

# HOUSING (WALES) MEASURE 2011

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2: Registered Social Landlords**

##### *Chapter 4 – Enforcement*

114. **Sections 50 to 71** insert a new Chapter 4A into the 1996 Act. Chapter 4A deals with the enforcement action that the Welsh Ministers may take against RSLs.

##### *Section 50 - Welsh Ministers' enforcement powers: general*

115. This section inserts a new section 50A into the 1996 Act. This new section provides that Chapter 4A does not apply in relation to a RSL's housing in England.

##### *Section 51 - Exercise of enforcement powers*

116. This section inserts a new section 50B into the 1996 Act. This new section applies where the Welsh Ministers are deciding whether to exercise an enforcement power, which power to exercise, or how to exercise a power. It provides that in all these circumstances, the Welsh Ministers must consider:
- (a) the desirability of RSLs being free to choose how to provide services and conduct business;
  - (b) whether the failure or other problem concerned is serious or trivial;
  - (c) whether the failure or other problem is a recurrent or isolated incident;
  - (d) the speed with which the failure or other problem needs to be addressed
117. Subsection (3) defines an 'enforcement power' as a power exercisable under any of the statutory provisions listed in that subsection.

#### **Enforcement Notice**

118. **Sections 52 to 56** insert new sections 50C to 50G into the 1996 Act. These new sections describe the arrangements relating to the giving of enforcement notices to RSLs.

##### *Section 52 - Grounds for giving notice*

119. This section inserts a new section 50C into the 1996 Act to specify the grounds on which the Welsh Ministers may give an enforcement notice to a RSL. Subsection (1) of new section 50C specifies that the Welsh Ministers must be satisfied that one of the cases for issuing an enforcement notice applies and that an enforcement notice is the appropriate intervention power to use, whether alone or as a potential precursor to further action.
120. Subsections (2) to (10) specify the cases that may form the basis for giving an enforcement notice as follows:
- that a RSL has failed to meet a standard established by the Welsh Ministers;

- that the affairs of a RSL have been mismanaged;
  - that the RSL has failed to comply with an earlier enforcement notice;
  - that the RSL has failed to publish information in accordance with a requirement under sections 50I(3) or 50Q(3);
  - that it is required to protect the interests of tenants;
  - that it is necessary to protect the assets of a RSL;
  - that a RSL has failed to comply with an undertaking that it has given to the Welsh Ministers;
  - that an offence under Part 1 of the 1996 Act has been committed by a RSL;
  - that a RSL has failed to comply with a recommendation made by the Public Service Ombudsman for Wales;
121. Subsection (11) provides that where the Welsh Ministers are satisfied that an offence under Part 1 of the 1996 Act has been committed in respect of a RSL but by another person (e.g. a member or employee), the Welsh Ministers may serve an enforcement notice on the other person rather than the RSL and, in such cases, references in Chapter 4A of the 1996 Act to the RSL should be read as references to that person.

### ***Section 53 - Content***

122. This section inserts a new section 50D into the 1996 Act to specify what an enforcement notice must include. It must specify which of the cases in section 50C of the 1996 Act are the grounds for the enforcement notice, the specific action which the RSL must take in response to the notice, the date by when the specified action must be taken, and the effect of an appeal or withdrawal.
123. Subsection (2) permits the Welsh Ministers to specify in an enforcement notice that the notice must be published in a specified manner.

### ***Section 54 - Appeal***

124. This section inserts a new section 50E into the 1996 Act to provide that a RSL served with an enforcement notice may appeal against it to the High Court.

### ***Section 55 - Withdrawal***

125. This section inserts a new section 50F into the 1996 Act to provide that the Welsh Ministers may withdraw an enforcement notice.

### ***Section 56 - Sanction***

126. This section inserts a new section 50G into the 1996 Act.
127. Subsection (1) of new section 50G places limitations on the further steps that may be taken by the Welsh Ministers where the enforcement notice has been served on a person (other than the RSL) under section 50C(11) of the 1996 Act. In these circumstances, the Welsh Ministers may only issue a penalty notice (as set out in sections 50H to 50M of the 1996 Act), or take steps to instigate a prosecution in relation to the offence which provided grounds for service of the enforcement notice. Subsection (2) provides that a person who has been served with an enforcement notice under Case 8 of section 50C of the 1996 Act may be prosecuted for the offence which gave grounds for that enforcement notice only if they have failed to comply with that notice.

## **Penalty**

128. [Sections 57 to 63](#) insert new sections 50H to 50N into the 1996 Act. These new sections describe the arrangements relating to the imposition of penalties on RSLs.

### ***Section 57 - Grounds for imposition***

129. This section inserts a new section 50H into the 1996 Act to specify the grounds on which the Welsh Ministers may decide to require RSLs to pay penalties. As well as being satisfied that one of the cases specified in this section applies, the Welsh Ministers must also be satisfied that a penalty is appropriate for the identified problem.
130. Subsections (2) to (6) of new section 50H specify the cases where the Welsh Ministers may issue a penalty. These cases are where:
- the RSL has failed to meet a standard under section 33A;
  - the affairs of the RSL have been mismanaged;
  - the RSL has failed to comply with an enforcement notice;
  - the RSL has failed to comply with an undertaking that it has given to the Welsh Ministers;
  - where offences under Part 1 of the 1996 Act have been committed by the RSL.
131. Subsection (7) provides that where the Welsh Ministers are satisfied that an offence has been committed in respect of a RSL by another person, the case for imposing a penalty is that which is set out in subsection (6), and the Welsh Ministers may require that other person rather than the RSL to pay the penalty. This subsection also provides that, in such cases, references in Chapter 4A of the 1996 Act to a RSL should be read as references to that other person.
132. Subsection (8) requires the Welsh Ministers to be satisfied beyond reasonable doubt if they wish to rely on the case described in subsection (6) as a basis for the imposition of a penalty.

### ***Section 58 - Imposition***

133. This section inserts a new section 50I into the 1996 Act to provide that a penalty is imposed by a written notice being served on a RSL. Subsection (2) of new section 50I requires the notice to specify which of the cases listed in subsections (2) to (6) of section 50H of the 1996 Act is the basis for the notice, the amount of the penalty that must be paid, how the penalty must be paid, the deadline for the payment, and any interest or additional penalty payable in the event of late payment.
134. Subsection (3) allows the notice to require the RSL to publish information about the penalty. Subsection (4) requires the notice to explain the enforcement action that may be taken in the event of non-payment and the right to appeal to the High Court against the penalty.

### ***Section 59 - Amount***

135. This section inserts a new section 50J into the 1996 Act which provides that the amount of the penalty that may be imposed on the ground specified in Case 5 (where an offence has been committed by a RSL) of section 50H of the 1996 Act may not exceed the maximum amount that the court could impose for that offence. In all other cases the maximum amount of penalty that the Welsh Ministers may impose is £5,000. The Welsh Ministers may amend this maximum penalty of £5,000 by affirmative resolution order.

### ***Section 60 - Warning***

136. This section inserts a new section 50K into the 1996 Act which sets out a warning procedure which must be followed before a penalty notice can be imposed. The Welsh Ministers must give a RSL a notice, called a “pre-penalty warning”, which must specify the grounds on which they think a penalty could be imposed, warn the RSL that the Welsh Ministers are considering imposing a penalty, include any indication the Welsh Ministers can give of the likely amount, and explain the RSL’s right to make representations (section 50L of the 1996 Act), the enforcement action that may be taken in relation to penalties (section 50M of the 1996 Act) and the RSL’s right to appeal against the penalty (section 50N of the 1996 Act).
137. Subsection (2) requires the Welsh Ministers to send any other person that it thinks appropriate, a copy of the pre-penalty warning. In deciding to whom it would be appropriate to send a copy, they must have particular regard to any person who provided information which has led to the giving of the pre-penalty warning.
138. Subsection (3) requires the Welsh Ministers to refer to section 6A of the 1996 Act (inserted by section 41 of this Measure and which permits RSL’s to offer voluntary undertakings) and indicate in its pre-penalty warning whether the Welsh Ministers would accept a voluntary undertaking instead of, or in mitigation of, a penalty.
139. Subsection (4) allows the Welsh Ministers to combine the pre-penalty warning with warnings about the use of its other enforcement powers.

### ***Section 61 - Representations***

140. This section inserts a new section 50L into the 1996 Act which allows RSLs issued with a pre-penalty warning to make representations to the Welsh Ministers.
141. Subsection (2) of the new section 50L specifies that the minimum period for representations must be at least 28 days, beginning on the date on which the RSL receives the pre-penalty warning.
142. The representations may address whether a penalty should be imposed, or the likely amount of any penalty
143. Subsection (4) provides that at the end of the period for representations the Welsh Ministers must consider any representations that have been made, and decide whether to impose a penalty.

### ***Section 62 - Enforcement***

144. This section inserts a new section 50M into the 1996 Act which specifies how penalties will be enforced, and provides sanctions for late payment or non-payment. Penalties are treated as a debt to the Welsh Ministers once a penalty notice is issued.
145. Subsection (2) of the new section 50M allows the Welsh Ministers to charge interest on penalties that are not paid by the date specified in the penalty notice and to impose additional penalties for late payment. In such cases, subsection (3) provides that the additional sums are also treated as penalties, and that these additional amounts may have the effect of increasing the penalty above the limit set by section 50J of the 1996 Act.
146. Subsection (4) gives a discretionary power to the Welsh Ministers to offer an early payment discount if the RSL pays the penalty in advance of the date specified in the penalty notice.
147. Subsection (5) specifies that if the penalty notice is served on a person under Case 5 of section 50H of the 1996 Act, that person may not be prosecuted for the offence which is the ground for requiring the payment of the penalty.

### ***Section 63 - Appeal***

148. This section inserts a new section 50N into the 1996 Act which gives a RSL the right to appeal to the High Court against the imposition of, and amount of, a penalty.

### **Compensation**

149. **Sections 64 to 71** insert new sections 50O to 50V into the 1996 Act. These new sections describe the arrangements relating to the imposition of a requirement on a RSL to pay compensation.

### ***Section 64 - Grounds for Award***

150. This section inserts a new section 50O into the 1996 Act which specifies the grounds on which the Welsh Ministers may require a RSL to pay compensation. The Welsh Ministers must be satisfied either that the RSL has failed to meet a standard of performance as set out in section 33A of the 1996 Act, or that the RSL has failed to comply with an undertaking that it has given to the Welsh Ministers under section 6A of that Act. They must also be satisfied that the award of compensation is appropriate.

### ***Section 65 - Persons to whom compensation may be awarded***

151. This section inserts a new section 50P into the 1996 Act which indicates those circumstances under which compensation may be awarded. It should be awarded to a person or persons who have suffered as a result of the failure that forms the basis for awarding compensation.

### ***Section 66 - Award***

152. This section inserts a new section 50Q into the 1996 Act which specifies the process for giving a notice to a RSL that requires payment of compensation, and the content of that notice. Compensation is awarded by the Welsh Ministers giving written notice (a “compensation notice”) to the RSL and the person or persons to be compensated.
153. Subsection (2) of new section 50Q provides that compensation notices must set out:
- the grounds on which compensation is awarded,
  - the amount of the compensation award,
  - the person or persons who are to be compensated,
  - the period within which that compensation must be paid, and
  - any interest or additional compensation payable in the event of late payment.
154. The notice may require the RSL to publish information about the award and must explain the effects of sections 50U (enforcement) and 50V (appeal) of the 1996 Act.

### ***Section 67 - Impact***

155. This section inserts a new section 50R into the 1996 Act which requires the Welsh Ministers to take account of any information available to it about the financial situation of the RSL when considering awarding compensation and when considering the amount. The Welsh Ministers must consider the likely impact on the RSL’s ability to provide services and in particular, must aim to avoid jeopardising its financial viability, existing financial commitments, and ability to remedy the problem.

### ***Section 68 - Warning***

156. This section inserts a new section 50S into the 1996 Act which allows for the issue of a 'pre-compensation warning' and specifies a similar procedure to that in section 50K(1) of the 1996 Act (pre-penalty warnings), as inserted by section 60 of this Measure.

### ***Section 69 - Representations***

157. This section inserts a new section 50T into the 1996 Act which allows the RSL to make representations to the Welsh Ministers in relation to compensation. The process specifies a similar procedure to that in section 50L of the 1996 Act (pre-penalty warnings - representations), as inserted by section 61 of this Measure.

### ***Section 70 - Enforcement***

158. This section inserts a new section 50U into the 1996 Act which makes provision for compensation payments to be enforced in a similar manner to section 50M of the 1996 Act, as inserted by section 62 of this Measure. Compensation is treated as a debt to the person or persons to whom it has been awarded. The Welsh Ministers may award interest or additional compensation for non payment or late payment of compensation.

### ***Section 71 - Appeal***

159. This section inserts a new section 50V into the 1996 Act which gives a RSL the right to appeal to the High Court against the award of compensation or the amount of compensation awarded.

## **Management and constitution of registered social landlords**

160. **Sections 72 to 78** insert new paragraphs 15B to 15H into Schedule 1 to the 1996 Act. These give the Welsh Ministers additional powers in relation to the management of RSLs.

### ***Section 72 - Management Tender***

161. This section inserts a new paragraph 15B into Schedule 1 to the 1996 Act. Sub-paragraph (1) of new paragraph 15B specifies that the Welsh Ministers may use the power conferred by this paragraph where they are satisfied that a RSL has failed to meet a standard set under new section 33A of the 1996 Act, or that there has been misconduct or mismanagement in its affairs.
162. If the Welsh Ministers are satisfied that one of the conditions in sub-paragraph (1) is met, sub-paragraph (3) gives them the power to require the RSL to put the RSL's management functions out to tender. The Welsh Ministers must specify the process that the social landlord is to follow in putting the services out to tender and making an appointment as a result of that process.
163. The services to be tendered out may relate to the RSLs affairs generally, or may relate to specified affairs.
164. The Welsh Ministers must specify certain matters when they exercise this power, as follows:
- the constitution of the panel which has the responsibility for selection, must include provision for ensuring tenants' interests will be represented on that panel,
  - provision for ensuring that the procurement process follows best practice, and
  - the terms and conditions on which the manager is to be appointed, that will include the setting of the required standards, how those standards will be monitored and enforced, and resources.



***Section 73 - Management tender: supplemental***

165. This section inserts a new paragraph 15C into Schedule 1 to the 1996 Act. Sub-paragraph (1) of new paragraph 15C provides that before the Welsh Ministers require a RSL to implement the tendering process, they must give that RSL a notice which specifies the grounds on which action may be taken, warns the RSL that they are considering action under this section, and explains the effect of the paragraph.
166. Sub-paragraphs (2) and (3) provide that the notice must specify a period during which the RSL may make representations to the Welsh Ministers, and that the period must be at least 28 days and begin on the date the social landlord receives the notice.
167. Sub-paragraph (4) requires the Welsh Ministers to send a copy of the notice to any person they think appropriate. In deciding to whom it would be appropriate to send a copy, they must have particular regard to any person who provided information which has led to the giving of the notice.
168. Sub-paragraph (5) provides that the notice served must advise the RSL on whom it is served about the provisions for the landlord to give voluntary undertakings to the Welsh Ministers, and the extent to which they would accept an undertaking instead of, or in mitigation of, the use of their powers under Chapter 2.
169. Sub-paragraph (6) allows the Welsh Ministers to issue the notice in conjunction with warning notices relating to the potential use of other enforcement powers.
170. Sub-paragraph (7) provides that in deciding whether to use this power, the Welsh Ministers must have regard to the views of relevant tenants, the RSL and, if appropriate, any relevant local housing authority.
171. Sub-paragraph (8) states that a RSL served with a notice by the Welsh Ministers under paragraph 15B of the 1996 Act has a right of appeal to the High Court.

***Section 74 - Management Transfer***

172. This section inserts a new paragraph 15D into Schedule 1 to the 1996 Act. The powers set out in this paragraph are exercisable following an inquiry as provided for under paragraph 20 of Schedule 1 to the 1996 Act, or an audit under paragraph 22 of that Schedule.
173. Sub-paragraphs (2) and (3) provide that the Welsh Ministers may require a RSL to transfer some or all of its management functions to a specified person. The requirement may relate to the RSL's affairs generally or to specified affairs only.
174. Sub-paragraph (4) provides that the requirement must specify the terms and conditions of the transfer (including as to remuneration) or make provision for the manner in which they are to be determined.
175. Sub-paragraph (5) gives the person to whom the management functions are to be transferred, the powers specified by the Welsh Ministers in the requirement. In addition the person to whom management is transferred by the requirement will have any other powers in relation to the RSL's business that are necessary to give effect to the purposes specified in the requirement. These specifically include the power to enter into agreements and take other action on behalf of the RSL.

***Section 75 - Management Transfer: supplemental***

176. [Section 41](#) inserts a new paragraph 15E into Schedule 1 to the 1996 Act. This makes similar supplemental provision in relation to management transfer to that made in paragraph 15C of that Schedule (inserted by section 73 of this Measure) in relation to management tender.

***Section 76 - Appointment of manager of registered social landlord***

177. This section inserts a new paragraph 15F into Schedule 1 to the 1996 Act. This gives the Welsh Ministers the power either to appoint an individual as manager of the RSL, or to require the RSL to appoint an individual as manager as set out in sub-paragraph (2) of new paragraph 15F.
178. The Welsh Ministers may exercise this power if they are satisfied that a RSL has failed to meet a standard set under section 33A of the 1996 Act or that there has been misconduct or mismanagement in its affairs.
179. Sub-paragraphs (3) to (5) of new paragraph 15F set out the nature of the requirement or the appointment that will be specified by the Welsh Ministers.
180. Sub-paragraph (3) provides that the Welsh Ministers may determine the matters in respect of which the manager is to be appointed.
181. Sub-paragraph (4) provides that the appointment of a manager is to be on terms and conditions (including as to remuneration) specified in or determined in accordance with the appointment of, or the requirement to appoint, a manager under sub-paragraph (3).
182. Sub-paragraph (5) gives the appointed manager any powers specified in the requirement or appointment, and any other powers in relation to the RSL's business that are required for the purposes specified in the requirement or appointment. These specifically include the power to enter into agreements and take other action on behalf of the RSL.

***Section 77- Appointment of manger: supplemental***

183. This section inserts a new paragraph 15G into Schedule 1 to the 1996 Act. This makes similar provision to that made in paragraph 15C of that Schedule in relation to appointment of a manager.

***Section 78 - Amalgamation***

184. This section inserts a new paragraph 15H into Schedule 1 to the 1996 Act. Sub-paragraph (1) of new paragraph 15H sets out the cases where this paragraph applies, which are where the Welsh Ministers are satisfied that there has been misconduct or mismanagement in the affairs of a RSL which is an industrial and provident society, or that the amalgamation of an industrial and provident society with another industrial and provident society would be likely to improve the management of its affairs.
185. Sub-paragraph (2) gives the Welsh Ministers power to bring about the amalgamation of the society with another industrial and provident society.
186. Sub-paragraph (3) specifies that an instrument providing for an amalgamation has the same effect as a resolution by that society under section 50 of the Industrial and Provident Societies Act 1965. Sub-paragraphs (4) to (6) require that a copy of the instrument be sent to and registered by the Financial Services Authority, at which point the instrument takes effect, and require that the copy is sent for registration within 14 days of the date of execution.
187. Sub-paragraph (7) provides that any body created by virtue of an amalgamation must be registered with the Welsh Ministers as a social landlord and pending registration, it is to be treated as registered.

**Amendments relating to inquiries or audits**

188. **Sections 79 to 82** make amendments to paragraphs 23 to 26 of Schedule 1 to the 1996 Act to amend the Welsh Ministers' powers in relation to matters consequential to the carrying out of inquiries or audits under that Schedule.



***Section 79 - Restrictions on dealings during an inquiry***

189. This section amends paragraph 23 of Schedule 1 to the 1996 Act by inserting a new sub-paragraph (2A). This sub-paragraph requires the Welsh Ministers to take reasonable steps to give notice to a RSL before making an order to restrict the dealings of the RSL during an inquiry. It also requires the Welsh Ministers to take reasonable steps to give notice to the landlord and the person to whom the order will be directed where the Welsh Ministers propose to make an order directing a bank (or other person) holding money or securities on behalf of a landlord not to part with the money or securities during an inquiry.

***Section 80 - Restrictions on dealings following an inquiry or extraordinary audit***

190. This section makes an equivalent amendment to that made by section 79 by amending paragraph 24 of Schedule 1 to the 1996 Act. It does this by inserting a new subparagraph (3A) in relation to dealings following an inquiry or audit. A new subparagraph (7) is also inserted into paragraph 24, stating that any restriction on dealings following an inquiry or extraordinary audit will have effect until it is revoked by the Welsh Ministers.

***Section 81 - Disqualification of removed person***

191. This section amends paragraph 25 of Schedule 1 to the 1996 Act by inserting a new sub-paragraph (4A). Paragraph 25 disqualifies a person removed from office under certain statutory provisions from acting as an officer of a RSL, and requires the Welsh Ministers to keep a register of all persons removed from office under those provisions. The Welsh Ministers may, however, waive a person's disqualification. Where they do so, new subparagraph (4A) will require the Welsh Ministers to show the details of any waivers in the register.

***Section 82 - Acting while disqualified***

192. This section makes a number of amendments to paragraph 26 of Schedule 1 to the 1996 Act.
193. The effect of the amendment in subsection (2) is to increase the period for which a person guilty of an offence of acting as an officer of a RSL while disqualified may be imprisoned on summary conviction. At present, such a person may be imprisoned for up to six months, but subsection (2) will enable such a person to be imprisoned for up to 12 months.
194. The effect of subsection (3) is to prevent this increased period of imprisonment from being imposed in relation to an offence committed before section 282 of the Criminal Justice Act 2003 has been commenced.
195. Under paragraph 26 of Schedule 1 to the 1996 Act, the Welsh Ministers may order a person to repay sums to a RSL or to the Welsh Ministers where that person has acted as an officer of that landlord while disqualified and has received payments or benefits in connection with that role. Subsection (4) inserts a new sub-paragraph into paragraph 26 to enable the landlord or the Welsh Ministers to recover that sum as a debt if the disqualified person fails to comply with an order.