

**National Assembly for Wales**  
Constitutional and Legislative  
Affairs Committee

## Report on the Housing (Wales) Bill

March 2014



Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales

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## Remit and Powers

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders 21. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

## Current Committee membership



**David Melding (Chair)**  
Deputy Presiding Officer  
Welsh Conservatives  
South Wales Central



**Suzy Davies**  
Welsh Conservatives  
South Wales West



**Julie James**  
Welsh Labour  
Swansea West



**Eluned Parrott**  
Welsh Liberal Democrats  
South Wales Central



**Simon Thomas**  
Plaid Cymru  
Mid and West Wales

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## Recommendations

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**Recommendation 1.** We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure in the first instance to the making of regulations under sections 7(1), 7(1)(b) and section 10(2)(b), followed thereafter by the negative procedure.

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**Recommendation 2.** We recommend that the Minister should table an amendment to the Bill requiring Assembly approval for the withdrawal of a code under section 28(8). This should replace the use of a direction under that section and would be consistent with the requirement for approval to issue a code in accordance with section 28(6).

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**Recommendation 3.** In the absence of detail on the face of the Bill and given that financial issues are involved, we recommend that the Minister should table an amendment to apply the affirmative procedure to regulations made under sections 7(1)(c) and section 10(2)(c).

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**Recommendation 4.** We recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 69(1).

(Page 22)

**Recommendation 5.** We recommend that the Minister should table an amendment to the Bill to set standards under section 94 by means of subordinate legislation to which the affirmative procedure should apply.

(Page 26)

**Recommendation 6.** We recommend that the Minister should table an amendment to ensure that the intention behind section 95(2) is more clearly stated on the face of the Bill.

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# 1. Introduction

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## *The Committee's remit*

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21<sup>1</sup> and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

## *Introduction of the Bill*

4. On 18 November 2013, the Minister for Housing and Regeneration, Carl Sargeant AM (“the Minister”) introduced the Housing (Wales) Bill (“the Bill”) and accompanying Explanatory Memorandum.<sup>2</sup>
5. The Assembly’s Business Committee referred the Bill to the Communities, Equality and Local Government Committee for consideration on 21 November 2013, setting the deadline of 21 March 2014 for reporting on its general principles.
6. The Constitutional and Legislative Affairs Committee considered the Bill at its meeting on 20 January 2014, taking evidence from the Minister and two officials.

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<sup>1</sup> National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, December 2012

<sup>2</sup> Welsh Government, *Housing (Wales) Bill Explanatory Memorandum, incorporating the Regulatory Impacts Assessment and Explanatory Notes*, November 2013



## 2. Background

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7. The Explanatory Memorandum says that the Bill:

“...will contribute to the Welsh Government’s three strategic priorities for housing: more homes, better homes, and better services. In broad terms, it will help to ensure that people have access to a decent, affordable home and that people at risk of becoming homeless receive the help they need.”<sup>3</sup>

8. In particular, the Bill:

“...will modernise the private rented sector and it will place a greater emphasis on action to prevent people from becoming homeless. It will also provide local authorities with the power to introduce ... an increased rate of council tax as another means of tackling the problem of empty homes and the impact on local housing supply in some areas. A duty will be placed on local authorities to provide sites for Gypsy and Traveller communities in response to identified need and the Bill will assist the expansion of co-operative housing by improving arrangements for people who wish to join or leave a co-operative. It will set standards for local authority rents, services charges and quality of accommodation and support the achievement of the Welsh Housing Quality Standard. Finally, it will abolish the Housing Revenue Account Subsidy system, enabling local authorities to become self financing.”<sup>4</sup>

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<sup>3</sup> Explanatory Memorandum, paragraph 1.1

<sup>4</sup> Explanatory Memorandum, paragraph 1.2

### 3. Legislative competence

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9. The Explanatory Memorandum states that the National Assembly has the competence:

- to make provision for and in connection with Housing by virtue of section 108 of Schedule 7, of the *Government of Wales Act 2006*; and
- to make provisions concerning Local Government by virtue of paragraph 12 of schedule 7, of the *Government of Wales Act 2006*.<sup>5</sup>

10. The Minister told us:

“...the housing element is a devolved function of the Welsh Government. We are satisfied, as are the Presiding Officer and the UK Government, regarding the competence of this Bill as it goes forward.”<sup>6</sup>

#### ***Our view***

11. We note that no issues have been raised with the Minister regarding the National Assembly’s ability to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.

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<sup>5</sup> Explanatory Memorandum, paragraphs 2.1–2.3

<sup>6</sup> Constitutional and Legislative Affairs (“CLA”) Committee, RoP [paragraph 13], 20 January 2014

## 4. General observations

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12. We asked the Minister about the balance between what is included on the face of the Bill and what is left to regulations. He told us that:

“We have endeavoured to put as much detail on the face of the Bill as possible in this process. The detail of the technical matters has been left to the Order and regulation-making powers...

“...we believe on merit that, as presented, the Bill is well-balanced and able to deal with the challenges that we face in terms of the face element of the Bill and the need to be nimble and have the ability to change as and when required.”<sup>7</sup>

### *Our view*

13. We note the Minister’s evidence. We believe that, in the main, the Bill strikes the right balance between the details and policy objectives contained on its face and what is left to be made through subordinate legislation.

14. We welcome the approach adopted by the Minister and consider the Bill’s policy objectives are reasonably clearly set out on its face.

15. We note that the Explanatory Memorandum identifies 28 powers to make subordinate legislation and consider this to be a significant number. Nevertheless, there is much greater clarity than in previous Bills about how these powers are to be used and for what purpose, identifying a clear policy direction.

16. In our view the approach marks an improvement in the way the Welsh Government is drafting its Bills. That said, the Welsh Government must always explain clearly why it is necessary to include a significant number of delegated powers, irrespective of how much detail is placed on the face of the Bill.

17. We hope this approach marks a conscious departure from the skeleton or framework Bills which we have considered so far during the Fourth Assembly.

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<sup>7</sup> CLA Committee, *RoP [paragraphs 10-11]*, 20 January 2014

## **5. Powers to make subordinate legislation – observations on specific powers**

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18. The Bill contains 128 sections and 3 Schedules and is divided into 8 Parts.

19. The Bill contains 28 powers to make orders and regulations. These are summarised in Part 5 of the Explanatory Memorandum. In addition, the Bill provides substantial powers for the Welsh Ministers to issue standards, guidance and directions.

20. This Chapter focuses on those powers of most interest and concern to us.

21. The absence of a recommendation or comment in respect of the use of a particular procedure for the making of subordinate legislation is an indication that we are content with the procedure chosen.

### **Part 1 – Private Rented Sector**

***Sections 2 – Meaning of key terms; 6 – Duty to maintain register in relation to rental properties; 7 – Registration by a local housing authority; 10 – Licence application requirements; 11– Fit and proper person requirement and 13 – Determination of application***

22. These sections are concerned with aspects of registration and licensing.

23. Section 2 sets out the meaning of terms such as rental property, landlords, agents, responsible persons and letting. Section 2(4) provides the Welsh Ministers with the power to amend the definition of a “rental property” in Wales by Order. According to the Explanatory Memorandum, the power is subject to the affirmative procedure because:

“...any change to the definition of a “rental property” could change the extent of the registration and licensing requirements.”<sup>8</sup>

24. Section 6 requires local housing authorities to maintain and keep up to date a register of landlords of private rented sector housing, rental properties and responsible persons and registered agents.

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<sup>8</sup> Explanatory Memorandum, Chapter 5, page 43

Section 6(4) provides the Welsh Ministers with the power to amend the categories of information held on the register from time to time and to amend what may be accessible by the public, by order. It is subject to the affirmative procedure because, according to the Explanatory Memorandum it allows:

“...amending of primary legislation and ... relates to the collection of the specific personal details of individuals and its release to others.”<sup>9</sup>

25. Under section 7, where a person applies to be registered in relation to a rental property and provides the necessary information and fee, the local housing authority must grant the application, and assign a registration number to the applicant. The local housing authority will then enter the applicant in the register as a registered landlord, registered responsible person or registered agent.

26. Section 7(1) provides the Welsh Ministers with the power to set out the time period for an applicant to be registered by a local housing authority, through regulations. Section 7(1)(b) enables the Welsh Ministers to prescribe, by regulations, the information required by a local housing authority when determining an application for registration. Both regulation-making powers are subject to the negative procedure because, according to the Explanatory Memorandum they prescribe “technical matters of detail, which may change from time to time”.<sup>10</sup> Section 7(1)(c) introduces the power to prescribe fees in relation to applications for registration, which is covered under section 31 below.

27. Section 10 provides that any person who has applied to be registered may also apply to a local housing authority for a licence to manage rental properties. Section 10(2)(b) enables the Welsh Ministers to prescribe, by regulations, the information required by a local housing authority when determining a licence application. The regulations are subject to the negative procedure because according to the Explanatory Memorandum they prescribe “technical matters of detail, which may change from time to time”.<sup>11</sup> Section 10(2)(c) introduces the power to prescribe fees in relation to applications for licences, which is covered under section 31 below.

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<sup>9</sup> Explanatory Memorandum, Chapter 5, page 43

<sup>10</sup> Explanatory Memorandum, Chapter 5, pages 43-44

<sup>11</sup> Explanatory Memorandum, Chapter 5, page 44

28. Section 11 sets out, on the face of the Bill, the matters and evidence to be taken into account by a local housing authority when considering whether an applicant for a licence is a fit and proper person. Section 11(6) provides the Welsh Ministers with the ability to amend section 11 by order to vary the list of evidence to be considered. According to the Explanatory Memorandum, the order is subject to the affirmative procedure because it allows primary legislation to be amended and relates to requirements for licence applicants to demonstrate they are fit and proper persons.<sup>12</sup>

29. Section 13 provides that a local housing authority must issue a licence to an applicant who meets all the requirements in section 10. Section 13(4) provides the Welsh Ministers with the flexibility to set out the time period, by regulations, for an application for a licence to be determined by local housing authorities. The regulations are subject to the negative procedure because according to the Explanatory Memorandum they prescribe “technical matters of detail, which may change from time to time”.<sup>13</sup>

30. We sought an explanation from the Minister on the rationale for the varying use of negative and affirmative procedures in these sections. He told us:

“...the Bill is composite, and there are many elements to it. While we try to look across the whole Bill and build consistency into the approach to the decision-making processes and whether we choose the affirmative or negative procedure, there are elements of that that are specific to this Part, and this section relates to the private rented sector, which is why we specifically apply the negative and affirmative procedures.”<sup>14</sup>

31. The Minister indicated that the order-making powers in sections 2, 6 and 11 “are wide-ranging and they have potential to limit or widen the scope of the regime” and for that reason “should be subject to the scrutiny approval of the Assembly.”<sup>15</sup> On the other hand, sections 7 and 10 “do not meet those criteria in terms of the need for that level

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<sup>12</sup> Explanatory Memorandum, Chapter 5, page 44

<sup>13</sup> Explanatory Memorandum, Chapter 5, page 44

<sup>14</sup> CLA Committee, *RoP [paragraph 16]*, 20 January 2014

<sup>15</sup> CLA Committee, *RoP [paragraph 17]*, 20 January 2014

of scrutiny and, therefore, we have approached it at a slightly different level.”<sup>16</sup>

32. We noted in Chapter 4 an improvement in the amount of detail contained on the face of the Bill compared to previous Welsh Government bills. However, we did question the Minister on this point in relation to sections 7 and 10, and suggested that the regulation-making powers might be subject to the affirmative procedure in the first instance and the negative procedure thereafter to ensure that the Assembly has a clearer indication of the Welsh Government’s thinking on this point. The Minister indicated that this had been considered but that “the negative procedure level is appropriate for this Part of the Bill at this point”.<sup>17</sup>

### ***Our view***

33. We are content with the application of the affirmative procedure to the order-making powers under sections 2, 6 and 11, and the negative procedure to the regulation-making power under section 13.

34. We remain unclear about the specific policy intentions of the Welsh Government as they relate to the regulation-making powers in sections 7 and 10. As a consequence, we believe that the making of regulations under these sections should be subject to the affirmative procedure in the first instance, followed by the negative procedure thereafter, except in relation to sections 7(1)(c) and 10(1)(c).

**Recommendation 1: we recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure in the first instance to the making of regulations under sections 7(1), 7(1)(b) and section 10(2)(b), followed thereafter by the negative procedure.**

35. The making of regulations under sections 7(1)(c) and 10(1)(c) is covered under section 31 (regulations about fees).

### ***Section 28 – Code of practice***

36. Section 28 empowers the Welsh Ministers to issue a code of practice which sets out standards of conduct to be followed by landlords, responsible persons and agents in managing rental

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<sup>16</sup> CLA Committee, *RoP [paragraph 17]*, 20 January 2014

<sup>17</sup> CLA Committee, *RoP [paragraph 19]*, 20 January 2014

properties. The code may not be issued until approved by resolution of the National Assembly (section 28(6)). Section 28(7) empowers the Welsh Ministers to set a date, by order (subject to no procedure) that a code of practice will come into force. Welsh Ministers may also modify or withdraw a code; section 28(8) provides that only a direction (to be laid before the Assembly) is required to withdraw a code.

37. The Minister explained that the code:

“...is likely to be in two parts. The first part will be on the governing relationship between the landlord and the tenants—so, the landlord’s code. The second part will be around the relationship between the agents and the landlord—the agent’s code, in effect. The landlord’s code will cover issues such as insurance, tenancy agreements, repair protocols, records of payments, et cetera with the landlord, and the agent’s code will be around the advertising of properties, letting arrangements, rent collection, property, protection of client’s money, et cetera.”<sup>18</sup>

38. In explaining why the process for revoking the code would follow a different procedure from that which introduces it, the Minister’s official said:

“The process requires approval. The reason for the provisions around withdrawing a code may be that, for example, if there were two codes separated out in the future and the Welsh Ministers just wanted to issue one, they could withdraw the element and it was not considered that that would necessarily need to be subject to any procedure. The important thing that we wanted to get across here was the actual code itself and that the wording of the code was subject to appropriate scrutiny, consultation and approval of Welsh Ministers. So, that was the balance that we were trying to strike.”<sup>19</sup>

39. The Minister indicated that revocation of a code was an “unlikely action, but it would only be on the basis of the re-introduction of something new, I expect”.<sup>20</sup> He added:

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<sup>18</sup> CLA Committee, *RoP [paragraph 73]*, 20 January 2014

<sup>19</sup> CLA Committee, *RoP [paragraph 81]*, 20 January 2014

<sup>20</sup> CLA Committee, *RoP [paragraph 85]*, 20 January 2014



“I think that the important process of this is the introduction element to the revocation, while important, and having to replace it with something else—it would come under the scrutiny of the Assembly.”<sup>21</sup>

40. The Minister also considered that the use of a Ministerial order to introduce the code (under section 28(7)) was an “appropriate vehicle”.<sup>22</sup>

### ***Our view***

41. We are content with the procedures provided for in the Bill in respect of sections 28(6) and 28(7).

42. Normal practice is for revocations, of a particular item of delegated legislation, to be subject to the same procedure as that which applies to the making of the legislation. We do not believe that the Minister has made a convincing case for departing from this principle.

**Recommendation 2: we recommend that the Minister should table an amendment to the Bill requiring Assembly approval for the withdrawal of a code under section 28(8). This should replace the use of a direction under that section and would be consistent with the requirement for approval to issue a code in accordance with section 28(6).**

### ***Section 29 – Guidance***

43. Under section 29, the Welsh Ministers, following consultation with local housing authorities and others, can issue, vary and revoke guidance to local housing authorities in respect of the exercise of their functions under Part 1 of the Bill. Local housing authorities are required to have regard to any guidance issued.

44. The power to issue guidance is broad, so we asked the Minister what it might include, to see whether regulations might be more appropriate. He provided some examples (by reference to previous responses given), such as the consideration of a fit and proper

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<sup>21</sup> CLA Committee, *RoP [paragraph 90]*, 20 January 2014

<sup>22</sup> CLA Committee, *RoP [paragraph 108]*, 20 January 2014

person<sup>23</sup> and what local authorities will be doing to start the registration process.<sup>24</sup> He added that:

“We think that we have covered all bases in terms of the detail that we understand the operation of the scheme to be in terms of what we are issuing in terms of guidance. The proposals around the registration and licensing of landlords and letting agents within the Bill ... give the right balance in the Bill. As an example, guidance could cross-reference enforcement powers under the housing health and safety rating system ... However, the sections of all of this are based in the guidance that we have presented and we believe that is the right balance.”<sup>25</sup>

45. He also said:

“...if there are elements where guidance is not strong enough to make sure it actually happens, it is something we would have to reconsider. At the moment, we believe—and the evidence we have and the detail coming forward from other schemes support this—that, in terms of the guidance element, we are not struck by the need for anything more than things being put into regulation at this point.”<sup>26</sup>

46. The Minister’s official said:

“...the guidance is for the operation by local authorities. First of all, with regard to the voluntary landlord scheme that currently operates, there is a vast amount of experience already there. That will form the basis of guidance that will be developed. However, as time goes on, as we review, monitor and evaluate, it will be important to enhance that guidance. We will learn, make continuous improvement and have good practice and best practice, and it is important that we spread that. So, the guidance could cover anything from the process they are adopting to publicity, promotion of the scheme and so on.”<sup>27</sup>

47. The Minister’s official also noted that local authorities:

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<sup>23</sup> CLA Committee, *RoP [paragraph 29]*, 20 January 2014

<sup>24</sup> CLA Committee, *RoP [paragraph 38]*, 20 January 2014

<sup>25</sup> CLA Committee, *RoP [paragraph 114]*, 20 January 2014

<sup>26</sup> CLA Committee, *RoP [paragraph 119]*, 20 January 2014

<sup>27</sup> CLA Committee, *RoP [paragraph 115]*, 20 January 2014

“...must have regard to guidance, and, when you read that in conjunction with case law, it is the case that they must follow the guidance unless they have good or cogent reasons not to do so. So, while it is a platform for spreading good practice, it will have a real status.”<sup>28</sup>

### ***Our view***

48. The power in section 29 is very widely-drawn. Because of the wide range of regulation-making powers available to the Minister, we are satisfied that they would be used to deal with matters of substantive policy and that guidance would be used to deal with matters of best practice etc. We would be concerned if this did not prove to be the case.

49. We are content with the power to issue guidance under section 29.

### ***Section 30 – Directions***

50. Section 30 enables the Welsh Ministers to give directions to a local housing authority about the exercise of its functions under Part 1 of the Bill. The local housing authority must comply with directions. The directions are subject to no procedure.

51. The Minister indicated that the directions could be used where a local authority follows the guidance reluctantly or in a very minor fashion.<sup>29</sup> He did not believe such powers were unique<sup>30</sup> and said:

“I think that what we are trying to achieve here is an element of a backstop position ... we do not see, currently, the need for this provision in terms of ... having to use this. However, subject to it not being implemented, I think it would be foolish not to have a position whereby we could take action, should we need to do so.”<sup>31</sup>

52. The Minister did not foresee a time when the Welsh Ministers might want to issue all-Wales regulations, as opposed to directions.<sup>32</sup>

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<sup>28</sup> CLA Committee, *RoP [paragraph 121]*, 20 January 2014

<sup>29</sup> CLA Committee, *RoP [paragraphs 126-127]*, 20 January 2014

<sup>30</sup> CLA Committee, *RoP [paragraph 129]*, 20 January 2014

<sup>31</sup> CLA Committee, *RoP [paragraph 129]*, 20 January 2014

<sup>32</sup> CLA Committee, *RoP [paragraphs 132-133]*, 20 January 2014

## ***Our view***

53. We consider the granting of powers of direction in section 30 to be appropriate and to reflect common practice.

### ***Section 31 – Regulations about fees***

54. Section 31 provides for the Welsh Ministers to set out, by regulations, the fees payable to a local housing authority by an applicant for registration (section 7(1)(c)) and licensing (section 10(2)(c)). The regulation-making powers are subject to the negative procedure because according to the Explanatory Memorandum they prescribe “technical matters of detail, which may change from time to time”.<sup>33</sup>

55. Section 31(1)(b) would permit the Welsh Ministers to delegate the setting of fees to a third party.

56. The Minister explained the rationale for the approach adopted:

“The setting of fees is an operational matter, we believe, and any fees are liable to change over a period of time—short or long; we do not know that currently. Therefore, the power to amend these fees is by means of subordinate legislation. Having the initial fee on the face of the Bill would cause confusion in the event of the fee subsequently changing, so that is why we needed the flexibility of not having it on the face of the Bill. It is usual practice for fees to be set in subordinate legislation. This follows common practice within Welsh legislation. In terms of delegating the setting of fees to a third party, a general power is needed; it could potentially relate to the training element of achieving licensing status. Third parties will be involved in that process of training, as long as they are approved training providers. Therefore, we believe that it is important that the delegation to give the flexibility to amend the fees is within the Bill’s structure.”<sup>34</sup>

57. The Minister wrote to the Committee on 14 February 2014 to clarify the provision in section 31(1)(b) allowing the Welsh Ministers to delegate the setting of fees. He said:

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<sup>33</sup> Explanatory Memorandum, Chapter 5, page 45

<sup>34</sup> CLA Committee, *RoP [paragraph 140]*, 20 January 2014

“Whilst the intention initially will be for the Welsh Ministers to set the fees, any fees will need to be kept under review. The case of *Hemming*...underlines the fact that any registration and licence fees must be proportionate to the costs of the actual authorisation ‘procedures and formalities’. As such, it may be that in future the Welsh Ministers might consider that the local housing authorities themselves would be best placed to review the costs of these procedures and formalities and set the fees accordingly. This provision would enable the Welsh Ministers to empower the authorities to do so.”

### ***Our view***

58. We note that the Bill contains virtually no detail on its face in respect of fees either through section 31 or the relevant regulation-making powers under sections 7(1)(c) and 10(2)(c). This is an important area of policy and, in our view, information about the principles surrounding the use of fees needs to be more clearly expressed on the face of the Bill.

59. In addition, given that financial matters are involved, we believe that the regulations should be subject to more robust scrutiny.

**Recommendation 3: in the absence of detail on the face of the Bill and given that financial issues are involved, we recommend that the Minister should table an amendment to apply the affirmative procedure to regulations made under sections 7(1)(c) and section 10(2)(c).**

### **Part 2 – Homelessness**

#### ***Section 36 – Duty to carry out a homelessness review and formulate a homelessness strategy***

60. Part 2 of the Bill provides for arrangements in relation to homelessness. Sections 36 to 38 are derived from the *Homelessness Act 2002*. They provide that a local authority is required to periodically carry out a homelessness review of its area and based on the results of the review, prepare and publish a homelessness strategy. A new strategy must be published every four years. The period has been

amended from five years to align with other local housing authority planning cycles.<sup>35</sup>

61. Section 36(2) requires local housing authorities to adopt a homelessness strategy in 2018 and in every fourth year after that. Section 36(3) permits the Welsh Ministers to amend those timescales by an order to which the negative procedure would apply, because according to the Explanatory Memorandum, it prescribes “technical matters of detail, which may change from time to time”.<sup>36</sup>

62. We asked the Minister to explain why the order-making power in section 36(3) is subject to the negative procedure. He said:

“...what we have tried to do is look on balance at what current legislation is in place and what new elements of this we have to introduce to bring the raft of homelessness legislation together. We have tried to balance that in terms of the affirmative and negative procedures throughout this section, too. This section prescribes technical matters of detail in this area, which may change from time to time, particularly around time levels, and, again, we are unsighted about what the future may hold in terms of homelessness. Therefore, we may have to review that at a further point in time in order to make the appropriate changes to the Bill.”<sup>37</sup>

### ***Our view***

63. We commend the Minister for putting a cycle on the face of the Bill to review homelessness. In our view this represents good practice.

64. It is the Committee’s established practice to seek the use of the affirmative procedure for any subordinate legislation that would change primary legislation. Nevertheless, matters of timing are regularly dealt with in subordinate legislation to which the negative procedure applies.

65. Given that the cycle of review has been placed on the face of the Bill, we consider that the use of the negative procedure is a proportionate way to amend the timeframe of that review.

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<sup>35</sup> Explanatory Memorandum, Annex C – Explanatory Notes, page 157

<sup>36</sup> Explanatory Memorandum, Chapter 5, page 45

<sup>37</sup> CLA Committee, *RoP [paragraph 154]*, 20 January 2014

## ***Chapter 2 – Help for people who are homeless or threatened with homelessness and Section 69 – Procedure on review***

66. Chapter 2 reforms duties to people affected by homelessness. In particular, new duties are placed on local authorities to take reasonable steps to prevent and relieve homelessness for all eligible applicants, including those who are not in priority need or are intentionally homeless. Many sections are derived from the *Housing Act 1996*, although in some instances they have been modernised and updated.

67. Chapter 2 contains eight regulation-making powers in sections 43, 45, 55, 61, 63 and 64.<sup>38</sup> All of these sections are subject to the affirmative procedure.

68. Section 69(1) enables the Welsh Ministers to set out, by regulations, the procedures to be followed when undertaking a review of a decision by a local authority regarding an application for assistance. According to the Explanatory Memorandum, the regulations are subject to the negative procedure because they prescribe “technical matters of detail which may change from time to time”,<sup>39</sup> a point confirmed by the Minister’s official.<sup>40</sup> He added that “it seemed sensible to have this one under the negative procedure, given the detail that would be involved in the right to review a decision”.<sup>41</sup>

69. The Minister’s official noted that many of the provisions relating to homelessness were restating Part 7 of the 1996 Act and this was one such case. He added that:

“...from the legal perspective, I would not see any reason why we would vary or depart very much from the existing subordinate legislation.”<sup>42</sup>

70. The Minister agreed to reconsider the use of the negative procedure for the power in section 69 after it was suggested that the Assembly would be interested in review procedures given the casework

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<sup>38</sup> Section 43 – Whether it is reasonable to continue to occupy accommodation; Section 45 – Suitability of accommodation; Section 55 – Priority need for accommodation; Section 61 – Deciding to disregard intentionality; Section 63 – Referral of case to another local housing authority and Section 64 – Local connection

<sup>39</sup> Explanatory Memorandum, Chapter 5, page 48

<sup>40</sup> CLA Committee, *RoP [paragraph 163]*, 20 January 2014

<sup>41</sup> CLA Committee, *RoP [paragraph 165]*, 20 January 2014

<sup>42</sup> CLA Committee, *RoP [paragraph 173]*, 20 January 2014

that Assembly Members receive.<sup>43</sup> In his letter of 14 February 2014, the Minister said he was minded to change the procedure from negative to affirmative, subject to our views.

### ***Our view***

71. On a general point of principle, we do not believe that restating a particular section of an existing UK Parliament or Assembly Act within a new Bill is reason enough to apply the same procedure to any subordinate legislative function that it contains. The procedure applied should be based on a range of factors, including what is most appropriate in the context of the new Bill and the level of detail it contains.

72. We note that the Minister is minded to change the procedure from negative to affirmative in respect of regulations to be made under section 69(1). We support and welcome the Minister's view.

**Recommendation 4: we recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 69(1).**

### ***Section 81 – Guidance***

73. Section 81 provides for local housing authorities to have regard to any guidance issued by the Welsh Ministers in respect of the authority's homelessness objectives. The guidance, which must be published, may be revised or withdrawn by the Welsh Ministers. The Minister explained that the power to issue guidance in section 81 of the Bill is an existing power under section 182 of the *Housing Act 1996*,<sup>44</sup> designed specifically for how local authorities should discharge their functions and apply various statutory instruments in practice.<sup>45</sup> The Minister's official indicated that existing guidance will need updating.<sup>46</sup>

### ***Our view***

74. We are content with the power to issue guidance under section 81.

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<sup>43</sup> CLA Committee, *RoP [paragraph 167]*, 20 January 2014

<sup>44</sup> CLA Committee, *RoP [paragraph 181]*, 20 January 2014

<sup>45</sup> CLA Committee, *RoP [paragraph 181]*, 20 January 2014

<sup>46</sup> CLA Committee, *RoP [paragraph 183]*, 20 January 2014



## **Part 3 – Gypsies and Travellers**

### ***Section 89 (Guidance)***

75. Section 89 contains a general power to issue guidance in relation to local authority functions relating to gypsies and travellers under Part 3 of the Bill.

76. The Minister explained that:

“The most important element of the guidance will be that it is important to consult directly with Gypsies and Travellers in all types of accommodation within a local authority area and organisations that may support them. So, that is a fundamental change to what we are currently seeing. There is often a basis of knowledge based upon a snapshot in time for Gypsy and Traveller communities. The guidance will be about the process of a more holistic view of the needs basis across an authority over a period of time, as opposed to one day in a year.”<sup>47</sup>

### ***Our view***

77. We are content with the power to issue guidance under section 89.

## **Part 4 – Standards for Social Housing**

### ***Sections 94 – Standards; 95 – Guidance; 96 – Consultation on standards and guidance***

78. Section 94 permits the Welsh Ministers to set standards to be met by local housing authorities in connection with the quality of accommodation provided, and the rent and service charges payable. The Welsh Ministers may revise and withdraw the standards from time to time and must publish any standards issued. These standards would be enforced by the Welsh Ministers by very extensive powers of direction and intervention, including powers of entry and inspection. No Assembly procedure would apply to these standards.

79. Section 95 enables the Welsh Ministers to issue guidance to local housing authorities that relates to a matter addressed by a standard and amplifies that standard. The Welsh Ministers may have regard to the guidance that they themselves have issued when considering if a

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<sup>47</sup> CLA Committee, *RoP [paragraph 193]*, 20 January 2014

local housing authority has complied with the standards. The Welsh Ministers may revise or withdraw the guidance and must publish any guidance issued. Section 96 sets out the arrangements for consulting on standards and guidance.

80. In considering the power in section 94 and noting a similar provision within the Bill at section 28, we asked the Minister whether the affirmative procedure would be more appropriate.

81. The Minister said:

“My response initially would be ‘no’; that is the way that we have laid these procedures to move forward. May I try to explain our processes behind that? On the standards for social housing, what we have tried to do is to put them on the same level, in terms of setting the approach, as what is in the standards for RSLs, so they broadly reflect each other. That is why we have linked in very strongly the approach where we would have the legislative programme that would take effect for local authorities and RSLs to be similar, if not the same, in terms of taking this forward. So, recognising your point across other elements of the Bill, we believe that this section is strongly related between RSLs and local authorities and that is why we have tried to mirror the legislation around that.”<sup>48</sup>

82. When asked whether the duty within section 96 of the Bill to consult on standards and guidance was a substitute for proper scrutiny of the proposals, the Minister said:

“We do not believe that that is the case. In relation to the statutory licensing conditions and failure to give rise to enforcement action, again, these are conditions that would mirror both RSLs and local authorities. So, we are not doing something in addition; we are trying to mirror the processes to get them on a level playing field in terms of legislation moving forward.”<sup>49</sup>

83. The Minister’s official added:

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<sup>48</sup> CLA Committee, *RoP [paragraph 195]*, 20 January 2014; an ‘RSL’ is a registered social landlord.

<sup>49</sup> CLA Committee, *RoP [paragraph 197]*, 20 January 2014

“...we did have regard to section 33C, in this particular instance, of the Housing Act 1996, which puts a similar consultation requirement in relation to RSL standards. That was introduced by the Housing (Wales) Measure 2011.”<sup>50</sup>

84. When asked about the possibility of the Welsh Ministers’ being permitted to disregard their own guidance by virtue of section 95(2), the Minister said:

“That is not what it is meant to suggest, Chair. It is perhaps the way that we have read it, in terms of the detail. Let me try to explain: in the guidance issued, in some cases, we believe, there will be a minimum standard and there will be a more gold-plated approach to best practice. We would expect guidance to be applied when we were considering at least minimum standards and, therefore, we could take into consideration the issues where gold-plated standards might or might not apply.”<sup>51</sup>

85. In his letter of 14 February 2014 the Minister explained the rationale for this approach:

“Firstly, there is no obligation upon the Welsh Ministers to issue guidance ...

“The purpose of the guidance is not to bind the Welsh Ministers. Therefore in assessing whether a local housing authority has met a standard, under section 95(2), Welsh Ministers may have regard to the guidance. There is no need for a duty to be placed upon the Welsh Ministers to have regard to the guidance.

“There are 3 scenarios to consider:

- (i) As noted above, guidance may not have been issued;
- (ii) Where guidance has been issued, the Welsh Ministers may be able to assess whether or not the standard has been met simply by reference to the standard. In which case, there would be no need for

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<sup>50</sup> CLA Committee, *RoP [paragraph 198]*, 20 January 2014

<sup>51</sup> CLA Committee, *RoP [paragraph 201]*, 20 January 2014

the Welsh Ministers to have regard to the guidance at all.

- (iii) Alternatively, there may be good reasons why a local housing authority has not complied with the guidance...”

86. The Minister went on to explain in the letter that the provision mirrors that in the *Housing (Wales) Measure 2011* and that no queries have been raised as to the provision. He also felt that “it would be unhelpful to amend the draft provision in section 95(2)”.

### ***Our view***

87. Section 28 of the Bill empowers the Welsh Ministers to issue a code of practice that sets standards relating to managing rental properties. Before the code can be issued, a draft must be approved by resolution of the Assembly.

88. Section 94 permits the Welsh Ministers to set standards to be met by local housing authorities in connection with the quality of accommodation provided, and the rent and service charges payable. These standards would be enforced by the Welsh Ministers by very extensive powers of direction and intervention, including powers of entry and inspection. No Assembly procedure would apply to these standards.

89. The contrast between the two approaches is striking. That in section 28 follows that in section 26 of the *Welsh Language (Wales) Measure 2011*, which provides for standards to be specified by regulations subject to the affirmative procedure.

90. We can see no logical reason for the difference of approach between section 28 and section 94. We believe that the setting of standards represents a significant policy issue. As in section 28 of the Bill and section 26 of the *Welsh Language (Wales) Measure 2011*, we consider that the setting of standards should be subject to robust scrutiny. The precise type of subordinate legislation is a matter for the Welsh Government to decide but, whichever is chosen, it should be subject to the affirmative procedure.

**Recommendation 5: we recommend that the Minister should table an amendment to the Bill to set standards under section 94 by**

**means of subordinate legislation to which the affirmative procedure should apply.**

91. Section 95(2) appears to us to be an unusual provision, permitting Welsh Ministers to disregard their own guidance. We note the Minister's evidence that this is not the intention. This being the case, we consider that section 95(2) would benefit from being re-drafted so that there can be no mistake about its intention and that there is absolute clarity about how section 95(2) will be used in practice.

**Recommendation 6: we recommend that the Minister should table an amendment to ensure that the intention behind section 95(2) is more clearly stated on the face of the Bill.**

## **Part 7 – Council Tax for Empty Dwellings**

### ***Section 122 – Amount of tax payable for empty dwellings***

92. Section 122 amends the *Local Government Finance Act 1992* by inserting a new section 12A. It enables a county council or county borough council in Wales, by determination, to increase the council tax payable on long term empty dwellings in their area by 50%. "Long term empty dwellings" are defined as dwellings that have been both unoccupied and substantially unfurnished for a continuous period of at least one year. The section also sets out the arrangements for making, varying or revoking a determination made under the section.

93. New section 12A(2) of the 1992 Act enables the Welsh Ministers to make regulations prescribing categories of dwelling in relation to which this additional council tax cannot be charged. According to the Explanatory Memorandum, the regulations are subject to the negative procedure because they prescribe "technical matters of detail which may change from time to time".<sup>52</sup>

94. Under new section 12A(10) of the 1992 Act, the furnishing or occupation of a dwelling for one or more periods of six weeks or fewer during that year will not affect its status as a long term empty dwelling. The Welsh Ministers may under section 12A(11) substitute, by regulations, a different period, of more than six weeks, for the six week period. According to the Explanatory Memorandum, the regulations are subject to the negative procedure because they

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<sup>52</sup> Explanatory Memorandum, Chapter 5, page 49

prescribe “technical matters of detail which may change from time to time”.<sup>53</sup>

95. In explaining the use of the negative procedure for regulations to be made under new section 12A(2), the Minister said:

“The issue around this procedure is that we have tried to mirror the process where the exemptions on the standard rate of council tax apply, which is also a negative procedure, and we have used the same procedure for council tax on empty dwellings.”<sup>54</sup>

96. An official accompanying the Minister added:

“...it is inserting provision into the Local Government Finance Act 1992, so it sits alongside existing provision that is subject to the negative procedure. You have to view it in the context of the legislation that it is going into.”<sup>55</sup>

### ***Our view***

97. We are content for the regulation-making powers in the new section 12A of the *Local Government Finance Act 1992* (and inserted by section 122 of the Bill) to be subject to the negative procedure.

## **Part 8 – Miscellaneous and General**

### ***Section 127 – Commencement***

98. Section 127 provides for commencement of the Bill to be by Order, subject to no Assembly procedure. Section 127(4)(b) would nevertheless permit the inclusion of transitory, transitional and saving provisions.

99. When questioned about the provisions in section 127(4)(b), the Minister said:

“...the powers that you are talking about relating to section 127(4)(b) do not allow Ministers to make consequential,

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<sup>53</sup> Explanatory Memorandum, Chapter 5, page 49

<sup>54</sup> CLA Committee, *RoP [paragraph 212]*, 20 January 2014

<sup>55</sup> CLA Committee, *RoP [paragraph 215]*, 20 January 2014

incidental or supplementary provisions in connection with the coming into force of the particular provisions.”<sup>56</sup>

100. The Minister’s official added:

“...the powers of transitory, transitional or saving provisions must be in connection with the commencement insofar as they are exercised under section 127. There are separate powers in section 126.”<sup>57</sup>

### ***Our view***

101. It is standard practice that no procedure is prescribed for commencement orders and we are content with this approach.

102. Any provision that could be made under section 127(4)(b) could also be made under section 126. The procedure that would apply to regulations under section 126 would normally be the negative procedure, unless they sought to change primary legislation, in which case the affirmative procedure would apply in accordance with section 124(3)(d).

103. On the basis of the explanation quoted in paragraph 100 and that the powers are to be used in a limited way, we are content. In this case, as in others, we have asked our officials to draw to our attention any use of commencement orders that the Committee might consider inappropriate.

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<sup>56</sup> CLA Committee, *RoP [paragraph 227]*, 20 January 2014

<sup>57</sup> CLA Committee, *RoP [paragraph 228]*, 20 January 2014