

HOUSING (AMENDMENT) (SCOTLAND) ACT 2018

EXPLANATORY NOTES

THE ACT

Regulatory intervention by Scottish Housing Regulator

Section 1 – Managers appointed by, or on the requirement of, the Scottish Housing Regulator

11. The Regulator has a number of powers under the 2010 Act that allow it to appoint a manager, or to require a social landlord (including an RSL) to appoint a manager.

Section 57 – Appointment of manager for housing activities

12. Under section 57, the Regulator can appoint a person as manager if the Regulator considers the social landlord is, or is at risk of, failing in a number of respects (including that the landlord is failing to achieve a standard or an outcome set out in the Scottish Social Housing Charter¹ or that the landlord is failing to comply with an enforcement notice²) and that a person needs to be appointed to ensure that the social landlord provides housing services to an appropriate standard. While the person can be appointed to manage the social landlord's housing activities generally, or just aspects of its activities, there is no express link between the failure which led to the manager's appointment and the activities the person will manage, nor is there any express provision limiting the period of the manager's appointment (although there is provision in section 59(1) for the Regulator to determine that period).
13. **Section 1(2)** of the Act amends section 57(1)(b) and (2) so that a person can be appointed as a manager but only to ensure that the social landlord rectifies the failure which the Regulator has identified.
14. **Section 1(2)** also amends section 57(1)(a) so that a manager can be appointed only where the social landlord has failed or is failing to achieve a standard or outcome set out in the Charter, or in some other respect, rather than where the landlord is only at risk of so failing.
15. In addition, section 1(4) amends section 59 by inserting a new subsection (1A) to limit the period of the manager's appointment to the period necessary to rectify that failure.

Section 58 – Appointment of manager for financial or other affairs

16. Section 58 of the 2010 Act relates to RSLs (and, unlike section 57, not all social landlords) and allows the Regulator to appoint a person as manager where it considers this is necessary to ensure the RSL manages its financial or other affairs to an appropriate standard.

¹ Prepared and published by the Scottish Ministers under Part 3 of the 2010 Act.

² Issued by the Regulator under section 56 of the 2010 Act.

17. As is the case with section 57, while the person can be appointed to manage the RSL's financial or other affairs generally, or just aspects of those affairs, there is no express link between the failure which led to the manager's appointment and the matters the person will manage, nor is there any express provision limiting the period of the manager's appointment.
18. **Section 1(3)** amends section 58 by inserting a new subsection (1). This replaces the existing subsection and provides that the manager may be appointed only where the RSL is failing or has already failed to comply with a statutory duty (imposed on it by the 2010 Act or by other legislation) or where the RSL has failed or is failing to comply with a requirement imposed on it by the Regulator. Examples of the latter would include where the RSL has failed or is failing to comply with the Regulator's requirement to address a failure to achieve standards of financial management and governance set out in the code of conduct under section 36 of the 2010 Act, or the Regulator's requirement to achieve financial management or governance targets set by the Regulator under section 37 of the 2010 Act.
19. The test for appointing a manager is that the appointment is necessary to rectify the failure identified by the Regulator.
20. New subsection (1A), inserted into section 59 of the 2010 Act by section 1(4), also has the effect of limiting the period of the manager's appointment under section 58 to the period necessary to rectify that failure.

Section 59 – Appointment of managers: supplementary

21. Section 59 of the 2010 Act makes provision about the appointment of managers under sections 57 and 58. In particular, section 59(4) provides that such a manager has a duty to comply with directions about the performance of the manager's functions given to the manager by the Regulator and may be removed if the manager fails to comply with those directions.
22. There is, as before, no express link between the failure that led to the manager's appointment and the functions in relation to which the Regulator may give the manager directions.
23. **Section 1(4)** replaces section 59(4) with new subsections (4) and (4A). While retaining the power of the Regulator to give directions, the duty of the manager to comply with those directions and the Regulator's power to remove a manager who fails to do so, these new subsections provide that the directions can relate only to rectifying the failure that led to the manager's appointment. Subsection (4A)(b) also clarifies that it is the Regulator who can remove a manager who fails to comply with a direction, even where the manager was appointed by the RSL under section 57 or 58 (rather than having been appointed directly by the Regulator).

Section 87 – Manager of registered society: extra powers

24. Part 7 of the 2010 Act covers the Regulator's powers where an RSL is about to become insolvent and includes provision imposing a moratorium on the disposal of an RSL's land³ and giving the Regulator power to appoint, or require the RSL to appoint, an interim manager under section 79 of the Act to manage the RSL's affairs during the moratorium. During the moratorium, the Regulator may make proposals for the future ownership and management of the RSL's land⁴ and may also appoint a manager to implement those proposals under section 85 of the Act.

³ See section 75 of the 2010 Act.

⁴ See sections 80 to 90 of the 2010 Act.

25. Section 87 of the 2010 Act provides for certain extra powers exercisable by such a manager where the RSL is a registered society,⁵ including the power to make and execute instruments providing for the amalgamation of the society and for transferring the society's engagements.
26. **Section 1(5)** of the Act amends section 87(3) and (4) to update references to sections of the Co-operative and Community Benefit Societies and Credit Unions Act 1965 with references, instead, to the equivalent sections of the Co-operative and Community Benefit Societies Act 2014, which has replaced the 1965 Act. The Act replaces and updates a number of such references to the 1965 Act to ensure that the provisions in the 2010 Act work as they should.⁶

Section 2 – Registered social landlords: removal, suspension and appointment of officers etc.

27. The Regulator has a number of powers under the 2010 Act in relation to the removal and suspension of officers of RSLs, as well as power to appoint replacement and additional officers. In this context, an “officer” of an RSL is generally a person exercising management and control of the RSL (as defined in section 165 of the 2010 Act).⁷
28. Section 60 of the 2010 Act gives the Regulator a general power to remove an officer of an RSL for a number of reasons, including that the officer is impeding the proper management of the RSL because of the officer's absence of other failure to act, which make it inappropriate for the person to be an officer of an RSL.⁸
29. Under section 61 of the 2010 Act, the Regulator has power, when carrying out an inquiry into an RSL, to suspend a “responsible individual” where the Regulator considers one or more of a number of failures have occurred or are occurring. “Responsible individual” is defined by section 63 of the 2010 Act as an officer or agent of the RSL who appears to the Regulator to be responsible for the failure. The failures which may lead to the Regulator suspending a responsible individual include where there has been misconduct or mismanagement of the RSLs financial or other affairs and where the interests of the RSL's tenants need to be protected.⁹
30. The Regulator has power to remove a responsible individual under section 62 of the 2010 Act. The grounds for removing a responsible individual are the same as the grounds for suspension under section 61 of that Act.¹⁰ The Regulator may remove, under section 62, a person suspended under section 61 (although the person need not have been first suspended before being removed under section 62)).
31. Section 64 of the 2010 Act provides a right of appeal to the Court of Session for a person removed under section 60 or 62 or suspended under section 61.
32. Under section 65 of the 2010 Act, the Regulator has power to appoint an individual as an officer of an RSL either to replace an officer removed under section 60 or 62,

⁵ Section 165 of the 2010 Act defines “registered society” as a society registered under the Co-operative and Community Benefit Societies and Credit Unions Act 1965 (but see now section 6(16) of the Act which amends that definition).

⁶ See, for instance, sections 2(7) and 7(4) of the Act. Although there is provision in the Co-operative and Community Benefit Societies Act 2014 which will “translate” references to repealed provisions into references to the equivalent provisions in the 2014 Act (see schedule 5, paragraph 3), the Government considers it is more helpful to the user of the 2010 Act to update these references in this Act.

⁷ The meaning of “officer” as defined in that section depends on the type of body the RSL is. In the case of an RSL that is a company, “officer” includes a director, manager or secretary of the company (see section 1173 of the Companies Act 2006). In the case of an RSL that is a registered society, “officer” includes a treasurer, secretary or member of the management committee of the society (see section 149 of the Co-operative and Community Benefit Societies Act 2014).

⁸ See section 60(1)(e) of the 2010 Act. Other grounds for removing an officer are set out in section 60(1)(a) to (d) of the 2010 Act and include that the officer is an undischarged bankrupt or is disqualified from being a charity trustee.

⁹ The full grounds for suspension are listed in section 61(1)(a) to (d) and the procedure for and effect of suspending the responsible individual are set out in section 61(2) to (4). Under section 61(5) and (6) it is an offence for a person suspended under section 61 to take, without the Regulator's consent, any action in relation to the management or control of the RSL or any other RSL.

¹⁰ See section 62(1)(a) to (d). The procedure for removal is set out in section 62(2). And section 62(3) and (4) make it an offence for a person removed under section 62(1) to take any action in relation to the management or control of the RSL or any other RSL without the consent of the Regulator.

where there are no officers, where there are insufficient officers or where the Regulator considers an additional officer is necessary for the proper management of the RSL's financial or other affairs.¹¹

33. **Section 2(2)** of the Act replaces the ground in section 60(1)(e) for suspending a responsible individual (that, through absence or failure to act, the individual is impeding the proper management of the RSL) with a ground that, because of the individual's absence or failure to act, the RSL is failing to comply with any duty imposed on it by the 2010 Act or with any other statutory duty or is failing to comply with a requirement imposed on the RSL by the Regulator.¹²
34. **Section 2(3)** amends section 61(1) of the 2010 Act, replacing the grounds for suspension in paragraphs (a) to (c)¹³ with a new ground that the RSL has failed or is failing to comply with its statutory duties, or with any requirement imposed on it by the Regulator, as a result of the responsible individual.¹⁴ That leaves one other ground for the suspension of a responsible individual – that, during a moratorium on the disposal of the RSL's assets under section 75 of the 2010 Act triggered by a person taking a step towards the insolvency of the RSL,¹⁵ the responsible individual is obstructing the Regulator or that the individual is not co-operating with the implementation of proposals about the future ownership and management of the RSL's assets.¹⁶
35. **Section 2(4)** makes a very similar amendment to section 62, replacing the grounds for removing a responsible individual set out in subsection (1)(a) to (c) with a new ground based on failure by the RSL to comply with statutory duties or with requirements imposed by the Regulator (which the responsible individual has been responsible for, has facilitated or otherwise contributed to, or has been privy to).¹⁷
36. As a result of the changes to sections 61 and 62, the references in section 63 to “misconduct” and to “mismanagement” need to be removed as those terms are no longer used in those sections. Section 2(5) makes this change.
37. **Section 2(6)** makes a number of changes to section 65 of the 2010 Act. The main change is to replace section 65(1)(d) – which allows the Regulator to appoint an officer of an RSL where the Regulator considers this is necessary for the proper management of the RSL's financial or other affairs – with a new ground for appointing an officer – that it is necessary to rectify a failure by the RSL to comply with a statutory duty or with a requirement imposed on it by the Regulator (such failure in either case relating to the RSL's financial or other affairs).
38. **Section 2(6)(c)** inserts a new subsection (2A) into section 65. This has the effect of limiting the period of appointment of an officer appointed by the Regulator under new section 65(1)(d) to the period necessary to rectify the failure which led to the appointment. This change mirrors the change made by section 1 of the Act to section 59 of the 2010 Act.¹⁸ A consequential amendment of section 65(2) is made by subsection (6)(b) and subsection (6)(d) and (e) make consequential amendments so that any reappointment of an officer appointed under new section 65(1)(d) is also limited to the period necessary to rectify the failure which lead to the appointment.

11 There are “insufficient officers” where there are currently not enough officers to validly appoint more officers under the RSL's constitution and the constitution does not provide for a way for more officers to be appointed – see section 65(1)(c).

12 Such a requirement imposed by the Regulator may include a requirement to appoint a manager under section 57 of the 2010 Act or a requirement imposed under section 66(2) of that Act directing the RSL not to undertake particular transactions during an inquiry.

13 Those grounds being that there has been misconduct or mismanagement, that the interests of the RSL's tenants need protection and that the RSL's assets need protection.

14 See section 61 as read with section 63.

15 See section 73 of the 2010 Act.

16 See sections 80 to 85 of the 2010 and, in particular section 84(2).

17 Again, see section 62 as read with section 63.

18 See paragraph 15 above.

*These notes relate to the Housing (Amendment) (Scotland)
Act 2018 (asp 13) which received Royal Assent on 6 July 2018*

39. Subsection (7) of section 2 updates the definition of “officer” in section 165 of the 2010 Act so that it refers to section 149 of the Co-operative and Community Benefit Societies Act 2014 (the 2014 Act having replaced the pre-existing law on registered societies).