a company into a registered society (under section 102),
 - a voluntary arrangement relating to a company (under section 103), and
 - the voluntary winding up of a company (under section 104).
89. Section 100(2) and section 101 (and, therefore, Chapter 2 of Part 10) apply to certain company restructurings, namely—
- restructurings made following an order under section 899 of the Companies Act 2006 (“the 2006 Act”) and which are of a type mentioned in section 900(1) of that Act,³⁷ and
 - which will result in a tenant under a Scottish secure tenancy ceasing to be a tenant of the RSL.
90. By virtue of section 123(2)(b) of the 2010 Act, restructurings where the RSL is being wound up or is in administration are not covered by Chapter 2 of Part 10 (although such restructurings still require consent under section 101).
91. Section 101(1) goes on to provide that the order under section 899 or 900 of the 2006 Act which will result in the company being restructured has effect only if the Regulator

³⁷ Section 900(1) relates to restructurings that involve a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies, and which will result in the whole or any part of the undertaking or the property of the company being transferred to another company.

consents and the RSL sends a copy of that consent to the registrar of companies with the copy of the order (which section 900(6) of the 2006 Act requires).

92. Section 101(2) applies to all restructurings where an order is made under section 900 of the 2006 Act (so restructurings of a type mentioned in section 900(1)) and provides that where the whole or any part of the undertaking and property and liabilities of the RSL are transferred to another company, that other company is to be included in the register of registered social landlords.³⁸
93. Section 100 is amended by section 6(7) of the Act. That subsection repeals subsections (2) and (3) of section 100. These repeals are consequential on the removal of the need for Regulator's consent. In addition, what was Chapter 2 of Part 10 is repealed (by section 6(15) of the Act)³⁹ as the requirements it imposes are now imposed directly in new section 100A and in the new version of section 101 inserted by section 6(8) and (9) of the Act. In addition, the tenant consultation requirements are now incorporated directly into sections 102, 103 and 104 (see further below).
94. [Section 6\(8\)](#) inserts a new section 100A into Part 8 of the 2010 Act. This new section applies where a company which is an RSL proposes to restructure and, as a result of that restructuring, a tenant under a Scottish secure tenancy will cease to be a tenant of the company. Restructurings where the RSL is being wound up or is in administration are not, however, covered.
95. This new section imposes a duty on the RSL to comply with sections 115 to 120 of Part 10 of the 2010 Act. As explained above in relation to the restructuring of registered societies, those sections, which apply to certain disposals of land by an RSL, are applied to the restructuring of an RSL that is a registered company by virtue of section 100A(3) with the modification in that subsection.⁴⁰ These sections require the RSL to consult the tenants affected by the restructuring and to then seek their agreement to it, either by ballot or by written agreement.⁴¹
96. [Section 6\(9\)](#) substitutes for section 101 of the 2010 Act a new version. This section applies to all restructurings by RSLs that are registered companies, not just those covered by section 100A.
97. Section 101(2) (read with section 101(3)) provides that, where an RSL proposes a restructuring to which section 100A applies,⁴² the court order relating to the restructuring has effect only if the RSL confirms it complied with its duty to consult its affected tenants under section 115, that it sought the agreement of those tenants under section 115A(1) and that a majority of these tenants agreed to the restructuring.
98. In the case of all restructurings, and not just those to which section 100A applies, the RSL must also give the Regulator notice of the restructuring. Where section 100A applies, that notice must be given no later than 28 days after the court order is made.
99. Section 101(5) re-enacts the provision in section 101(2) of the 2010 Act which provides that that where the whole or any part of the undertaking and property and liabilities of the RSL are transferred to another company, that other company is to be included in the register of registered social landlords.⁴³

38 Established under Part 2 of the 2010 Act and maintained by the Regulator.

39 See also paragraphs 108 to 110 below.

40 The modification relates to when notice of the results of the tenant ballot or the seeking of tenant's written agreement is to be given to the Regulator under section 115A(2).

41 See paragraphs 53 to 61 above for a full explanation of Chapter 1 of Part 10 and the amendments made to it by section 4 of the Act.

42 And which therefore requires the RSL to seek the agreement of affected tenants.

43 Established under Part 2 of the 2010 Act and maintained by the Regulator.

Conversion of company into a registered society

100. The conversion of an RSL that is a company into an RSL that is a registered society is covered by section 102 of the 2010 Act. That section provides that the special resolution relating to the conversion has effect only if the Regulator consented to it before it was passed and the RSL sends a copy of that consent along with the resolution to the registrar of companies. By virtue of section 100(3), the Regulator may consent only where the RSL consulted its tenants on the conversion.
101. The existing section 102(2) makes provision for the inclusion in the register of registered social landlords of the new registered society created as a result.
102. [Section 6\(10\)](#) of the Act replaces section 102 with a new version. The main difference between the current version and the new one is the removal of the need for the Regulator's consent.
103. The new section 102(2) places a duty on the RSL to consult its tenants on the proposed conversion into a registered society. By virtue of subsection (3), the special resolution relating to the conversion has effect only if the RSL confirms it did so, and sends a copy of that confirmation to the registrar of companies with the resolution. Under section 102(4), the RSL must give the Regulator notice of the sending of the special resolution to the registrar. Section 102(5) re-enacts section 102(2) and provides for the inclusion of the new registered society in the register of registered social landlords. Finally, subsections (6) and (7) require the Regulator to issue guidance about tenant consultation and require the RSL to have regard to that guidance when consulting its tenants.

Company voluntary arrangement

104. Section 103 of the 2010 Act applies to voluntary arrangements under Part 1 of the Insolvency Act 1986⁴⁴ by RSLs that are registered companies and provides that the arrangement does not take effect unless the Regulator consents. By virtue of section 100(3), the Regulator may consent only where the RSL consulted its tenants on the arrangement.
105. [Section 6\(11\)](#) of the Act replaces this section with a new version, the main change being the removal of the need for Regulator's consent. In place of that, section 103(2) places a duty on the RSL to consult its tenants on the voluntary arrangement. Under subsection (3), the arrangement does not take effect unless the RSL did so. The RSL must give the Regulator notice of the arrangement as soon as reasonably practicable after it takes effect (section 103(4)). Section 103(5) requires the Regulator to issue guidance about tenant consultation and section 103(6) requires the RSL to have regard to that guidance when consulting its tenants.

Voluntary winding up of companies

106. Section 104 of the 2010 Act makes provision where an RSL that is a registered company is being voluntarily wound up under the Insolvency Act 1986 and provides that the special resolution for the winding up is valid only if the Regulator consents and the RSL sends a copy of the consent (with the required copy resolution) to the registrar of companies. By virtue of section 100(3), the Regulator may consent only where the RSL consulted its tenants on the winding up.
107. [Section 6\(12\)](#) of the Act (by substituting for section 104 a new version of that section) removes the need for Regulator's consent and, instead, places a direct duty on the RSL to consult its

⁴⁴ A "voluntary arrangement" is a proposal (made by either the directors or, if the company is being wound up or is in administration, by the liquidator or by the administrator) to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs.

tenants before passing the special resolution relating to the winding up (section 104(2)). The special resolution is valid only if the RSL confirms it consulted its tenants and sends a copy of that confirmation to the registrar of companies along with the copy resolution. The RSL will also be required to notify the Regulator that the copy resolution has been sent to the registrar (see section 104(4)). Finally, subsections (5) and (6) of new section 104 require the Regulator to issue guidance on tenant consultation under that section and require the RSL to have regard to it.

Chapter 2 of Part 10 of the 2010 Act

108. The amendments made to Part 8 of the 2010 Act make Chapter 2 of Part 10 redundant. Section 123 of the 2010 Act applies Chapter 1 of Part 10 to the restructuring of registered societies under section 97 and to the restructuring of companies under section 101. The substantive provisions of section 123 are now, as a result of the amendments in section 6(3), (4), (8) and (9) of the Act, in Part 8 of the 2010 Act.
109. Section 124 of the 2010 Act currently provides that any failure by the Regulator or an RSL to comply with a provision of Chapter 1 of Part 10 (as applied by section 123) does not invalidate the Regulator's consent to the restructuring. Regulator's consent will no longer be required. And the consequences for a failure by the RSL will be dealt with by section 97(2) and (3) and section 101(2) and (3) (as amended). So section 124 is no longer necessary.
110. Accordingly section 6(15) repeals Chapter 2 of Part 10.

Section 165 of the 2010 Act – definition of “registered society”

111. [Section 6\(16\)](#) of the Act amends the definition of “registered society” in section 165 of the 2010 Act so that it refers to the Co-operative and Community Benefit Societies Act 2014 rather than the Co-operative and Community Benefit Societies and Credit Unions Act 1965 (which has been repealed).

Section 7

– Registered social landlord becoming a subsidiary of another body

112. Part 8 of the 2010 Act also makes provision about an RSL that proposes to become a subsidiary of another body. Section 104A makes provision where the RSL is either a registered society or a registered company. Subsection (2) provides that an arrangement under which such an RSL is to become a subsidiary of a body of which it is not currently a subsidiary has effect only if the Regulator consents before the arrangement is completed. Subsection (3) provides that Chapter 3 of Part 10 has effect for the purposes of Regulator's consent and that Chapter essentially applies Chapter 1 of Part 10 to the obtaining of that consent.
113. [Section 7](#) of the Act replaces section 104A with a new version, under which Regulator's consent is no longer required. Instead, under section 104A(2), the RSL has a duty to comply with sections 115 to 120 of Chapter 1 of Part 10 directly, as applied by section 104A(3). In addition, for the arrangement under which the RSL will become a subsidiary to have effect, the conditions in section 104A(4) must be met. Those conditions are that the RSL complied with its duty to consult its affected tenants under section 115, that it sought the agreement of those tenants under section 115A(1) and that a majority of these tenants agreed to the RSL becoming a subsidiary (see section 104A(4)).
114. Section 104A(5) re-enacts the provision currently in section 124A(2) under which the Regulator must determine that the duty to comply with the tenant consultation and tenant approval provisions of Chapter 1 of Part 10 do not apply (or should cease to apply) where the Regulator considers—

*These notes relate to the Housing (Amendment) (Scotland) Act 2018 (asp 13)
which received Royal Assent on 6 July 2018*

- that the RSL's viability is in jeopardy for financial reasons,
 - that a person could take a step in relation to the RSL which would require to be notified to the Regulator under section 73 of the 2010 Act (being a step which could result in the insolvency of the RSL⁴⁵), and
 - that making a determination would substantially reduce the likelihood of the person taking that step.
115. Section 104A(6) places a duty on the RSL to give notice of the arrangement under which the RSL will become a subsidiary to the Regulator no later than 28 days after the arrangement takes effect.

Chapter 3 of Part 10 of the 2010 Act

116. As with Chapter 2 of Part 10 of the 2010 Act, the amendments made to Part 8 of the 2010 Act – in particular, to section 104A – make Chapter 3 of Part 10 redundant. Section 124A of the 2010 Act applies Chapter 1 of Part 10 to arrangements under which RSLs will become subsidiaries as it applies to disposals of land. The substantive provisions of section 124A are now, as a result of the amendments in section 7(2) of the Act, in section 104A of the 2010 Act.
117. Section 124B of the 2010 Act currently provides that any failure by the Regulator or an RSL to comply with a provision of Chapter 1 of Part 10 (as applied by section 124A) does not invalidate the Regulator's consent to the arrangement. Regulator's consent is no longer required. And the consequences for a failure by the RSL are dealt with by section 104A(2)(b) and (4) (as amended). So section 124B is no longer necessary.
118. Accordingly section 7(3) repeals Chapter 3 of Part 10.

Section 165 of the 2010 Act – definition of subsidiary

119. [Section 7\(4\)](#) of the Act amends the definition of “subsidiary” in section 165 of the 2010 Act so that it refers to the Co-operative and Community Benefit Societies Act 2014 rather than the Co-operative and Community Benefit Societies and Credit Unions Act 1968 (which has been repealed).

Further modification of regulation of social landlords

Section 8

– Power to modify functions of Scottish Housing Regulator

120. [Section 8](#) of the Act allows the Scottish Ministers, through the conferral on them of a regulation-making power, to further modify the functions of the Regulator in relation to social landlords (including registered social landlords).
121. Such regulations will be subject to the affirmative procedure in the Scottish Parliament.⁴⁶ Before Ministers lay the draft of any regulations under this section before the Parliament, they must consult the Regulator, tenants of social landlords or their representatives, social landlords or their representatives (such as the Scottish Federation of Housing Associations and the Glasgow and West of Scotland Forum of Housing Associations) and secured creditors of registered social landlords or their representatives (primarily being UK Finance, formerly the Council of Mortgage Lenders).

⁴⁵ Such steps include presenting a petition for the winding up of the RSL and applying for the RSL to be put into administration (see section 73(1)(b)).

⁴⁶ So laid in draft and approved by a resolution of the Scottish Parliament before final regulations are made – see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”).

Local authority influence over registered social landlords

Section 9

– Power to reduce local authority influence over registered social landlords

122. In classifying RSLs as public bodies, the ONS indicated to the Scottish Government that another aspect of public sector control over RSLs was the potential involvement in them of local authorities and the ability of local authorities in some cases to exert a degree of influence over RSLs by having either the ability to appoint officers⁴⁷ of the RSL or by having certain voting rights, or by having both powers.
123. **Section 9** of the Act allows the Scottish Ministers, through the exercise of a regulation-making power, to limit or remove the ability of local authorities to exert this sort of influence over RSLs. This section is similar to section 93 of the Housing and Planning Act 2016, enacted as part of the UK Government’s response to the classification, by the ONS, of private registered providers of social housing (“housing associations”) in England as public bodies.⁴⁸
124. Regulations under this section are subject to the affirmative procedure.⁴⁹

Duration of regulation-making powers

Section 10

– Duration of powers conferred by sections 8(1) and 9(1)

125. As already noted, sections 8 and 9 of the Act confer power on the Scottish Ministers to make regulations further modifying the functions of the Scottish Housing Regulator and limiting or removing certain types of local authority influence over RSLs. Section 10 creates a time limit for the exercise of both of these powers. The powers may only be exercised in the 3 years beginning with the day after the Act received Royal Assent (subsection (1)). That is, the powers conferred by sections 8(1) and 9(1) are temporary.
126. The temporary nature of these powers means that, on their expiry, the provisions conferring the powers are effectively repealed.⁵⁰ The repeal of an enactment generally has the effect of automatically revoking any subordinate legislation made under that enactment. Section 15 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that such revocations do not affect certain things. For example, the validity of things done under regulations while they were in force is not affected by the revocation of the regulations. Textual amendments of other enactments also survive the revocation of the regulations which made the amendments. But section 15 does not generally provide for freestanding provision made by subordinate legislation to continue to have effect following revocation. Unless provision is made to the contrary, any freestanding provision made by regulations made under section 8 or 9 would be revoked at the end of the 3 year period provided for in subsection (1) of section 10.
127. To avoid this, subsection (2) provides that the subsection (1) does not affect the continuation in force of any regulations made during the 3 year period. So, although no further regulations can be made under section 8 or 9 after the expiry of the 3 year period,

⁴⁷ For the meaning of “officer” in relation to an RSL, see section 165 of the 2010 Act and paragraph 27 above.

⁴⁸ See

[Classification announcement: "Private registered providers" of social housing in England](#)

⁴⁹ So laid in draft and approved by a resolution of the Scottish Parliament before final regulations are made – see section 29 of ILRA.

⁵⁰ See section 18 of ILRA.

*These notes relate to the Housing (Amendment) (Scotland) Act 2018 (asp 13)
which received Royal Assent on 6 July 2018*

any regulations in force at the end of that period will remain in force indefinitely.⁵¹ For example, if regulations are made under section 9(1) restricting the number of officers that a local authority can appoint to an RSL, that restriction will remain in place on the expiry of the 3 year period mentioned in subsection (1), rather than local authorities regaining their ability to appoint a greater number of officers. This will ensure that any ONS reclassification decision which depends on the provision made in the regulations is not jeopardised by the end of the 3 year period.

General provision

Sections 11

– Commencement

128. **Section 11** provides for commencement of the Act. Other than section 11 itself, and section 12 (which sets out the short title of the Act), which both come into force on the day after Royal Assent, the Act will be brought into force by commencement regulations. Such commencement regulations are made by the Scottish Ministers and then laid before the Scottish Parliament, not being subject to either the negative or the affirmative procedure.⁵²

51 Power to make regulations includes power to amend or revoke them. Therefore, restricting the power to make regulations under sections 8 and 9 to the 3 year period mentioned in section 9A(1) also has the effect of restricting the power to amend or revoke any regulations made during that 3 year period to that 3 year period. The Scottish Ministers will not be able to amend or revoke any regulations continued in effect by section 9A(2) by subordinate legislation. If any such regulations need to be amended or revoked in future, primary legislation will be required.

52 See section 30 of ILRA.