

EXPLANATORY MEMORANDUM TO

THE TENANTS' ASSOCIATIONS (PROVISIONS RELATING TO RECOGNITION AND PROVISION OF INFORMATION) (ENGLAND) REGULATIONS 2018

2018 No. 1043

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry for Housing, Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument helps qualifying tenants (usually long leaseholders who pay a variable service charge) to set up, and gain official recognition of, their tenants' association. This is achieved by:
- reducing the threshold for recognition from 60 % of relevant qualifying tenants to 50%;
 - setting out the matters the First Tier Tribunal (Property Chamber) must have particular regard to in deciding whether to issue, or refuse to issue, a certificate of recognition to the association and the circumstances in which such a certificate may be cancelled; and
 - requiring the landlord to provide contact details of relevant qualifying tenants (but only with their consent) to the secretary of a tenants' association upon receiving a request to do so, for the purpose of contacting the qualifying tenant to ascertain whether they wish to join the association.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None. This instrument is subject to a negative resolution procedure and is not likely to be scheduled for debate.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to the negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England.
4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

- 6.1 This instrument is made under the powers in sections 29 (5) (b) to (d) and (6) and 29A of the Landlord and Tenant Act 1985. Part 2 of the instrument introduces a statutory framework for recognition of a tenants' association by the First Tier Tribunal (Property Chamber) (section 29 of the Act). Part 3 confers upon a secretary of a tenants' association power to require a landlord to provide contact information about qualifying tenants and sets out the procedure and rules for compliance (section 29A of the Act).

7. Policy background

What is being done and why?

- 7.1 Tenants' Associations which have been recognised directly by the landlord, or by the First Tier Tribunal (Property Chamber), can enable more effective enforcement of qualifying tenants' rights and greater scrutiny of the management of a leasehold development than individual tenants acting alone. In particular, a recognised association has certain statutory rights to scrutinise service charges, insurance cover, long term agreements, major works, and the appointment of managing agents.
- 7.2 However, associations face barriers to gaining recognition. The current threshold for membership is set out in non-statutory guidance from 1980 at 60%¹ of qualifying tenants. This threshold was criticised in 2015 by the Upper Tribunal.² The threshold is higher than the qualifying threshold for more recent and powerful legislative tools available to leaseholders. These are collective enfranchisement and right to manage – where the participation threshold is 50% of qualifying tenants.³
- 7.3 Not only does an association have to show under the current rules that a significant majority of qualifying tenants are members, but it faces a further major barrier in making contact with leaseholders in the first place to establish whether or not they wish to join the association. This is a particular problem in larger developments with a high turn-over of leaseholders and in blocks where the flat owners sublet or do not occupy the property as their main residence.
- 7.4 This instrument will help remove these two main barriers to establishing a membership threshold for an association to be recognised by the First Tier Tribunal.
- 7.5 Firstly, in part 2, it introduces a new mandatory threshold of not less than 50% membership,⁴ to replace the non-statutory 60% set out in guidance. Not only does this bring the threshold into line with other leasehold legislation such as Right to Manage and collective enfranchisement, it also provides certainty in the future which non statutory guidance cannot give. Part 2 of the instrument also puts on a statutory footing the rules around the constitution, transparency and openness of an association

¹ This guidance dates from October 1980 when the legislation was first introduced under the Housing Act 1980. It has remained in force since and appears as one of the criteria the First Tier Tribunal will have regard to in deciding whether to grant a certificate of recognition. (Although its status is less clear because of the tribunal case noted below)

² Upper Tribunal (Lands Chamber), See *Rosslyn Mansions Tenants' Association v Winstonworth Ltd* UKUT 11 (LC) (12 January 2015).

³ See Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993 and Part 2, chapter 1 of the Commonhold and Leasehold Reform Act 2002, respectively.

⁴ This is subject to an exception where a tribunal order has not been complied with under Part 3 of the Regulations and in which case it can still grant a certificate of recognition even if it is not satisfied the 50 % rule is met (see Regulation 4 (2)).

which are key factors when deciding whether to grant a certificate of recognition. It also sets out the circumstances in which a tribunal can refuse or revoke a certificate.

- 7.6 Secondly, in part 3, the instrument introduces a new requirement that a landlord must disclose the contact details known to them of qualifying tenants in the development to the secretary of the association. However, this is subject to two caveats. Firstly, the information can only be disclosed if it is requested in writing, explaining the purpose to which the information will be used. Secondly, the landlord must seek the written consent of each qualifying tenant to disclose the information and obtain permission in writing to disclose it before doing so. Part 3 also includes rules about time limits for responding to requests - the main one being the landlord must respond to the original request within four months. These are matters to be included in notices and sanctions that can be applied by the First Tier Tribunal if a landlord does not comply.
- 7.7 Taken together the measures in parts 2 and 3 of the instrument provide a comprehensive package of reforms to make it easier for properly constituted and representative associations to obtain a certificate of recognition from the First Tier Tribunal.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

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

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 There has been a public consultation on the measures in parts 2 and 3 of the Instrument.
- 10.2 In March 2015 the coalition Government published a discussion paper “Residential Leasehold and Recognised Tenants’ Associations – non statutory guidelines”,⁵ which set out the current guidance in relation to Recognised Tenants’ Associations, sought views on whether the current threshold for membership should be reduced to 50% to qualify to recognition, whether “model rules” should be followed for recognition, and whether changes should be made statutory or set out in new guidance. There were 17 responses to the consultation and not all of the 20 questions were answered. However, on the issue of reducing the threshold to 50%, there was significant interest with 12 consultees supporting such a change. No separate response to this discussion paper has been published, but in so far as changes proposed in it are to be implemented in part 2 of the instrument, these are explained in the response published below.
- 10.3 Section 29A of the Landlord and Tenant Act 1985 (inserted by section 130 of the Housing and Planning Act 2016) provides that the Secretary of State may by regulations impose duties on landlords to provide information to a secretary of a tenants’ association about relevant qualifying tenants. On 25 July 2017 the

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417786/15032_5 - RTA discussion paper - final_2 .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/417786/15032_5_-_RTA_discussion_paper_-_final_2_.pdf)

Government published a consultation paper “Recognising residents’ associations, and their power to request information about tenants” in which the Government sought views on what ought to be included in the regulations. In summary, the consultation issues included the following: what information should be disclosed; with what frequency should it be disclosed; should consent be required to disclose; who should pay for providing the information; and on the procedure and process in obtaining the information. The consultation closed on 15 September 2017 and 108 responses were received.

- 10.4 On some issues respondents were largely in agreement. For example on the limitation of the information that could be provided, where 78% of respondents agreed with the Government’s suggestions. Views on whether consent should be required from the qualifying tenant were more polarised. Although 62% agreed it should be required, a significant minority, for diverse reasons, disagreed with the policy approach. On other issues, such as the process and procedure and payment of costs, opinion was more diverse.
- 10.5 Overall, the detailed and helpful responses to this consultation have helped inform the Government's policy on how to introduce this new duty on landlords without imposing undue burdens on them and ensuring that timescales are realistic. It was also clear that simply requiring landlords to provide information was not the complete solution to making it easier for tenants’ associations to obtain recognition from the First Tier Tribunal, which is why we have included the provisions in part 2 of the instrument.
- 10.6 The Government’s response to the consultation, setting out the reasons for our approach to the instrument, was published on 4 October 2018 and is available at <https://www.gov.uk/government/consultations/recognising-residents-associations-and-their-power-to-request-information-about-tenants>

11. Guidance

- 11.1 Guidance will be published in November 2018 once the regulations come into force. The Department will engage with partners prior to the publication of guidance.

12. Impact

- 12.1 There is no significant impact on business, charities or voluntary bodies.
- 12.2 There is no impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument. This is because in keeping with the Government’s Reducing Regulation Sub-committee guidance, the policy in part 3 has been subject to a fast track impact assessment, and classified as ‘de minimis’, that is its impact on business is under £5 million, and it is not subject to a full regulatory impact assessment. The policy in part 2 has no impact on business at all.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is to carry out a review by October 2021.

15. Contact

- 15.1 Robert Skeoch at the Ministry of Housing, Communities and Local Government robert.skeoch@communities.gsi.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Lakhbir Hans, Deputy Director for Leasehold, Commonhold and Rentcharges policy at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Heather Wheeler, Parliamentary under Secretary of State at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.

