



Guidance for Charitable Registered Social Landlords (including the acquisition of Tenanted Housing and Tenants as members of Governing Bodies)

About this guidance.

The Charity Commission (the Commission) and the Housing Corporation (the Corporation) have streamlined the processes leading up to the registration of prospective registered social landlords (RSLs) which are also seeking registered charity status. The Corporation will carry out the bulk of the pre-registration scrutiny, and then confirm to the Commission that the body meets certain criteria. Confirmation from the Housing Corporation that prospective charitable RSLs meet its criteria will help facilitate their registration as charities in accordance with the Commission's criteria for determining charitable status. This guidance is designed to help such RSLs through this process.

Whilst this guidance is primarily aimed at organisations seeking to become RSLs and register with the Commission, it is also relevant to existing RSLs registered as charities, and those registered as industrial and provident societies on charitable rules, and which (although exempt from registration with the Commission) are subject to charity law.

This guidance replaces previous joint guidance from the Commission and the Corporation and should be taken into account when reading other publications such as those of the Corporation on its Regulatory Code and on Group Structures.

The Commission treats residents as 'users'. By users we mean anyone who uses or benefits from (a beneficiary of) the charity's services or facilities. We use the term "trustee" throughout this guidance to mean the people responsible under a charitable RSLs governing document for controlling its management and administration, regardless of what they are called.

Applications for registration with the Corporation and the Commission.

It is important that applications to the Corporation and to the Commission for registration are made on behalf of the new organisation, which should also have its own independent professional advisers. This avoids the self-evident potential conflict of interest if the application is made by the local authority which is planning to transfer the housing, or if the professional advisers are shared by the local authority and the applicant. There is no difficulty with the local authority reimbursing the promoters for the cost of their independent professional advice.

When considering applicants for registration the Commission and the Corporation will make reference to their own respective (published) criteria. In most instances the requirements of the Commission and the Corporation are broadly similar. However, on occasion the requirements of the two organisations may pull in opposite directions, due to their differing statutory functions. Given the extent to which the respective requirements do overlap it is recommended that a prospective RSL should first approach the Corporation. Meeting the Corporation's requirements should go a long way to meeting those of the Commission, and, using this guidance, it should be possible to identify and address issues that might prove problematic to the Commission.

With regard to the handling of applications, Annex 1 contains a checklist and a suggested timetable for organisations seeking registration with both the Commission and the Corporation.

Objects of charitable RSLs.

The main objects of most charitable social landlords will be along the following lines:

"to carry on for the benefit of the community the business of providing housing and any associated amenities for persons in necessitous circumstances upon terms appropriate to their means", and/or

"providing for aged persons in need thereof housing and any associated amenities especially designed or adapted to meet the disabilities and requirements of such persons".

Some RSLs seeking charitable status may wish to adopt additional objects directed towards the regeneration of the local area. Such RSLs should consult the Commission's guidance Promotion of Urban and Rural Regeneration (RR2) and bear in mind that it is important that their governing document shows clearly what their true and immediate purposes are. On occasion the Commission has received applications for registration on the basis of a governing document declaring additional "regeneration" objects formulated as follows:

"for the benefit of the community in [a specified area] to promote any charitable purpose in particular but not exclusively by...[there follows a list of means which often disclose the real charitable purpose].

Such formulations (including the device of stating objects in wide terms and later importing a restriction to such of them as are charitable) have been regularly criticised by the Courts because the object prevents the real purpose of the RSL from being readily recognised and increases the difficulty of interpreting or acting upon the governing document. Therefore, the Commission and the Corporation do not consider such objects suitable for RSLs.

Independence/Constitutional issues

In considering applications for registration, both the Commission and the Corporation will be concerned to ensure that a prospective RSL-

- has in place an effective governing document;
- is independent of other bodies (particularly a transferring local authority); and
- is fully able to take decisions in its own interests and those of its beneficiaries.

Particular areas of interest and concern are:

- *nomination agreements with local authorities.* Most RSLs have these. They are a convenient way of meeting local housing needs, and the criteria for admission to waiting lists generally fit well with charitable objectives. A charitable RSL must, however, always be free to consider other applicants. As it must have the final choice over all tenants (beneficiaries) it houses, there can be no question of any outside body having a right of selection, only a right to nominate candidates for consideration by the RSL. Guidance on nomination agreements acceptable to the Commission and the Corporation can be found at Annex 2.

- *group structures.* Charitable RSLs may be part of a group structure. However, the Commission will be concerned to establish that the trustees are able to take decisions that are demonstrably in the best interests of the RSL and independent of the group parent. A charitable subsidiary could be established with tightly drawn objects, so that the trustees may thereafter act independently within the confines of those objects. It is also acceptable for the parent to have an ability to appoint, re-appoint or remove the trustees of the subsidiary charity. These powers can, however, only be exercised in the best interests of the charity (which need not be the same as the best interests of the parent). They must not be used to interfere with the day-to-day running of the charity while it is properly carrying out its charitable purposes. Finally, the Commission will need to be satisfied that charitable funds will not be diverted to a non-charitable member of the group.

- *governing body membership.* To ensure constitutional independence, neither the Commission nor the Corporation will expect to see local authority nominees comprising a majority of the trustees (the Corporation will not normally accept any more than one third). There must be in place proper procedures for dealing with conflicts of interest that might arise (see model clause).

Can a charity acquire tenanted housing stock?

In order to comply with the requirements of its governing document(s) and general charity law, a charitable RSL may only acquire tenanted housing stock (including local authority housing stock) when it is satisfied that the acquisition-

- will enable it to further its charitable objects; and
- is capable of being regarded objectively in that way.

A charitable RSL is likely to have two main reasons for contemplating an acquisition of tenanted stock:

- to provide a better service for the existing tenants than the present, or in some circumstances, some other alternative landlord, or
- to increase the RSL's ability to provide, in the longer-term, for persons qualified to be beneficiaries as vacancies arise in the acquired stock.

In assessing the compatibility of a proposed acquisition with its objects, the trustees will need to consider a number of factors in good faith and with open minds, taking advice from their own lawyers, from the Corporation and from the Commission as necessary. Such relevant factors include the following, though this list is not intended to be exhaustive:

- *how the intended acquisition fits in with the charity's policy for fulfilling its objects.* The trustees must consider what the purchase is really likely to achieve for present and future users or beneficiaries. Existing RSLs planning to receive a transfer of stock should consider whether it is an effective use of money and manpower which may otherwise be used elsewhere.

- *the proportion of non-beneficiaries in the properties to the existing tenants as a whole.* This will be a major factor. It is impossible to lay down a maximum acceptable percentage, as circumstances will vary from case to case, but proper beneficiaries should normally be in a substantial majority.

- *the expected rate of turnover of non-beneficiary tenants.* The higher the proportion of such tenants, the more important this factor becomes. Longer term access to vacant dwellings is a relevant consideration.

- *statutory rights to buy.* The fact that transferring tenants may have a preserved right to buy, or the right to acquire, does not of itself make the purchase inconsistent with the landlord's objects. However, the trustees ought to take into account the likely take-up by tenants of these rights on their future management of the housing stock, and any financial implications there may be.

- *the opportunity to buy on advantageous terms.* These transactions will normally take place on a tenanted value basis rather than an unrestricted market basis, assuming that the dwellings will be kept available for letting and that rents will generally be kept down to levels within the reach of the lower paid. The availability of any public monies to assist the purchase will clearly also be a relevant factor.

Lettings policies/housing of non-beneficiaries

The key consideration for charitable RSLs in developing their lettings policies is that they should seek to ensure that each housing unit is let in accordance with their charitable objectives, or alternatively that it is let on market terms as an investment.

Although the principle is simple, the application can be complex. The Government, Commission, and Corporation are all clear that it is not appropriate for RSLs to

means-test beneficiaries with a view to terminating their tenancies should their economic circumstances improve. Equally, charitable RSLs should remind beneficiaries that the RSL's charitable support can only be offered in law because their circumstances are such as to show a need for the help that the charity can give. The beneficiary should be asked to inform the trustees if his or her circumstances improved substantially so as to throw this into doubt.

All charitable RSLs should, from the outset, have in place policies for dealing with cases that come to the trustees' attention. RSLs might, for example, promote any available incentive schemes leading to full or shared ownership of the current (or other) dwelling.

Resident board membership of a RSL

There are a variety of ways in which users, including residents, will be involved in the running of charities that might also be RSLs. In some cases this user involvement may take the form of board representation. The Commission's guidance *Users on Board: Beneficiaries who become trustees* (CC24) published in March 2000 looks specifically at the question of board representation, highlighting the potential benefits of including users as trustees or board members. There is no legal bar on the number of users who can be trustees. In principle, this means that a social landlord with a resident majority on its board can be a charity.

However, all trustees or board members must act (and be seen to act) in the interests of the charity and not for their own, or their particular group's, private interest or gain. It does not matter how the trustees arrived on the board, for example whether they were nominated by a local authority, elected by other residents or tenants, or appointed in some other way. The Commission and the Corporation therefore expect to see proper arrangements in place for dealing with potential conflicts of interest. The Commission places great weight on this because a decision taken by a charity, which is affected by a conflict of interest, is open to legal challenge.

In many cases prospective RSLs which are charities will wish to follow the conventional stock transfer governance model of one-third 'independent' board members, one-third resident elected board members and one-third local authority nominated board members. This governance model, where the proportion of user trustees make up a third or less of the board, is one way of ensuring that residents cannot be accused (rightly or wrongly) of taking control of the direction of the charity.

When a charity believes that it will operate more effectively with a greater number of users on its board, including in some cases a majority, it will need to have, and be seen to have, robust arrangements for avoiding conflict of interest.

We have set out below a model clause that we think a charity could usefully use for dealing with these potential conflicts of interest and which will enable it to continue to make decisions and carry out its business:

Good practice clause for managing conflicts of interest: -

- (1) In this clause the expression "relevant interest" means any personal or financial interest, whether direct or indirect.

(2) Members of the [board] may receive benefits from the [charity] only if the conditions set out in sub-clause (3) below are met.

(3) The conditions mentioned in sub-clause (2) above are that:

(a) agendas for meetings of the [board] must identify any items for discussion or decision in which members of the [board] are known to have a relevant interest;

(b) if any member of the [board] has a relevant interest in any matter to be discussed or decided at a meeting of the [board], whether or not it has been identified in the agenda, they must declare their relevant interest at that meeting before discussion begins on the matter;

(c) if the members of the [board] are to discuss or decide a question which involves giving a direct material benefit to an individual (whether uniquely or as one of a number selected from those eligible to benefit from the [charity]) any member of the [board] who has a relevant interest in the award of the benefit must absent themselves from the meeting whilst the question is discussed or decided, without taking part in the discussion (unless expressly invited to remain in order to provide information) or decision and should not be counted in the quorum for that part of the meeting;

(d) if the members of the [board] are to discuss or decide a question which involves giving an indirect benefit to all those eligible to benefit from the [charity] any member of the [board] who has a relevant interest in the indirect benefit must declare their interest but may remain at the meeting and vote on the matter;

(e) the minutes of the meeting at which any direct benefit is given to a member of the [board] must fully record the reasons for the decision and must in particular describe the selection criteria and procedures applied in reaching it.

(4) This clause may not be amended without the prior written consent of the Charity Commission [and the Housing Corporation].

Conclusion

Nothing set out in this guidance is new, and charitable RSLs will doubtless already be operating within its terms. In some cases, however, trustees might find it worthwhile to look again at their relevant policies and check whether they require any updating.

Annex 1

Timetable and checklists for organisations seeking registration with the Charity Commission and the Housing Corporation

Timetable

The outline timetable overleaf shows those elements of the transfer process which relate to the Government approvals and consents process, including the formal consultation process with tenants, and the timing of seeking registration with the Corporation, the Commission and Companies House. This timetable applies to those transfers where the homes are transferring to a new organisation. In other cases, a local authority will transfer some or all of its homes to an existing charity which is already a Registered Social Landlord (RSL); in those cases, not all the steps outlined below will apply.

Checklists

1. The Housing Corporation's publication *Guidance for applicants seeking to become registered social landlords - stock transfer applicants* (second edition August 1998) provides further guidance for applicants on the Corporation's registration and information requirements.

More information about the role of the Housing Corporation can be found on its web site: <http://www.housingcorp.gov.uk>

2. The Charity Commission's publication *Registering as a Charity (CC21)* provides further guidance on the Commission's registration and information requirements.

Annex 2

NOMINATIONS AGREEMENTS

Local authorities will want to retain the right to nominate individuals to housing stock transferred to an RSL, inter alia to enable them to meet their statutory duties.

In the case of the transfer of the whole of the housing stock of a local authority, the Corporation and the Commission would accept a Nominations Agreement covering the following:-

1. Local authority to have the right to nominate Nominees to a minimum of 50% of the dwellings which are vacant and available for letting: provided that at all times the RSL is able to consider other applicants.
2. RSL to have the right to interview each Nominee and make inquiries into the economic and other circumstances of each Nominee.
3. RSL to have the right to reject any Nominee if, in the reasonable opinion of the RSL, the grant by the RSL of a Tenancy Agreement to such Nominee would be in breach of the RSL's charitable objects, or of Part I of Schedule 1 to the Housing Act 1996, or of the RSL's Allocations Policy for the time being in force.
4. Nominations Procedure should be set down with the proviso as to the circumstances in which the RSL is free to let the property free from the rights of nomination. The general requirements that any nomination agreement must meet are set out on page 3 of this guidance.
5. Allocations policy to be set in accordance with the charitable objectives - in doing so, the trustees have a duty to take into account, in so far as is reasonable, the Local Authority's statutory duties regarding the homeless and people in priority housing need.
6. Detailed provisions as to when a property, for the purposes of the Agreement, is regarded as vacant and available for letting, properties so defined will include the allocation of a reasonable number set aside by the RSL to rehouse its own residents. Such internal rehousing will include transfer applicants, residents being moved because of repair programmes and emergency need.
7. In order to preserve an association's independence, the agreement must:
 - reflect the association's objectives both as set out in their governing instrument and as agreed by the governing body;
 - be approved by the governing body;
 - be subject to regular and timely review;
 - run for such a term as will enable the parties to exit from it should circumstances or requirements change.