

# CHILDREN AND FAMILIES (WALES) MEASURE 2010

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## EXPLANATORY NOTES

### **Part 2: Child Minding and Day Care for Children**

#### ***Section 19: Meaning of “child minding” and “day care for children”***

53. **Section 19** defines “child minding” and “day care for children” for the purpose of regulating these activities under Part 2 of the Measure.
54. A person is a “child minder” if they look after one or more children under the age of eight on domestic premises for reward.
55. A person provides “day care for children” if they provide care at any time for children under the age of eight on premises other than domestic premises.
56. Subsection (3) provides the Welsh Ministers with a power by order to change the ages referred to in the definitions of “child minder” and “day care for children” and to specify circumstances which will amount to exceptions from the definitions. A person whose activity falls within the circumstances specified by order will not be a child minder or a provider of day care (as the case may be) and will not be required to register either under section 21 or section 23. Subsection (5) sets out a non-exhaustive list of the kinds of matters in relation to which exceptions may be made: (a) the category of person providing the child minding or day care; (b) the child or children for whom it is provided; (c) the nature of the child minding or day care; (d) the premises on which it is provided; (e) the times during which it is provided and (f) the arrangements under which it is provided.
57. The principal factor which distinguishes child minding from day care is whether or not children are cared for on “domestic premises”, which are defined in subsection (6) as any premises which are wholly or mainly used as a private dwelling.

#### ***Section 20: Register of child minders***

58. **Section 20** makes it a requirement for the Welsh Ministers to maintain a register of all persons registered as child minders under this Part of the Measure.

#### ***Section 21: Duty of child minders to register***

59. This section places a duty on child minders in Wales to register with the Welsh Ministers. A person must register as a child minder with the Welsh Ministers before acting as a child minder in Wales (subsection (1)). The Welsh Ministers may serve an enforcement notice on any person they consider is acting as a child minder without being registered, as a preliminary step to further enforcement measures if the notice is not complied with (subsection (2)). Enforcement notices have effect for one year from the date of service. An unregistered child minder commits an offence if that person has been served with an enforcement notice and goes on to act as a child minder without reasonable excuse (subsection (5)). Subsection (6) provides that a person convicted in

a magistrates' court of an offence under subsection (5) is liable to a fine not exceeding level 5 on the standard scale (currently £5000).

***Section 22: Register of providers of day care for children***

60. **Section 22** makes it a requirement for the Welsh Ministers to maintain a register of all persons registered to provide day care for children under this Part of the Measure.

***Section 23: Duty of day care providers to register***

61. **Section 23** places a duty on any person (whether a natural person or a body of persons corporate or unincorporated) who provides day care for children in Wales to register with the Welsh Ministers. A person who does so without registering and without reasonable excuse commits an offence. Subsection (3) provides that a person convicted by a magistrates' court of an offence under subsection (2) is liable to a fine not exceeding level 5 on the standard scale (currently £5000).

***Section 24: Applications for registration: child minding***

62. **Section 24** and regulations to be made under this section set out what a person who wishes to register as a child minder must do in order to make a valid application for registration. It also places a duty on the Welsh Ministers to grant an application for registration if certain conditions are met and a duty to refuse an application for registration if those conditions are not met.
63. Subsection (2) provides that an application must give information about matters as required by regulations, give other information reasonably required by the Welsh Ministers and be accompanied by a fee set in regulations. Under subsection (3) the Welsh Ministers must grant an application unless the applicant is either disqualified under section 38 or it appears that the requirements for registration as a child minder are not satisfied or are not likely to continue to be satisfied. The requirements for registration as a child minder are to be set out in regulations under section 25. Where the Welsh Ministers are not required to grant the application under subsection (3), they must refuse it (subsection (4)).

***Section 25: Prescribed requirements for registration as a child minder***

64. This section sets out the types of things which regulations may prescribe as requirements for registration as a child minder.

***Section 26: Applications for registration: day care for children***

65. **Section 26** and regulations to be made under this section set out what a person who wishes to register as a provider of day care for children must do in order to make a valid application for registration. It also places a duty on the Welsh Ministers to grant an application for registration if certain conditions are met and a duty to refuse an application for registration if those conditions are not met.
66. Subsection (2) provides that an application must give information about matters as required by regulations, give other information reasonably required by the Welsh Ministers and be accompanied by a fee set in regulations. Under subsection (3) the Welsh Ministers must grant an application unless the applicant is either disqualified under section 38 or it appears that the requirements for registration as a day care provider are not satisfied and are not likely to continue to be satisfied. The requirements for registration as a provider of day care for children are to be set out in regulations under section 27. Where the Welsh Ministers are not obliged to grant an application under subsection (3), they must refuse it (subsection (4)).

***Section 27: Prescribed requirements for registration of providers of day care for children***

67. This section sets out the types of things which regulations may prescribe as requirements for registration as a provider of day care for children.

***Section 28: Entry on the register and certificates***

68. Subsection (1) provides that if an application under section 24(1) is granted, the Welsh Ministers must register the applicant on the child minders register as a child minder and issue the applicant with a certificate of registration stating that the applicant is registered.
69. Subsection (2) provides that if an application under section 26(1) is granted, the Welsh Ministers must register the applicant as a day care provider in respect of the premises in question and issue the applicant with a certificate of registration stating that the applicant is registered.
70. Subsection (3) provides for the Welsh Ministers to set out in regulations the information which a certificate of registration must contain.
71. Subsection (4) requires the Welsh Ministers to give the registered person an amended certificate if there has been a change of circumstances which requires an amendment to be made to the certificate.
72. Subsection (5) requires the Welsh Ministers to provide a copy of the certificate on payment by the registered person of any prescribed fee, if they are satisfied that the original certificate has been lost or destroyed.

***Section 29: Conditions on registration***

73. **Section 29** empowers the Welsh Ministers to impose conditions on the registration of a person who acts as a child minder or a day care provider. Conditions may be imposed either on first registration or at any subsequent time. The Welsh Ministers as the registration authority have discretion to decide what conditions to impose and under subsection (3) may also vary or remove any condition. Subsection (4) provides that a registered person commits an offence if, without reasonable excuse, they fail to comply with any condition. Subsection (5) provides that a person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5000).

***Section 30: Regulations governing activities***

74. **Section 30** provides for the Welsh Ministers to make regulations imposing requirements about how registered persons carry on the regulated activity.
75. Regulations may impose requirements about (amongst other things) the welfare and development of the children concerned; suitability to look after, or be in regular contact with, the children concerned; qualifications and training; the maximum number of children who may be looked after and the number of persons required to assist in looking after them; the maintenance, safety and suitability of the premises and equipment; the procedures for dealing with complaints; the supervision of staff; the keeping of records; and the provision of information.
76. Regulations may also require any person to meet factors, standards or other matters which may be prescribed by or referred to in the regulations and the Welsh Ministers may take any failing by any person into account when exercising their functions under this Part of the Measure and in any court proceedings, whether civil or criminal. Subsection (4) provides that the regulation-making power includes a power to make a breach of the regulations a criminal offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale (currently £5000).

### ***Section 31: Cancellation of registration***

77. Subsection (1) provides that Welsh Ministers must cancel the registration of a registered child minder or day care provider if that person has become disqualified from registration under section 38.
78. Subsection (2) provides that the Welsh Ministers may exercise their judgment to cancel a person's registration if the suitability requirements under section 25 or section 27 have ceased to or will cease to be satisfied, if the person has failed to comply with a condition of their registration or they have failed to pay a prescribed fee.
79. Subsection (3) prevents cancellation if there has been a requirement imposed on the registered person to make any changes or additions to any services, equipment or premises and the person has not had a fair chance to meet the requirement because the time set by the registration authority for complying has not expired and the only defect or insufficiency is due to the changes or additions not having yet been made.
80. A cancellation under this section must be in writing (subsection (4)) and is subject to the requirements about procedure set out in section 36.
81. In addition, subsection (5) provides that the Welsh Ministers may prescribe in regulations other circumstances in which the registration of a person may be cancelled.

### ***Section 32: Suspension of registration***

82. **Section 32** allows the Welsh Ministers to make regulations to set circumstances when the registration of a child minder or day care provider may be temporarily suspended. The regulations can provide for a maximum period of suspension and can also provide for suspension at the request of the registered person.
83. Subsection (3) requires that regulations include a right of appeal to the First-tier Tribunal against suspension, except in relation to voluntary suspension at the request of the registered person (subsection (4)). A registered person must not act as a child minder or provide day care on the premises for which they are registered whilst suspended. Subsection (7) provides that a person is guilty of an offence if they act as a child minder or provide day care on premises without reasonable cause whilst their registration is suspended and is liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5000).

### ***Section 33: Voluntary removal from the register***

84. **Section 33** provides for a child minder or day care provider to voluntarily remove their name from the relevant register by giving notice to the Welsh Ministers.
85. The Welsh Ministers must not comply with a request for voluntary removal if they have given notice of their intention to cancel the person's registration and they still intend to do so (subsection (3)). Neither can the Welsh Ministers comply with such a request if they have given notice of their decision to cancel registration and the time within which an appeal may be brought has not expired or, if an appeal has been brought, it has not been determined (subsection (4)).

### ***Section 34: Protection of children in an emergency: cancellation of registration***

86. **Section 34** provides for the Welsh Ministers to apply to a justice of the peace for an order cancelling a person's registration with immediate effect if it appears that a child is suffering or is likely to suffer significant harm. Such an application may be made without notice and any order made must be in writing. The Welsh Ministers must serve a copy of the order on the registered person as soon as possible, together with any written statement made in support of the application and notice of the right of appeal. Subsection (7) requires the Welsh Ministers to notify the relevant local authority of the order.

87. Subsection (8) defines “harm” as having the same meaning as in the Children Act 1989 (“the 1989 Act”) and the question of whether harm is significant is to be determined in accordance with section 31(10) of the 1989 Act. In the 1989 Act “harm” means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another. The provisions of section 31(10) of the 1989 Act provide that where the question of whether harm suffered by a child is significant turns on the child’s health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.

### ***Section 35: Protection of children in an emergency: changes to conditions***

88. **Section 35** allows the Welsh Ministers to vary or remove existing conditions, or add new conditions, to a person’s registration with immediate effect where they have reasonable cause to believe that there is a risk of significant harm to a child if they do not do so. The Welsh Ministers must take such action by written notice to be served on the registered person by delivering it to them or by sending it by post to that person’s last known address. The notice must include the Welsh Ministers’ reasons for believing that a child is at risk of significant harm, specify the condition varied, removed or imposed and explain the right of appeal to the First-tier Tribunal under section 37.

### ***Section 36: Procedure for taking certain steps***

89. **Section 36** sets out the procedures for the Welsh Ministers to give advance notice to a registered person or applicant for registration if they propose to take one of a number of steps affecting registration. The steps are: refusing an application for registration; imposing a new condition on a person’s registration; varying or removing any condition imposed on a person’s registration; refusing to grant an application for the variation or removal of any such condition; cancelling a person’s registration.
90. Subsection (2) provides that section 36 does not apply to actions taken in response to emergency situations under section 34 (protection of children in an emergency: cancellation of registration) or section 35 (protection of children in an emergency: changes to conditions).
91. When the Welsh Ministers have served notice of their proposal, subsection (5) prevents them from taking the proposed step until 28 days have passed from the date of service of the notice, unless the recipient of the notice notifies the Welsh Ministers that they wish to object to the step being taken. If the recipient gives notice that they wish to object, the Welsh Ministers must provide the recipient of a notice with an opportunity to object before taking the proposed step (subsection (6)). If the Welsh Ministers decide to take the step, they must give the recipient notice of their decision (subsection (8)). This duty applies whether or not the recipient gives notice of a wish to object.

### ***Section 37: Appeals***

92. **Section 31** provides for appeals to be made against the decisions of the Welsh Ministers to the First-tier Tribunal<sup>1</sup>.
93. Subsection (1) allows an applicant for registration or (as the case may be) a registered person to appeal against a decision of the Welsh Ministers to refuse an application for registration, to impose, vary or remove conditions of registration, to refuse an application to vary or remove a condition, or to cancel registration.
94. Subsection (2) also allows for an appeal to the First-tier Tribunal by an applicant for registration or (as the case may be) a registered person in respect of a determination (other than one of the decisions in subsection (1)) which the Welsh Ministers specify

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<sup>1</sup> The First-tier Tribunal is divided into 5 different chambers. Appeals against decisions of a registration authority under these provisions are to the First-tier Tribunal’s Health, Education and Social Care Chamber.

in regulations. Appeals may also be made by a registered person against whom an order is made under section 34 (protection of children in an emergency: cancellation of registration) and a registered person who is given notice under section 35 (protection of children in an emergency: changes to conditions).

95. Subsections (3) and (4) set out the actions that may be taken by the First-tier Tribunal on appeal.

### ***Section 38: Disqualification from registration***

96. **Section 38** allows the Welsh Ministers to make regulations which set out circumstances under which a person is disqualified from registration. Subsection (3) sets out the range of circumstances which may be included in the regulations. The list of circumstances is not an exhaustive list.
97. Subsection (4) provides that regulations may also disqualify a person from registration if someone they live with or who works in their household is disqualified.
98. Subsection (5) provides that where a person is disqualified they can apply to the Welsh Ministers for their disqualification to be waived if the person has disclosed the disqualification to the Welsh Ministers and the Welsh Ministers give their consent in writing.

### ***Section 39: Consequences of disqualification***

99. **Section 39** sets out the effect of disqualification on a person. A person who is disqualified under section 38 must not act as a child minder in Wales or provide day care in Wales or be directly concerned in the management of any provision in Wales; neither can a registered person employ a disqualified person in connection with the provision of day care or child minding.
100. Subsection (3) provides that contravention of subsection (1), by the person disqualified, or contravention of subsection (2), by an employer, is an offence. In both cases the offence is punishable on summary conviction by imprisonment for a term not exceeding 51 weeks or to a fine not exceeding level 5 on the standard scale (currently £5000), or both. Where the offenders' disqualification is the result of his being part of the same household as another person who is disqualified or the offence is one of employing a disqualified person, then it will be a defence for a person to prove that they didn't know and had no reasonable grounds for believing that they lived with or in a household with or had employed a disqualified person.

### ***Section 40: Inspection***

101. **Section 40** gives the Welsh Ministers the power by regulations to provide for child minding and day care providers in Wales to be inspected and for the publication of inspection reports. The regulations can provide that inspections will be organised either by the Welsh Ministers or by Estyn (which is the inspectorate of education and training headed by Her Majesty's Chief Inspector of Education and Training in Wales) or any other person under arrangements made with the Welsh Ministers. The regulations may provide that inspection reports are "privileged" for the purposes of the law of defamation unless it can be shown that publication has been made with malice.

### ***Section 41: Powers of entry***

102. **Section 41** provides powers of entry for any person authorised by the Welsh Ministers at any reasonable time to enter premises in Wales on which child minding or day care is at any time provided. Subsection (2) provides an authorised person with a power of entry to premises if there is reasonable cause to believe that a child is being looked after there in contravention of the provisions of Part 2 of the Measure.

***Section 42: Powers of inspection***

103. **Section 42** sets out the powers of inspection of those who enter premises for that purpose. It includes a power to seize and remove documents or anything else which may be evidence of failure to comply with regulatory requirements. It also includes power to require access to records or documents which may be stored on a computer. A person who obstructs an inspector exercising a power of entry or inspection power or who fails to comply with the requirement of an inspector commits an offence and is liable on conviction in a magistrates' court to a fine not exceeding level 4 on the standard scale (currently £2,500).

***Section 43: Power of constable to assist in exercising powers of entry***

104. **Section 43** provides for a person authorised to enter premises under section 41, where attempts to exercise inspection powers have been thwarted, to apply to a court for a warrant authorising a constable to assist the authorised person, using reasonable force if necessary. The application for a warrant may be in response to a person preventing exercise of the power of entry or another inspection power under section 42.

***Section 44: Supply of information to the Welsh Ministers***

105. In addition to the power to see documents and other materials in the course of inspection, the Welsh Ministers may also require any registered child minder or day care provider to provide them with any information connected with that person's activities as a child minder or day care provider which the Welsh Ministers consider necessary for the purposes of their functions under this Part.

***Section 45: Supply of information to local authorities***

106. **Section 45** provides for the Welsh Ministers to provide information to local authorities about those who are registered to provide child minding or day care. This is necessary to enable the local authority to provide information about the availability of childcare in fulfilment of its functions under section 27 of the Childcare Act 2006 (duty to provide information, advice and assistance). The sharing of the information prescribed is triggered by one of the following steps: granting registration; issuing a notice of intention to cancel registration; cancelling registration; suspending registration; removing a person from the register at that person's request and if a justice of the peace makes an order under section 34(2). Subsection (5) provides for the Welsh Ministers to provide information to a person exercising statutory functions (for purposes connected to those functions) about whether a person is registered as a child minder or day care provider.

***Section 46: Offence of making false or misleading statement***

107. A person will be guilty of an offence under subsection (1) if they knowingly make a false or misleading statement when applying for registration and will be liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5000).

***Section 47: Penalty notices***

108. **Section 47** provides for the Welsh Ministers to impose fixed penalty notices on registered persons where they are satisfied that a person has committed a relevant offence. The Welsh Ministers have power to set out in regulations those offences which will be capable of being dealt with by a fixed penalty notice. The proposal to impose a penalty notice offers the registered person the opportunity of paying a penalty in respect of an identified breach and thereby discharging all criminal liability for the breach in question. Where a notice has been issued but not yet paid, proceedings may not be commenced for the offence to which the notice relates until such time as the period specified in the notice has expired. If the person pays the penalty in accordance with the

notice, they cannot then be convicted of an offence to which the notice relates. Penalties are payable to the Welsh Ministers.

***Section 48: Penalty notices: supplementary provisions***

109. Regulations under section 48 can make provision about the form and content of the penalty notices including monetary amounts and time limits for payment, and actions to be taken if penalty is not paid in accordance with the penalty notice. Subsection (2) provides that regulations may make provision for different penalties to be payable in different cases and also for the amount to differ if paid at different times. The amount prescribed to be paid under a penalty notice cannot exceed a half of the maximum amount of a fine that would have to be paid on conviction.

***Section 49: Time limit for proceedings***

110. Section 49 sets the time limit for bringing a prosecution at one year from the date on which sufficient evidence to warrant the proceedings comes to the prosecutor's knowledge. This is subject to the overall limit that no prosecution may be brought more than three years after the commission of the offence.

***Section 50: Offences by bodies corporate***

111. Section 50 provides that where an offence is committed by a body corporate, officers of that body may be liable to be prosecuted and punished accordingly, if it is proved that an offence is committed with their consent or connivance or is due to any neglect on their part.

***Section 51: Unincorporated associations***

112. Section 51 makes provision that where an offence is committed by an unincorporated association, proceedings must be brought in the name of the association (and not in the name of any of its members). Rules of court apply in relation to the service of documents on an unincorporated association as if they were a body corporate. It also provides, just as with a body corporate, that an officer or member of the association is guilty of an offence if it is committed with their consent or connivance or is due to any neglect on their part of an officer of the association or a member of its governing body and they may be liable to prosecution as well as the association. Subsection (3) makes provision about the circumstances in which an association may be represented in proceedings by a duly authorised person. Subsection (4) provides that a fine imposed on an unincorporated association is to be paid out of the association's funds.

***Section 52: Functions of local authorities***

113. Regulations made under this section can set out and make provision for a local authority to secure provision of information or advice about child minding and day care and to secure the provision of training about the provision of child minding and day care.

***Section 53: Fees***

114. Regulations can set out and make provision for registered child minders or day care providers to pay fees to the Welsh Ministers, including the circumstances when such fees may be waived.

***Section 54: Co-operation between authorities***

115. Section 54 provides for the Welsh Ministers to request the help of a local authority to assist in the exercise of the Welsh Ministers' functions. A local authority must comply with the request if it is compatible with its own statutory and other duties and does not unduly prejudice the discharge of any of its functions.

***Section 55: Notices***

116. **Section 55** makes provision about notices to be issued by a child minder or day care provider to the Welsh Ministers under section 33 (voluntary removal from the register) or notices issued by the Welsh Ministers under section 36 (procedure for taking certain steps).

***Section 56: Death of registered person***

117. **Section 56** provides the power to make regulations to deal with the position where a sole registered person for a day care business dies so that the day care business can be carried on for a certain period. The section also allows for regulations to impose a requirement on the personal representatives of a child minder or day care provider to notify the Welsh Ministers of the death.