EXPLANATORY MEMORANDUM TO

THE BUILDING SAFETY (LEASEHOLDER PROTECTIONS ETC.) (ENGLAND) (AMENDMENT) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Levelling Up, Housing and Communities and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 Part 5 of the Building Safety Act 2022 ("the Act") made provision for leaseholder protections, which came into force on 28 June 2022. To operationalise the regime, the Building Safety (Leaseholder Protections) (England) Regulations 2022 and the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 ("the existing leaseholder protection regulations") came into force on 20 and 21 July, respectively.

2.2 The Joint Committee on Statutory Instruments (JCSI) reported the latter regulations for defective drafting and doubtful vires. However, the Government was satisfied that, notwithstanding the JCSI's concerns, there were no issues with the regulations that would prevent the leaseholder protection provisions from operating successfully. The then-Minister Marcus Jones MP committed to come back to Parliament with proposals if it became apparent that changes were necessary.

2.3 This instrument uses powers in the Act to make amendments to the existing leaseholder protection regulations to address issues raised in relation to the JCSI report and two Judicial Review applications against the regulations, and makes amendments and clarifications to the existing leaseholder protection regulations to ensure they have effect in the way originally intended.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument uses powers in sections 123(1) and (5), 124(5) and 168(2) of, and paragraphs 12, 13, 14, 15 and 16 of the Schedule 8 to, the Building Safety Act 2022. The regulations are made in part to address issues raised in relation to the JCSI report.

3.2 The Building Safety (Leaseholder Protections) (England) (Amendment) Regulations 2023 made an amendment to the Building Safety (Leaseholder Protections) (England) Regulations 2022 in relation to the definition of 'associated persons' for the purpose of the landlord group to which the contribution condition applies. The regulations came into force on 9 February 2023, and special attention was drawn to the instrument in the Thirty-First Report of the Secondary Legislation Scrutiny Committee[1]. A

[1] https://committees.parliament.uk/publications/34206/documents/188161/default/

motion to regret was moved by Baroness Pinnock on 21 March 2023, with 185 contents and 138 not contents at division.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdictions which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

5. European Convention on Human Rights

5.1 Parliamentary Under Secretary of State Lee Rowley has made the following statement regarding Human Rights:

"In my view the provisions of the Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The instrument amends the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022 (SI 859/2022) and the Building Safety (Leaseholder Protections) (England) Regulations 2022 (SI 711/2022), which were made under powers in the Act. It addresses the issues raised in relation to the Ninth Report of the Joint Committee on Statutory Instruments[2] and the two Judicial Review cases, and makes amendments and clarifications to the existing leaseholder protection regulations to ensure that they have effect in the way originally intended. The instrument is subject to the affirmative procedure, and follows on from the then-Minister Marcus Jones MP's commitment in the House of Commons to make necessary amendments to the statutory instruments (SIs) in July 2022.

6.2 Sections 123(1) and (5) and 124(5) of the Act give powers to the Secretary of State to prescribe in regulations persons who may apply for remediation orders and remediation contribution orders. Regulation 4 names Homes England (in its legal identity as the Homes and Communities Agency) as an interested person for the purpose of sections 123 and 124, and resident management companies (RMCs), right-to-manage companies (RTMs) and named managers as interested persons for the purpose of section 124 only.

6.3 Regulations 3, 5, 6, 7 and 10 define and provide for 'named managers' to notify and recover remediation amounts from landlords in the same way as RMCs and RTMs. Regulation 3 defines a 'shared ownership lease' in line with that used in the Act. Regulation 10 amends the definition of 'RMC' in the Building Safety (Leaseholder Protections) (England) Regulations 2022 so that it is the same as in the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022. Regulation 10 corrects the definition of, and references to, a 'current landlord' to ensure that all leaseholders receive a copy of the landlord certificate. Regulation 13 corrects a reference to the 'lease', and a numbering error, in relation to non-residential leases.

6.4 Paragraph 12 of Schedule 8 to the Act gives powers for the Secretary of State to make provision for, and in connection with, the recovery, from a prescribed relevant

[2] https://committees.parliament.uk/publications/23086/documents/169097/default/

landlord, of any amount that is not recoverable under a lease as a result of the Schedule. Regulation 5 makes clear that developers who were associated with the landlord sit at the top of the liability hierarchy, and that they must be notified of their liability, but that 'L' (a landlord, RMC, RTM or named manager) can still seek to recover costs from other landlords liable to contribute. Regulations 5, 6 and 7 provide clarity on the evidence that L must include in a notice, sets out the intended outcomes of a landlord's appeal against a notice and provides for the landlord to be able to seek an extension to the appeal period by 30 days with permission of the First-tier Tribunal. Regulations 5, 6 and 7 also provide that an amount payable by a landlord to L, as a result of a notice, is recoverable through the courts as a civil debt.

6.5 Paragraph 13 of Schedule 8 to the Act gives powers for the Secretary of State to make provision for requirements as to the information to be provided in the leaseholder deed of certificate, the form of the certificate and its execution. Regulation 8 sets out that a leaseholder must provide the leaseholder certificate together with the prescribed evidence.

6.6 Paragraph 14 of Schedule 8 to the Act gives powers for the Secretary of State to make provision for requirements as to the information to be provided in the landlord certificate, the form of the certificate and its execution. Regulations 11 and 12 amend the regulations associated with the landlord certificate to provide exclusions for information and evidence sharing requirements in certain circumstances. Regulation 13 provides for a new landlord certificate in the Schedule to the regulations to reflect this, and regulation 11 provides that a landlord must update the landlord certificate within four weeks of becoming aware of a leaseholder deed of certificate.

6.7 Paragraphs 15 and 16 of Schedule 8 to the Act give powers for the Secretary of State to make provision requiring a tenant or relevant landlord to give prescribed information or documents to the landlord, tenant or other prescribed person. Regulations 8 and 11 provide for the sharing of the landlord certificate and leaseholder deed of certificate from the current landlord to the RMC, RTM or named manager.

7. Policy background

What is being done and why?

7.1 The instrument defines and provides 'named managers' with the same protection as resident management companies (RMCs) and right-to-manage companies (RTMs), enabling them to apportion costs they incur for remediating historical safety defects (which were previously passed on to leaseholders) between relevant landlords. It defines a 'shared ownership lease' to make it clear that we are using the same definition as in the Act.

7.2 The instrument amends the definition of 'RMC' in the Building Safety (Leaseholder Protections) (England) Regulations 2022 so that it is the same as in the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022. It corrects the definition of, and references to, a 'current landlord' to ensure that all leaseholders receive a copy of the landlord certificate which sets out their landlord's liability. It also corrects a reference to the 'lease', and a numbering error, in relation to non-residential leases.

7.3 The instrument names Homes England (in its legal identity as the Homes and Communities Agency) as an interested person for the purpose of applying for

remediation orders (to require a landlord to undertake remediation within a specified period) and remediation contribution orders (to require a landlord, developer or their associate to make payment in relation to costs incurred or to be incurred in remedying relevant defects). It also names RMCs, RTMs and named managers as interested persons for the purpose of applying for remediation contribution orders.

7.4 The instrument makes clear our intention that landlords who were associated with the developer sit at the top of the liability hierarchy. 'L' (a landlord, RMC, RTM or named manager) must notify the landlord who was associated with the developer of their liability, but is not prevented from seeking to recover costs from others, such as contributing landlords. It provides that an amount payable by a landlord to L as a result of a notice is recoverable as a civil debt. The instrument makes clear that an appeal by a landlord is not against the fact that the notice has been issued but on the grounds of appeal, and sets out the intended outcomes of such an appeal. It provides clarity on the evidence that L must include in a notice. It also provides for the landlord to seek an extension to the appeal process by 30 days with permission of the First-tier Tribunal.

7.5 The instrument makes clear that, in order to qualify for the protections, a leaseholder must provide the evidence required under the leaseholder deed of certificate as well as the certificate itself. It provides that a landlord must update the landlord certificate within four weeks of becoming aware of a leaseholder deed of certificate, so it is taken into account when calculating a leaseholder's liability under the Act. The Schedule to the instrument replaces the existing landlord certificate, and amendments are made to the corresponding regulations, so that the current landlord does not need to provide certain evidence where they accept liability for historical safety defects for a lease under the Act, whilst still complying with the requirement to provide a landlord certificate. Finally, the instrument provides for the sharing of the landlord certificate and leaseholder deed of certificate from the current landlord to the RMC, RTM or named manager to ensure that they all have the required information to apportion costs and to ensure that qualifying leaseholders' capped remediation costs are reduced appropriately.

Explanations

What did any law do before the changes to be made by this instrument?

7.6 The provisions on protection of leaseholders from remediation costs in the Building Safety Act 2022 came into force on 28 June 2022, with the accompanying regulations coming into force on 20 and 21 July 2022. Building owners and landlords who were, or were associated with, the developer are liable to pay for relevant measures in relation to relevant defects in buildings they own that are above 11 metres or five storeys. Qualifying leaseholders, whose lease met the requirements in section 119(2) on 14 February 2022, are protected from all cladding remediation costs and by fixed caps for non-cladding defects and interim measure costs. These caps are dependent on the landlord group's net worth, the property's value, the leaseholder's shared ownership status and costs already paid since 28 June 2017. Remediation costs above the qualifying leaseholder caps are apportioned between relevant landlords in the building in accordance with the existing leaseholder protection regulations, and leaseholders and other interested persons can take action against non-compliant landlords via the First-tier Tribunal.

Why is it being changed?

7.7 The Joint Committee on Statutory Instruments (JCSI) reported the affirmative SI for four cases of defective drafting and one case of doubtful vires; the two SIs are also part of two judicial review (JR) cases. Whilst the Government was satisfied that, notwithstanding the JCSI's concerns, there were no issues with the regulations that would prevent the leaseholder protection provisions from operating successfully, the then-Minister, Marcus Jones MP, committed in the House to come back to Parliament with proposals if it became apparent that changes were necessary. This amending instrument addresses the issues raised in relation to the JCSI's report and the JR cases, and makes amendments and clarifications to the existing leaseholder protection regulations to ensure they have effect in the way originally intended.

7.8 The ground in the first stayed Judicial Review application against SI 2022/859 is based on the alleged failure of the Secretary of State to make provision for the recovery by named managers of the costs of building safety works, incurred by those named managers, from property owners which are no longer recoverable from leaseholders by virtue of Schedule 8 of the Act. The instrument addresses this by making provision for 'named managers' to be treated in the recovery of amounts from other landlords in the same way as RMCs and RTMs, enabling them to apportion and recover the costs of relevant measures in relation to relevant defects from landlords. The instrument makes provision for amounts payable under these regulations to be recoverable by named managers as a civil debt, and for them to be able to pursue a remediation contribution order to recover costs incurred or to be incurred in remedying relevant defects.

7.9 The ground in the second stayed Judicial Review application against SI 2022/859 is based on the alleged failure of the Secretary of State to make provision in the regulations to set out an order of precedence for recovery of remediation sums as between regulations 3, 4, and 5 of SI 2022/859. This ground is not accepted, but regulation 5(9) of this instrument amends SI 2022/859 to provide that developers who were associated with the landlord must be notified of their liability, although L can notify and seek to recover costs from other landlords liable to contribute.

What will it do now?

7.10 The instrument delivers the additional detail needed for the existing leaseholder protection provisions in the regulations and Act to have effect in the way originally intended. Named managers will have the same protection as RMCs and RTMs. Clarity will be provided on existing definitions of 'shared ownership lease', 'RMC' and 'current landlord'. Homes England will be able to apply to the First-tier Tribunal for remediation orders or remediation contribution orders to ensure historical safety remediation work is undertaken or paid for, while RMCs, RTMs and named managers will be able to apply to the Tribunal for remediation contribution orders. Landlords that sit at the top of the hierarchy and were associated with the developer will be notified of their liability to pay for historical safety defects. The amount payable by a landlord to L as a result of a notice will be recoverable as a civil debt, through the courts if necessary. Clarity will be provided on the appeals process, including setting out what must be included in the notice, the potential outcomes of an appeal and the landlord may apply for an extension to the appeal process by 30 days with the permission of the First-tier Tribunal.

The instrument clarifies that leaseholders are required to provide the specified evidence as part of their self-declaration of qualifying status in the leaseholder deed of certificate. Landlords must update the landlord certificate within four weeks of becoming aware of a leaseholder deed of certificate for a lease. The Schedule to the instrument replaces the existing landlord certificate, and amendments are made to the corresponding regulations, so that the current landlord does not need to provide certain evidence where they accept liability for historical safety defects for a lease under the Act, whilst still complying with the requirement to provide a landlord certificate. Current landlords must provide the RMC, RTM or named manager with a copy of the landlord certificate and leaseholder deed of certificate to enable them to apportion historical safety remediation costs in line with the provisions set out in the Act and existing leaseholder protection regulations.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Not applicable.

10. Consultation outcome

10.1 Not applicable, a consultation was not required for these regulations.

11. Guidance

11.1 The Department has published guidance relating to the leaseholder protections here:

https://www.gov.uk/guidance/building-safety-leaseholder-protections-guidance-for-leaseholders

11.2 A checker tool to see whether leaseholders will have to pay to fix historical safety defects in their building is available here:

https://www.gov.uk/check-building-safety-costs

12. Impact

12.1 The majority of the impact on business, charities or voluntary bodies in respect of the leaseholder protections is in relation to Part 5 of, and Schedule 8 to, the Building Safety Act 2022 rather than these regulations. The Act transfers liabilities from leaseholders to businesses which operate as building owners and landlords. The leaseholder protections should drive enhanced proportionality, as landlords will consider much more carefully what works are essential and proportionate to make the building safer, as they are due to now being liable for some, or all of, the associated costs. We anticipate that this will result in reduced costs for remediation going forward.

12.2 The impact on the public sector is similar to that for the private sector, however, the Act does not apply the contribution condition to social housing providers, therefore they will only be required to pay for relevant works where they were, or were associated with, the developer, or where remediation costs exceed the leaseholder caps.

12.3 A full Impact Assessment has not been prepared for this instrument because it simply amends the original regulations to enable the policy intent to have full working effect, and therefore does not change the impact from the original Impact Assessment. This was published on 20 June 2022 and is available on the legislation.gov.uk website here:

https://www.legislation.gov.uk/ukia/2022/52/pdfs/ukia_20220052_en.pdf

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. To minimise the impact of the leaseholder protections on small businesses, the Act and existing leaseholder protection regulations provide that landlords with a net worth of below £2 million per relevant building are only liable for an apportioned share of costs after the leaseholder has paid up to their cap, unless they were (or were associated with) the developer.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause as this is already included in the existing leaseholder protections regulations to which this instrument relates.

15. Contact

15.1 Kate Pickering at the Department for Levelling Up, Housing and Communities Telephone: +44 (0) 303 444 8916 or email: kate.pickering@levellingup.gov.uk can be contacted with any queries regarding the instrument.

15.2 Camilla Sheldon, Deputy Director for Building Safety Reform, at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under Secretary of State Lee Rowley at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.