

EXPLANATORY MEMORANDUM TO THE HOUSING (SERVICE CHARGE LOANS) (AMENDMENT) (WALES) REGULATIONS 2011 SI 2011 No.

AND

THE HOUSING (PURCHASE OF EQUITABLE INTERESTS) (WALES) REGULATIONS 2011 SI 2011 No.

This explanatory memorandum has been prepared by the Housing Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Housing (Service Charge Loans) (Amendment) (Wales) Regulations 2011 and The Housing (Purchase of Equitable Interests) (Wales) Regulations 2011. I am satisfied that the benefits outweigh any costs.

HUW LEWIS

26 July 2011

1. Description

1.1 Both statutory instruments concern assistance to leaseholders of housing authorities (including local authorities and Registered Social Landlords) for the purpose of enabling such leaseholders to pay leasehold service charges owed to their landlords. All properties to which both sets of Regulations will apply will be flats. Whilst the Regulations refer to “tenants” this memorandum refers “leaseholders” as the Regulations concern the leaseholders of flats.

1.2 The Housing (Service Charge Loans) (Amendment) (Wales) Regulations 2011 amend the Housing (Service Charge Loans) Regulations 1992 enable social landlords to make such a loan to their leaseholders in respect of service charges for repairs or improvements on terms that do not require the payment of interest or that require payment of interest on part of the loan.

1.3 The Housing (Purchase of Equitable Interests) (Wales) Regulations 2011 give social landlords the power to assist a leaseholder by buying an equitable interest (ie, a share of the value) in the flat in order to assist the tenant to meet some or all of the costs of service charge payments payable by the leaseholder in respect of repairs and improvement contributions.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 None.

3. Legislative Background

3.1 Sections 308 and 309 of the Housing & Regeneration Act 2008 (“the 2008 Act”) contain the provisions giving rise to these two sets of Regulations. Section 308 amends section 450C of the Housing Act 1985 (“the 1985 Act”) with regard to the terms of loans under sections 450A or 450B to certain leaseholders, enabling the Welsh Ministers to amend the regulations under which those loans are made.

3.2 Section 309 adds a new section 450D to the 1985 Act containing a power for “the appropriate national authority” to make regulations with regard to purchase of equitable interests. The appropriate national authority means the Welsh Ministers in relation to Wales.

3.3 Both sets of Regulations concern assistance to long leaseholders of housing authorities (mainly local authorities and Registered Social Landlords). In the majority of cases their flats will have been bought originally under the Right to Buy scheme (“RTB”).

3.4 These regulations follow the negative resolution procedure.

3.5 No procedure applies to the Commencement Order which accompanies the regulations.

4. Purpose and intended effect of the legislation

4.1 A secure tenant of a flat who exercises the RTB under Part 5 of the Housing Act 1985, or a purchaser of an ex-RTB flat on the open market, will usually be required, under the terms of the lease, to pay service charges to the landlord. These payments will be the leaseholder's contribution to works of repair and maintenance, which the landlord is obliged to carry out under the terms of the lease, and to any improvement work which the landlord carries out. Service charges may include variable sums in respect of such works to the common parts of the building in which the leaseholder's flat is located, or to the grounds of the estate.

4.2 In the majority of secure tenancies, the landlord is a local authority. However, until the Housing Act 1988 created the assured tenancy scheme, housing associations could also grant secure tenancies. In a number of cases, therefore, the landlord of a leaseholder of an ex-RTB flat is a housing association. [

4.3 The Housing (Service Charge Loans) (Amendment) (Wales) Regulations 2011 ("the Loan Amendment Regulations") amend the Housing (Service Charge Regulations) 1992 ("the 1992 Regulations"), which make provision for loans under sections 450A and 450B of the 1985 Act. The amendment enables a landlord who makes such a loan under the discretionary power deriving from section 450B to do so on terms other than payment of interest.

4.4 The Housing (Purchase of Equitable Interests) (Wales) Regulations 2011 ("the Equitable Interest Purchase Regulations") give social landlords the power to assist a leaseholder by buying an equitable interest (ie, a share of the value) in the flat.

4.5 Both these instruments apply in relation to Wales only.

4.6 Local housing authorities sold 2,917 flats under the Right to Buy over the period April 1996 to March 2011. They also disposed of 93 flats under voluntary and other sales, making a total of 3,010 flats disposed of in Wales over the period. The Welsh Housing Quality Standard (WHQS) was introduced in 2002 to improve the quality of social housing in Wales. Since that time, local authorities and Registered Social Landlords have made significant strides in improving quality.

4.7 In the case of large blocks of flats, where some homes have been sold under the Right to Buy (RTB) scheme, the cost of the works should be borne by landlords/tenants (via rents) and the leaseholders (via service charges). However, in some cases individual leaseholders have been asked to pay significant sums (over £10,000) for their share of the cost of refurbishing large blocks of flats.

4.8 Issues relating to service charges on former Right to Buy flats were initially raised in “*Clarifying The Right to Buy Rules – A Consultation Paper*” which was issued by the UK Government and the Welsh Government to local authorities and other interested parties in August 2007.

4.9 The consultation included proposals to widen the range of options available to social landlords to assist owners of ex council properties who are finding it difficult to meet their obligations to contribute to the cost of major works of repair, maintenance and refurbishment. In some cases, owners might have purchased their flats many years ago and could now be living on modest incomes (or pensions). They may not, therefore, be able to access sufficient capital to meet their share of the cost of the work undertaken by the landlord. This situation can cause distress for owners but also difficulties for landlords in funding the cost of all the work undertaken on a block of flats.

Meaning of “housing authority”

4.10 The Loan Amendment Regulations affect only the discretionary power to make loans deriving from section 450B (see paragraph 4.30). The landlords to whom sections 450B and C, new section 450D and the 1992 Regulations apply, and to whom the Loan Amendment Regulations, and the Equitable Interest Purchase Regulations will apply, are “housing authorities”. In this context, this means largely local authorities and housing associations. Virtually all of the latter are also registered social landlords (ie, registered with the Welsh Ministers under the Housing Act 1996. However the exact meaning of “housing authority” varies slightly between the Loan Amendment Regulations and the Equitable Interest Purchase Regulations.

4.11 A housing authority is defined in section 4 of the 1985 Act for the purposes of the 1985 Act as meaning “a local housing authority or a new town corporation”, and “local housing authority” is defined in section 1 of the Act as “a district council, a London borough council, the Common Council of the City of London, a Welsh county council or county borough council, or the council of the Isles of Scilly”. The general definition of “housing authority” is glossed by two further interpretation provisions, so far as sections 450B and C are concerned. In section 458(1) for the purposes of Part 14 of the Act “housing authority” includes “any local authority, an urban development corporation, the Housing Corporation and a registered social landlord”.

4.12 Section 450B(4) adds the further gloss that “housing authority” includes “any registered social landlord other than a co-operative housing association and any co-operative housing association which is not a registered social landlord.” This will apply to the Loans Amendment Regulations.

4.13 With regard to the Equitable Interest Purchase Regulations, the new section 450D of the 1985 Act (inserted by section 309 of the 2008 Act) contains a separate gloss on the meaning of “housing authority”. That term –

- a. “does not include a registered provider of social housing, or a registered social landlord, which is a co-operative housing association;

b. “includes a co-operative housing association which is neither a registered provider of social housing nor a registered social landlord.”.

4.14 Neither set of Regulations applies to cases where the Welsh Ministers are the landlord, except where this is as a result of exercising functions under Part 3 of the Housing Associations Act 1985 (see sections 450B(1A) and 450D(4) of the 1985 Act).

The Loan Amendment Regulations

4.15 In order to give assistance in paying service charges, sections 450A, 450B and 450C of the 1985 Act give powers to make provision by regulations for mandatory and discretionary loans to leaseholders of flats whose landlords are housing authorities. The 1992 Regulations were made jointly for England and Wales under these powers. The power to make regulations for Wales was subsequently devolved to the National Assembly for Wales, and now lies with the Welsh Ministers.

4.16 Two sorts of loans are provided for in the 1992 Regulations –

a. mandatory loans (deriving from the power in section 450A), available only where certain criteria are satisfied, and in respect of which terms are specified in detail;

b. discretionary loans (deriving from the power in section 450B) in other cases, in respect of which the terms are to be determined by the lender.

4.17 The Regulations do not specify in so many words that loans must be on interest-bearing terms, but this is implied by the wording. Regulation 6(3) states that “A loan under these Regulations shall, as regards the rate of interest payable on it and the administrative expenses of the lender in connection with it, be subject to the provisions of Schedule 2 to these Regulations”. Paragraph 1 of Schedule 2 to the 1992 Regulations is headed “The rate of interest” and specifies that –

“The rate of interest payable on the loan shall be such reasonable rate as may be determined by the lender except where the lender is a local authority in which case the provisions of Schedule 16 to the Act shall apply”.

4.18 The provisions regarding payment of interest on loans in the 1992 Regulations repeats wording to the same effect in section 450C, which contains supplementary details with regard to the regulation-making powers under sections 450A and B.

4.19 In order to enable the Welsh Ministers to amend the 1992 Regulations with regard to payment of interest on loans on flats in Wales, therefore, it was necessary to amend the enabling wording in section 450C to the 1985 Act.

Section 308 of the 2008 Act made such amendment, by substituting, in section 450C(4), the phrase “in a case where a rate of interest is payable on some or all of” for the previous wording “as regards the rate of interest payable on”.

4.20 Section 308 of the 2008 Act is to be commenced on 19 August 2011.

4.21 No amendment has been made to the provisions in the 1992 Regulations regarding terms of mandatory loans, and therefore the powers in section 450A of the 1985 Act are not used in this instrument (see paragraph 4.30).

The Equitable Interest Purchase Regulations

4.22 Section 309 of the 2008 Act is to be commenced on 19 August 2011.

4.23 Where a purchase is made of an equitable interest in a flat, payment for that interest is subject to similar requirements as apply to payment of loans under the 1992 Regulations. The aim of these provisions is to ensure that the money made available is used for the purpose for which it is intended. Section 450D(2) requires that the Regulations –

“... shall ensure that the purchase price is to be met by the landlord reducing or (as the case may be) cancelling the service charge payable to the landlord by the tenant to such extent as corresponds to the amount concerned”.

4.24 By section 450D(3)(c) the landlord is entitled to make a charge for administrative expenses in connection with the purchase, and the purchase price for the equitable interest may (at the option of the purchaser) take into account a deduction for these expenses. In such circumstances, therefore, the amount paid can take into account the administrative expenses as well as the amount needed to cancel the service charge. In other words, the equitable interest which the landlord buys must be sufficient for the price paid to equal the total of both the service charge amount and the administrative expenses.

4.25 Since all properties to which the Regulations will apply will be leasehold flats, any agreement between the landlord and leaseholder with regard to purchase by the former of an equitable interest in the flat may need to be reflected in the terms of the lease. Alternatively the parties may agree to replace the existing lease with a lease on Homebuy terms.

4.26 The two sets of Regulations will give social landlords discretionary powers, for the purpose of assisting their leaseholders in the payment of service charges, to –

- a. offer them loans on equity share terms, i.e. wholly or partly interest-free loans in which instead the lender is entitled on repayment of the loan to a percentage of the market value of the flat;

b. purchase an equitable interest in the flat, so that the social landlord authority will be entitled to a specific share of the value of the flat when it is sold.

4.27 The decision on whether to buy an equity share or offer an equity loan is at the discretion of the landlord, and entering into any agreement will be voluntary for both the landlord and the leaseholder. It will also be up to these parties to decide the terms of any agreement.

4.28 In keeping with the principle that it should be for the parties concerned to decide all terms, the Equitable Interest Purchase Regulations do not include provision for specifying administrative expenses, calculation of purchase price, the imposition of charges for the services of district valuers, or allocating pro-rata future service charges (although a power to make such provision is included in section 450D(3)). However the Regulations provide the landlord with the power to charge administrative expenses (in regulation 5), and for these to be taken into account with regard to the purchase price (regulation 4(2)).

4.29 Similarly, with regard to the Loan Amendment Regulations, although section 308 of the 2008 Act inserts a new paragraph 450C(4)(aa) in the 1985 Act, giving a power to make provision about calculating the market value of the flat and imposing charges for the services of district valuers, this power has not been used. Again, it will be up to the parties to agree such terms.

4.30 It is open to the parties to agree to a loan under the discretionary provisions of the 1992 Regulations even where the leaseholder would be entitled to rely on the mandatory provisions. For this reason the Loans Amendment Regulations enable non-interest-bearing terms in respect only of discretionary loans deriving from the powers in section 450B of the 1985 Act. The provisions in the 1992 Regulations regarding payment of interest on mandatory loans have not been amended. Given that there is to be no mandatory element to equity share loans, it was not considered necessary to add wording about discretionary choices to the mandatory provisions.

4.31 There are two main risks if the legislation is not made:

a. owners of leasehold flats (who may have bought them many years ago) could experience difficulties arising from requests to pay significant sums to their landlord for service charges in circumstances where their means do not enable them to meet the charge, and

b. the income and/or business plan of the landlord could be adversely affected by owners of flats not meeting their share of the cost of major repairs/refurbishment to the block where the cost has been borne by the landlord.

4.32 The regulations will provide landlords with greater flexibility in assisting owners of former RTB flats who are finding it difficult to afford the cost of

maintaining their homes (or facing major works bills which are higher than they expected).

4.33 The regulations will provide a corresponding benefit to leaseholders of flats in terms of providing them with additional ways of meeting the service charge costs for which they are liable under the terms of their lease.

5. Consultation

5.1 The former Welsh Assembly Government and the UK Government consulted a range of bodies (including local authorities, Registered Social Landlords, tenant organisations, housing and other interested organisations) in August 2007 on the policy behind changes to the operation to the Right to Buy scheme.

5.2 A clear majority of respondents supported the proposals which were incorporated into the drafting of the Housing & Regeneration Act 2008. A minority of respondents expressed concern that the proposals could create additional administration and cost of the transactions proposed. The Welsh Government has responded to these concerns by minimising regulation, and by leaving it to the discretion of the housing authorities whether to make use of these powers and on what terms.

6. Regulatory Impact Assessment

6.1 An Impact Assessment has not been prepared for these instruments because no impact on the private or voluntary sector is foreseen.

6.2 The impact on the public sector is that a wider range of discretionary options will be available to housing authorities and their leaseholders, in relation to service charge bills. There is no obligation on any party to implement the provisions in these regulations if they do not wish to do so.

6.3 The regulations will have no impact on business, charities or voluntary bodies.

6.4 The proposals will have no impact upon equality of opportunity, the Welsh language or sustainable development.

6.5 In addition, the Welsh Government considers that:

- a. the economic impact of the changes is likely to be negligible;
- b. the regulations will not impose any additional costs on local or national Government;
- c. loans by housing authorities will not reduce opportunities for other lenders as the leaseholders concerned are unlikely to be able to afford commercial rates;

d. there will be no race or gender equality impact, nor any impact on the environment or adverse impact on rural communities;

e. the social impact of the changes are likely to be negligible, and there is no adverse impact on competition; and

f. there is no impact upon Human Rights.

6.6 The proposals are not expected to be controversial in any way, and it is considered highly desirable to introduce legislation to enable housing authorities to offer leaseholders a wider range of support in relation to their service charge bills.

7. Guidance

7.1 Housing authorities will be notified that the Regulations have come into force.

8. Monitoring & review

8.1 The decision on whether to use the powers enabled by these Regulations will rest solely with housing authorities and their leaseholders, and the extent to which the options are taken up will depend largely on external factors such as the financial markets. The Welsh Government will therefore conduct an internal review 3 years after the powers become available to housing authorities, as the impact of the Regulations is not expected to be apparent before then.