EXPLANATORY MEMORANDUM TO

THE REDRESS SCHEMES FOR LETTINGS AGENCY WORK AND PROPERTY MANAGEMENT WORK (REQUIREMENT TO BELONG TO A SCHEME ETC) (ENGLAND) ORDER 2014

2014 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order requires persons who engage in letting agency work or property management work to belong to a redress scheme that has been approved by the Secretary of State or that has been designated as a government administered redress scheme. It excludes persons who engage in certain types of activity from the requirement to belong to such a scheme. It makes provision for the enforcement of the duty to belong to a scheme.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Section 83(1) of the Enterprise and Regulatory Reform Act 2013 (c.24) ("the Act") provides that the Secretary of State may by Order require persons who engage in "lettings agency work" to belong either to a redress scheme that has been approved by the Secretary of State or to a government administered redress scheme. Section 84(1) provides that the Secretary of State may require persons who engage in "property management work" to belong to such a redress scheme. Section 85 enables the Secretary of State to make provision for the enforcement of the requirement to belong to a redress scheme.

4.2 The Redress Schemes for Lettings Agency Work and Property Management Work (Approval and Designation of Schemes) (England) Order 2013 (S.I. 2013/3192) (the Approval of Schemes Order) made provision for the procedure relating to applications for approval; the conditions a scheme must meet before the Secretary of State may approve the scheme or designate it as a government administered redress scheme; and for the procedure relating to the withdrawal of approval or designation from such schemes.

5. Territorial Extent and Application

5.1 This instrument applies to England.

6. European Convention on Human Rights

Kris Hopkins, Parliamentary Under Secretary of State (Housing) for the Department for Communities and Local Government, has made the following statement regarding Human Rights:

In my view the provisions of the Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014 are compatible with the Convention rights.

7. Policy background

What is being done and why

Background

7.1 The size of the private rented sector in England is rapidly increasing - up from 2.4m households in 2005 to 4.0m in 2012. There are around 12,000 lettings agents in England, handling between half and two-thirds of all lettings. There are around 2 million leasehold flats and 1 million leasehold houses in England and around 40% of new build property in England is leasehold.

7.2 It is important that people living in or owning property in these sectors have the ability to complain if they receive poor service from their agent. Common complaints about lettings and property management in the private rented sector are around how agents handle the security and holding deposits, missed appointments, pressuring tenants to take tenancies, poor customer service, out of date and misleading adverts and opaque and variable fees. Many landlords also appoint an agent to manage their properties on their behalf with common complaints about how the property is managed being around repairs not being carried in a timely manner or to a satisfactory standard, general customer service and notice and conduct of visits from agents.

7.3 The main types of issue raised by leaseholders, identified from statistics collected by the Leasehold Advisory Service (dealing with around 40,000 leasehold enquiries a year) are service charges (20%), application to First-tier Tribunal (property chamber) (9%), lease extension (9%), freehold purchase (8%) and management (6%). Other issues include repairs, statutory consultation, breaches of covenant, interpreting leases and the Right to Manage (where leaseholders of a building containing flats take over the management of the building themselves).

7.4 The Act gave the Secretary of State the power to require all persons who engage in lettings agency work or property management work in relation to residential properties in England to be members of a government approved or government administered redress scheme. This will mean that tenants and

landlords dealing with agents in the private rented sector and leaseholders and freeholders dealing with agents in the residential leasehold sector will be able to complain to an independent person about the service they have received.

7.5 Article 3 of the Order requires lettings agents to belong to a redress scheme that deals with complaints from prospective landlords and prospective tenants. The requirement is limited to prospective private sector landlords and tenants because for lettings this is who is directly affected by the actions of the agent. Prospective tenancies to which the scheme applies are assured tenancies (most usually shorthold) to be granted by private sector landlords – see section 83 (10) of the Act. Thus, prospective tenants who may seek redress are only individuals as companies cannot hold an assured tenancy.

7.6 Article 5 requires persons who engage in property management work to belong to a redress scheme that deals with complaints about that work. The Order does not define the type of complaints that the schemes must consider for property management work. For property management work, it is less clear cut who may want to make a complaint, than for lettings. This is partly because property management work typically will have a longer duration than for lettings and partly because property management covers both the private rented and the leasehold sectors. By not defining a complaint in the Order, the schemes have more flexibility in deciding who to hear a complaint from.

7.7 A scheme must, however, make satisfactory provision for complaints against noncompliance with statutory codes of practice, these being : The Rent Only Management Code; The Code of Management Practice for Private Retirement Housing and the Service Charge Residential Management Practice- see Articles 4 (1) (d) and 5 (1) (c) of the Approval of Schemes Order.

7.8 Ultimately, the requirement for all letting and managing agents in England to belong to an approved redress scheme will help weed out the cowboys that give agents a bad name, and drive up standards with the least regulatory burden.

7.9 Under Article 4 of the Approval of Schemes Order the Secretary of State has approved two Ombudsmen schemes that already operate voluntary redress schemes in these sectors: The Property Ombudsman (http://www.tpos.co.uk/) and Ombudsman Services Property (http://www.ombudsman-services.org/property.html), which between them have approximately 60% to 70% of all lettings and property management agents in England as members. In addition he has approved a new scheme, the Property Redress Scheme (PRS) (www.theprs.co.uk).More details about the approved schemes can be found at their respective websites.

7.10 These schemes between them have sufficient capacity to take the around 3,000 lettings agents and 500 property managers who had not voluntarily joined a

redress scheme. The Government's intention is to now impose the duty to belong to one of the approved schemes by way of this Order.

Lettings Agency Work

7.11 In the Act, lettings agency work means things done by an agent in the course of a business in response to instructions from:

- a private rented sector landlord who wants to find a tenant; or
- a tenant who wants to find a property in the private rented sector.

7.12 In the Act, lettings agency work does not include the following things when done by a person who does no other work falling within the definition above:

- publishing advertisements or providing information;
- providing a way for landlords or tenants to make direct contact with each other in response to an advertisement or information provided;
- providing a way for landlords or tenants to continue to communicate directly with each other.

7.13 It also does not include things done by a local authority, for example, where the authority helps people to find tenancies in the private rented sector. As lettings agency work is things done in the course of a business, this rules out friends and families who may make recommendations for people to rent a property but who are clearly not operating as a business.

7.14 The intention is that all "high street" and web based letting agents, and other organisations including charities which carry out lettings work in the course of a business will be subject to the duty to belong to an approved redress scheme or government designated scheme. However, there are a number of organisations who under the definition could be said to be undertaking lettings agency work but who it would be inappropriate to impose a duty on. Article 4 of the Order sets out matters that are not "lettings agency work".

7.15 Article 4(2) of the Order excludes things done by the employer where the prospective tenant is an employee, or a contractor. It excludes the person to whom the prospective tenant provides work or services where the prospective tenant is a worker, or a contractor, or is for example on secondment. It also excludes the hirer where the prospective tenant is an agency worker.

7.16 This is because, especially in areas of high labour demand, an employer may either directly or via a third party, help an employee find accommodation as a way to attract and then retain workers. This would fall into the definition of lettings work but, to avoid discouraging organisations from providing housing assistance to those who work or provide services for them they have been exempted.

7.17 Article 4(3) (a) of the Order excludes higher and further education establishments. For example, universities often provide a service for their students to help them find property to rent. While this is lettings agency work as per the definition, the housing teams are not acting as independent agents and have a wider duty of care for the students at their institution. If an individual student feels that the housing teams have not provided a good service there are existing channels for students to complain to including the students union.

7.18 Finally, in the Order, Article 4(3) (b) excludes those authorised or licensed to carry out regulated legal activities under the Legal Services Act 2007. Legal professionals could be considered as carrying out lettings type work, for example when they draft tenancy agreements. They are excluded from the duty as they are already heavily regulated and complaints about their services can already be made to the Legal Ombudsman. It would not be appropriate to require them to belong to another redress scheme.

7.19 The Order does not exclude charitable organisations because any charity that is operating not as a business will already be exempt from the requirement. It is important that where charitable organisations are operating in the course of a business and especially where they are dealing with the most vulnerable that those most in need of support are not denied the opportunity to seek redress where things have gone wrong.

Property Management Work

7.20 In the Act, property management work means things done by a person in the course of a business in response to instructions from another person who wants to arrange services, repairs, maintenance, improvement, or insurance or to deal with any other aspect of the management of residential premises. However, it does not include things done by, amongst others, registered providers of social housing, that is, housing associations and local authorities who are social landlords, as these organisations are already required to belong to a redress scheme by Schedule 2 to the Housing Act 1996.

7.21 For there to be property management work, the premises must consist of or contain a dwelling-house let under a long lease, an assured tenancy under the Housing Act 1988 or a protected tenancy under the Rent Act 1977. For these purposes, “long lease” includes leases granted for more than 21 years, leases granted under the right to buy, and shared ownership leases.

7.22 Property management work would arise where a landlord instructed an agent to manage a house let to a tenant in the private rented sector. It would also arise where one person instructs another to manage a block of flats (often with responsibility for the common areas, corridors, stairwells etc.) that contains flats let under a long lease or let to assured or protected tenants.

7.23 The legislation will apply to agents who in the course of their business manage properties, for example, high street and web based agents, agents managing leasehold blocks and other organisations who manage property on behalf of the landlord or freeholder. However, as was the case with lettings work, the definition could also be applied in a number of cases where it is inappropriate to enforce the duty. These are described below.

7.24 Article 6(2) of the Order makes it clear that the requirement does not apply to the manager of commonhold land even if one of the units is subsequently let on an assured tenancy. This is to avoid the manager having to join a redress scheme if one of the units on the development was let under a relevant tenancy type, when this is not something they are likely to be aware of. A relevant tenancy type means:

a. a tenancy which is an assured tenancy for the purposes of the Housing Act 1988

b. a tenancy which is a regulated tenancy for the purposes of the Rent Act 1977

c. a long lease other than one to which Part 2 of the Landlord and Tenant Act 1954 applies

7.25 For avoidance of doubt, the exemption for managers of commonhold land only applies to the manager of the whole development, where an agent manages an individual dwelling-house in such a development, the duty to belong to a scheme will apply.

7.26 Articles 6(3) to (7) of the Order excludes student accommodation. In particular, halls of residence (which may be run privately), accommodation provided to students by education authorities and charities; and accommodation provided by any landlord where the students are nominated by an educational establishment or charity. Educational institutions will often rent bed space from trusted private providers (frequently agreeing a certain number of beds for a number of years and hence guaranteeing a level of rental income for the private provider) and then provide that provider with a list of names (nominated students) who will actually take up residence each year. The exclusion has been included because the legalisation is not aimed at university managed accommodation which is already well regulated and students have other mechanisms to complain including through the students union.

7.27 Article 6(9) of the Order exempts organisations that provide accommodation (refuge homes) for people who are fleeing from actual or the threat of violence or abuse including controlling, coercive or threatening behaviour, physical violence or abuse of any other description (including both physical and mental). Where those organisations are not operated on a commercial basis and its costs of operation are provided wholly or in part by a government department or agency or a local authority or the organisation is managed by a voluntary

organisation or charity then there is no requirement for the managers of the building to join a redress scheme. We have taken a belts and braces approach to exclusion (in cases where there is a non in-house manager) because the management of such properties and the lettings goes significantly wider than property management per se and the person living in such a property will not be occupying it as their permanent residence.

7.28 Article 6(10)(a)of the Order excludes work done by a person ("A") in the course of a business where the property is subject to a mortgage and A is the receiver of the income of it. When a borrower defaults on a mortgage the receiver is appointed as agent for the mortgagor and as such steps into their shoes. As such it would not be appropriate to treat the receiver as a managing agent and require them to join a redress scheme

7.29 Article 6(10)(b) of the Order excludes authorities where Part 3 of the Local Government Act 1974 applies, as these authorities will already be subject to investigation by the Local Government Ombudsman. Such bodies include a local authority as not all local authorities are social landlords, a National Park authority or a police and crime commissioners, or fire and rescue authorities etc. For this reason, the requirement to belong to a scheme under this Order does not apply to work carried out by these authorities.

7.30 Under Article 6(10)(b) Right to Manage companies who acquire the right to manage under Part 2 of the Commonhold and Leasehold Reform Act 2002 are exempt from the requirement to join a redress scheme as they are in effect long leaseholders who have taken direct management of their block of flats from the landlord.

7.31 Article 6(10) (b) of the Order also excludes those authorised or licensed to carry out regulated legal activities under the Legal Services Act 2007. This is because they are already heavily regulated and complaints by relevant persons about their services can already be made to the Legal Ombudsman. It would therefore not be appropriate to require them to belong to a redress scheme in relation to property management work. (Where a property management firm is part of a joint venture with a legal firm but is operating under its own identity and is carrying out property management work then it will have to join an approved or designated redress scheme as under these circumstances it will not be authorised or licensed under the Legal Services Act 2007.)

7.32 Article 6(11) of the Order makes clear that property management work does not include things done where a Local Authority or a social landlord have instructed the person undertaking the work. Again this is because local authorities and registered social providers are already heavily regulated and consumers already have guaranteed access to an Ombudsman.

Enforcement

7.33 In order for the requirement for lettings and property management agents to belong to a redress scheme to be effective there needs to be a process for ensuring compliance and for there to be a fair and effective penalty where the requirement is not met.

Enforcement authority

7.34 Article 7 of this Order makes provision for an enforcement authority to enforce the Order. Engagement with partners suggested that the requirement should be enforced at a local level and ideally by private sector housing teams who are most likely to have the detailed knowledge of which agents operate in their area. Therefore, the enforcement authority for the purposes of this Order will be a district council, a London Borough Council, the Common Council of the City of London in its capacity as a local authority, or the Council of the Isles of Scilly. These are all local housing authorities.

Penalty for breach of requirement to belong to a redress scheme

7.35 The enforcement needs to be proportionate and the approach chosen is designed to be cost effective by imposing a fine significantly greater than the anticipated cost of joining a scheme and minimising the impact on the courts and tribunals. Article 8 of the Order, therefore, permits a local authority to impose a fine of up to £5000 where it is satisfied, on the balance of probability, that someone is engaged in letting or management work and is required to be a member of a redress scheme, but has not joined.

7.36 The schedule to the Order provides that where an enforcement authority intends to impose a penalty they must give written notice of their intention, setting out the reasons for the penalty, the amount of the penalty and explaining that there is a 28 day period to make written representations or objections, from the date the notice is received. This written notice must be served within 6 months of the date on which the enforcement authority is in the position to issue the fine (have gathered sufficient evidence and satisfied any internal requirements that a fine is appropriate).

7.37 At the end of the 28 day period the enforcement authority must decide whether to impose the fine and, if so, must give at least 28 days for payment to be made. When imposing a fine, the enforcement authority must explain why the fine is being imposed, the amount to be paid, how payment may be made, and the consequences of failing to pay. They must also explain about the right to appeal and that any appeal must be made within 28 days after the imposition of the fine.

7.38 The enforcement authority may stop the process of imposing a fine at any stage.

Appeals

7.39 To ensure that the enforcement process is administered fairly and persons who are not required to be a member of a scheme do not receive a fine, Article 9, provides any person served with a final notice (requiring a fine to be paid) will have 28 days to lodge an appeal against a penalty to the First-tier Tribunal. If an appeal is lodged the fine cannot be enforced until the appeal is disposed of.

7.40 Appeals can be made on the grounds that the decision to impose a fine was based on a factual error or was wrong in law. Appeals can also be made on the grounds that the amount of the fine is unreasonable or that the decision was unreasonable for any other reason.

7.41 The Tribunal may agree with the enforcement authority's notice to issue a penalty or may decide to quash or vary the notice and fine.

Recovery of the penalty

7.42 The fine will be enforceable with the permission of the court as a court order.

7.43 Where proceedings are necessary for the recovery of the fine, a certificate signed by the enforcement authority's chief finance officer stating that the amount due has not been received by a date stated on the certificate will be taken as conclusive evidence that the fine has not been paid.

Consolidation

7.44 No consolidation is necessary.

8. Consultation outcome

8.1 A number of roundtable discussions, involving a wide range of landlord bodies, tenant and leaseholder groups and the lettings and management industry were held to develop the policy. This informal consultation with around 60 partners led to general consensus on the policy design which has been subsequently incorporated into the policy and greatly informed the drafting of this Order.

9. Guidance

9.1 Guidance will be provided as follows:

a. On the enforcement process for local authorities, this will include a leaflet that can be printed off and provided to agents.

b. For charities and the enforcement authority explaining what would and wouldn't count as in the course of a business.

10. Impact

10.1 The impact from this Order on business charities or voluntary bodies is that where they are carrying out lettings and or property management (except for refuge homes) in the course of a business they will have to join one of the approved redress schemes.

10.2 The impact from this Order on the public sector is that Local Authorities will need to enforce the duty. Local Authorities and social housing providers are exempt from the duty to belong to a scheme.

10.3 This is a fast track measure for which it is agreed that the impact on business is low cost. A full impact assessment has been submitted but not yet agreed.

11. Regulating small business

11.1 The impact on small businesses is low cost.

12. Monitoring & review

12.1 Success for this Order is that all lettings agents and all property management agents not exempted by this Order join one of the government approved redress schemes. Monitoring of the number of agents joining the approved schemes will take place after the implementation of this Order when membership of an approved scheme is a legal requirement. A review is planned once approved schemes have been operating for around a year to ensure that they are working as envisaged and to calculate the level of compliance in terms of agents joining the schemes.

13. Contact

Ruth Hayes at the Department for Communities and Local Government Tel: 0303444 3556 or email: ruth.hayes@communities.gsi.gov.uk can answer any queries regarding the instrument.