

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

31st Report of Session 2022–23

Drawn to the special attention of the House:

Building Safety (Leaseholder Protections) (England) (Amendment) Regulations 2023

Includes information paragraph on:

Draft Agriculture (Financial Assistance)
(Amendment) Regulations 2023

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 12 May 2022, are set out on the website but are, in summary:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

And, to scrutinise –

- (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
- (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

[Lord De Mauley](#)

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Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Chris Smith (Adviser), Jane White (Adviser) and Glenn Chapman (Committee Operations Officer).

Further Information

Further information about the Committee is available at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://statutoryinstruments.parliament.uk/>

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Thirty First Report

DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Building Safety (Leaseholder Protections) (England) (Amendment) Regulations 2023 (SI 2023/126)

Date laid: 8 February 2023

Parliamentary procedure: negative

*These Regulations correct an error in a previous instrument to ensure that, when liability for the costs of remedying historical defects of a building is assessed, the consideration of the net worth of a landlord group under the Buildings Safety Act 2022 includes parent and sister companies, as originally intended. The previous instrument unintentionally excluded parent and sister companies from being considered as associated with the landlord. The Department says that at least one parent company was able to avoid liability because of this error. **While we welcome that the error has now been corrected, we regret that the Department was unable to share with us data on the number of landlords that may have benefitted from the mistake and who, as a result, may have been able to pass on costs of remedying historical building defects to their leaseholders. The Department's position that it would have been "inappropriate" to share this data on the ground that it is "less than completely reliable" is a matter of concern: without reliable data it is not possible for this Committee or Parliament to form a view of the extent of the problem that this instrument rectifies. We find the absence of a mechanism that allows for the accurate monitoring of the impact of the Department's error worrying. We also regret that there appears to be no plan to identify affected leaseholders and to alert them to the possibility of appealing to the First-tier Tribunal for the recovery of costs.***

We are concerned that a potential lack of resources at the Department may have contributed to the error, and we are writing to the Minister to seek assurance that such mistakes will be avoided in future. We are also asking the Minister whether protection for affected leaseholders could be introduced retrospectively through primary legislation and, if so, whether this route has been considered.

The Regulations are drawn to the special attention of the House on the ground that they are politically or legally important and give rise to issues of public policy likely to be of interest to the House.

1. These Regulations have been laid before Parliament by the Department for Levelling Up, Housing and Communities (DLUHC) with an Explanatory Memorandum (EM). The instrument corrects an error in a previous instrument, the Building Safety (Leaseholder Protections) (England) Regulations 2022 (SI 2022/711) ("the 2022 Regulations"), to ensure that, when liability for the costs of remedying historical defects of a building is assessed in England, the net worth of a landlord group includes parent and sister companies, as originally intended.

Background

2. DLUHC explains that the leaseholder protection provisions in the Building Safety Act 2022 (“the Act”) came into force in June 2022, with the supporting 2022 Regulations coming into force in July 2022. Under the Act, building owners and landlords who are, or are connected to, the developer must fix all historical safety defects in buildings they own that are above 11 metres or five storeys. In addition, landlords whose landlord group had a net worth of more than £2 million per relevant building on 14 February 2022 (“the contribution condition”) must not pass on costs for historical safety remediation to leaseholders. Historical safety defects include the replacement of inadequate fire doors or fixing missing compartmentation, but not dangerous cladding: leaseholders are protected from the costs of the removal of such cladding under the Act. Where costs can be passed on to leaseholders, there is a cap on leaseholders’ contributions of £10,000 (£15,000 in Greater London) spread over 10 years for a property value of up to £1 million, with a higher cap for more valuable properties.
3. DLUHC states that the retrospective application of the contribution provision ensured that “unscrupulous landlords could not game the system by disposing of assets to avoid meeting the contribution condition”. The 2022 Regulations set out how to calculate a landlord group’s net worth and what are considered as associated persons of the landlord.

Correction made by this instrument

4. According to DLUHC, the intention of regulation 3(2) in the 2022 Regulations was to avoid unrelated companies that shared non-executive directors with relevant companies becoming liable under the Act. The Department explains that in trying to address this issue, parent and sister companies¹ unintentionally became excluded from being considered as associated with the landlord because of an accidental numbering error that occurred when the 2022 Regulations were drafted alongside the Building Safety Bill clauses. This instrument rectifies this error and ensures that the net worth of a landlord group includes parent and sister companies for the purposes of determining whether they meet the contribution condition.
5. DLUHC says that it is unable to make retrospective provision through secondary legislation. The correction applies from the day the instrument came into force on 9 February 2023, one day after being laid before Parliament. While this is in breach of the convention that there should be 21 days between the laying/publishing of an instrument and its coming into force, the Department says that giving 21 days’ notice could have enabled “unscrupulous landlords to circumvent the new provisions” to avoid paying for remediation.

Impact of the error on leaseholders

6. The Department told us that it was notified of this error through correspondence from a leaseholder in Autumn 2022, when a large institutional landholder successfully claimed that it did not meet the contribution condition, on the basis that its Special Purpose Vehicle (SPV) was the landlord of the building and therefore not associated with the institutional freeholder, and that this SPV did not itself have a net wealth of more than £2 million. DLUHC

1 Parent companies refers to companies which have a controlling interest in one or more smaller company and sister companies are subsidiary companies owned by the same parent company.

explains that even though the relevant guidance indicated that the parent company would be in scope, the parent company was able to avoid liability in practice by claiming they were not associated to the landlord due to the error in the 2022 Regulations.

7. The Department says that because the instrument does not apply retrospectively, landlords that have already passed on remediation costs to leaseholders, by issuing a required certificate,² will not be affected by the correction. The new provisions will apply, however, if an updated certificate is required, for example because new relevant defects to the building are discovered. According to DLUHC, this will mean that, over time, the original error will be rectified in “many cases and more leaseholders will be protected from historical safety remediation costs”, as was originally intended, and “landlords will no longer be able to pass on costs of historical safety remediation to qualifying leaseholders”.
8. As the extent of the problem caused by the error is not clear from the EM, we asked the Department how many other businesses had avoided liability. DLUHC told us that:

“The Department is aware of very few cases where the landlord has benefitted from the error and successfully avoided liability as, to do so, they would have been required to have issued a certificate, not met the contribution condition on the original rules and have attempted to recover capped costs from qualifying leaseholders.

Our understanding from engagement with the sector has indicated that, as this is a new process, many landlords are still in the process of completing a landlord certificate. It would not therefore be appropriate to make public data which we know to be less than completely reliable. However, we are clear that any opportunities to avoid the protections need to be closed off swiftly.”

9. Asked about the number of leaseholders that had to pay for remediation costs as a result of the error, the Department similarly said that it was aware “of very few cases where the leaseholders have already paid costs as a result of the error”.
10. **While we welcome that DLUHC has now corrected its error, we regret that the Department was unable to share with us data on the number of landlords that may have benefitted from the mistake and who, as a result, may have been able to pass on costs of remedying historical building defects to their leaseholders. The Department’s position that it would have been “inappropriate” to share this data on the ground that it is “less than completely reliable” is a matter of concern: without reliable data it is not possible for this Committee or Parliament to form a view of the extent of the problem that this instrument rectifies. We find the absence of a mechanism that allows for the accurate monitoring of the impact of the Department’s error worrying. The House may wish to press the Minister further on this issue.**

² DLUHC, ‘Guidance: Mandatory information required from leaseholders and building owner’s’ (25 January 2023): <https://www.gov.uk/guidance/mandatory-information-required-from-leaseholders-and-building-owners#landlords-certificate> [accessed 28 February 2023].

11. We also raised with DLUHC the question of compensation or support for affected leaseholders. The Department told us that:

“The Department will not be compensating leaseholders who have already paid remediation costs. However, leaseholders and other interested persons can seek to recover costs incurred or to be incurred in remedying relevant defects in relevant buildings via an application to the First-tier Tribunal for a remediation contribution order under Section 124 of the Building Safety Act 2022. The Department has published guidance on this.”³
12. Asked whether the Department would alert affected leaseholders to the possibility of applying to the First-tier Tribunal, as leaseholders may not know that such a route exists, DLUHC responded that this is “something we will consider further, as we will be updating the guidance on gov.uk explaining the changes made through this amending regulation”.
13. **We regret that the Department currently has no plans to alert affected leaseholders to the appeal route. Online guidance is unlikely to reach all those affected. Given that leaseholders may have to pay for costs as a result of an (albeit unintentional) error made by DLUHC, the Department should consider how affected leaseholders can be identified and how they can be informed, in a targeted way, that an appeal route is available to them to recover costs.**
14. **We are concerned that a potential lack of resources at the Department may have contributed to the error, and we are writing to the Minister to seek assurance that such mistakes will be avoided in future. We are also asking the Minister whether protection for affected leaseholders could be introduced retrospectively through primary legislation and, if so, whether this route has been considered. We will publish the Minister’s response in one of our next reports.**

3 DLUHC, ‘Guidance: Making sure remediation work is done’ (21 July 2022): <https://www.gov.uk/guidance/making-sure-remediation-work-is-done> [accessed 28 February 2023].

INSTRUMENTS OF INTEREST

Draft Agriculture (Financial Assistance) (Amendment) Regulations 2023

15. This instrument proposes to simplify the operation of financial assistance schemes launched under the Agriculture Act 2020 (“the Act”) and the Agriculture (Financial Assistance) Regulations 2021 (the “2021 Regulations”), which established an oversight regime. Amongst other changes, the instrument would minimise the references to specific financial assistance schemes and definitions in the 2021 Regulations to allow future changes to be made to the name or design of specific schemes without the need for amendments and to avoid an increasing list of schemes in the 2021 Regulations. The instrument also proposes to extend an exemption for agreement holders under the Annual Health and Welfare Review⁴ and the Tree Health Pilot⁵ who do not have to publish certain information where publication could be damaging to them and could inhibit cases of pests and diseases being reported.
16. The instrument would retain the exemption for both schemes and allow Ministers to extend it to certain other financial assistance schemes under the Act, if certain conditions are met. While the Department for Environment, Food and Rural Affairs (Defra) says that this aims to “avoid the need to constantly amend the 2021 Regulations”, we note that, in practice, this would mean that as schemes are created, renamed or closed, Ministers would be able to exempt these schemes from full publication requirements without having to lay secondary legislation before Parliament.
17. Asked about this removal of parliamentary oversight, Defra said that while the Government committed to publishing data on the financial beneficiaries of assistance schemes during the passage of the Agriculture Act 2020, there needed to be the right balance between being transparent and protecting the privacy of agreement holders. Defra said:

“We believe the power to exempt certain schemes from full publication [...] does strike that balance. We have carefully considered where publication could have a detrimental impact on scheme uptake, risk achievement of target outcomes and value for money, as well as potentially damage individuals and businesses.”
18. Defra explained that the proposed power will only be available to the Secretary of State where two conditions are satisfied:

“The first condition is if a scheme or part of a scheme is established to protect or improve the health or welfare of livestock, or to protect or improve the health of plants. The second condition is that the Secretary of State must be satisfied that publication of individual beneficiaries’ data is likely to hinder the extent to which the scheme achieves that purpose.”

4 This scheme launched in February 2023 and makes funding available to eligible farmers for an annual visit from a vet-led team of their choice to carry out an on-farm review of animal health and welfare, providing advice on actions and available support to improve and protect the health and welfare of animals and livestock. See: DEFRA, ‘SFI annual health and welfare review’ (30 March 2022): <https://www.gov.uk/guidance/sfi-annual-health-and-welfare-review> [accessed 28 February 2023].

5 This pilot tests different ways of slowing the spread of tree pests and diseases and building the resilience of trees across England. See: DEFRA ‘Tree health pilot scheme 2022’ (15 February 2023): <https://www.gov.uk/guidance/tree-health-pilot-scheme> [accessed 28 February 2023].

19. The Department added that the exemption would therefore be limited to “only a small number of potential schemes”, that it could not be applied to payments under Defra’s core environmental land management or productivity schemes and that aggregate data for each exempted scheme would be published on the new land payment data service on GOV.UK. This will set out the details of payments made to beneficiaries and which schemes are exempted from full publication, with annual updates to record any new exempted schemes. We are publishing the Department’s full response at Appendix 1.

**INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF
THE HOUSE**

Draft instruments subject to affirmative approval

Agriculture (Financial Assistance) (Amendment) Regulations 2023

APPENDIX 1: DRAFT AGRICULTURE (FINANCIAL ASSISTANCE) (AMENDMENT) REGULATIONS 2023

Additional information from the Department for Environment, Food and Rural Affairs

Q: Did the Government make a commitment during the Committee or Report State of the Agriculture Act in 2020 that schemes would be subject to full publication requirements?

Q: Regarding the scope of the power of the Secretary of State to exempt schemes from full publication requirements administratively, is there further explanation/assurance that the Department could provide about how this power will be used in future and about the limits on its use, given that parliamentary oversight (in the form of having to lay secondary legislation) is being removed from these exemption decisions?

A: During the report stage of the Agriculture Act 2020 in the House of Lords, the Government committed that beneficiary data should be published on a publicly available searchable database, and that details of the beneficiary's name, postcode, the amount of funding received and a high-level purpose of the funding payments should be recorded. We are preparing the Find Farm and Land Payment Data service to make this information available to the public on GOV.UK.

However, the Government also stated the need to strike the right balance between being transparent while also protecting the privacy of agreement holders. We believe the power to exempt certain schemes from full publication in the draft 2023 Regulations does strike that balance. We have carefully considered where publication could have a detrimental impact on scheme uptake, risk achievement of target outcomes and value for money, as well as potentially damage individuals and businesses.

The proposed power to exempt a scheme or part of a scheme from the requirement to publish beneficiary payment information in full will only be available to the Secretary of State where it satisfies two conditions. The first condition is if a scheme or part of a scheme is established to protect or improve the health or welfare of livestock, or to protect or improve the health of plants. The second condition is that the Secretary of State must be satisfied that publication of individual beneficiaries' data is likely to hinder the extent to which the scheme achieves that purpose.

This means that the exemption is limited to only a small number of potential schemes, that are in a similar position to the two schemes already exempted by Parliament in the 2021 Regulations—The Tree Health Pilot⁶ and the Annual Health and Welfare Review⁷. Schemes developed under the other 10 purposes in section 1 of the Agriculture Act 2020 will continue to be published in full.

This means that the exemption cannot be applied to payments under Defra's core environmental land management or productivity schemes, for example. Also, if a farmer or land manager is exempt from publication for one scheme, we will still publish beneficiary data for payments they receive under any other Financial Assistance schemes that they are participating in.

6 Forestry Commission and Department for Environment, Food & Rural Affairs 'Tree health pilot scheme 2022' (15 February 2023): <https://www.gov.uk/guidance/tree-health-pilot-scheme-2022> [accessed 28 February 2023].

7 DEFRA, *The Annual Health and Welfare Review: rolling out yearly vet visits* (7 February 2023): <https://defrafarming.blog.gov.uk/2023/02/07/the-annual-health-and-welfare-review-rolling-out-yearly-vet-visits> [accessed 28 February 2023].

It should be noted that the vast majority of schemes being introduced under the 2020 Act will not be exempt. The schemes currently exempted only make up 0.7% of the total farming budget. We do not expect this figure to change significantly. Even if all the schemes that meet the first condition of our exemption test were exempted, it would only amount to 4.4% forecasted spend.

We believe it is important for our schemes to be designed in partnership with our stakeholders and users. From our 2020 consultation we found that there were concerns in relation to tree pest and disease findings being published as this could be damaging to the individuals or businesses concerned and therefore inhibit cases being reported. During co-design of animal health and welfare schemes, farmers expressed concerns over publication of their data and the impact it could have on their farms. They reported that participation in these schemes could be misconstrued as meaning that the farm has a disease that is tested for, which could then affect the sale price of any future livestock if known by the buyer.

We are still ensuring there will be transparency and accountability with payments. Ahead of any use of the power, we will provide our rationale on new exemptions to the [House of Commons Environment, Food and Rural Affairs Committee] before each scheme is fully launched. Also, where a scheme is exempt from the requirement to publish beneficiary data, Regulation 14 as amended will require the Secretary of State to publish aggregate data broken down by each financial assistance scheme or part of a scheme, and to include the number of agreement holders in each case.

Payment data will be easily accessible for the public. The Find Farm and Land Payment Data service on GOV.UK will include the details of payments made to beneficiaries in each financial year as well as aggregate data. The service will also detail which schemes are exempted from full publication and will be updated to record any new exempted schemes. Information about publication will be provided in the terms and conditions for each scheme as well as in the privacy notices and public information charters provided by Defra and its delivery bodies.

24 February 2023

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 28 February 2023 and included in this report, Members declared no interests.

Attendance:

The meeting was attended by Baroness Harris of Richmond, Lord Hunt of Wirral, Lord Hutton of Furness, Baroness Lea of Lymm, Lord Powell of Bayswater, Baroness Ritchie of Downpatrick, Lord Rowlands, Lord Russell of Liverpool and Lord Thomas of Cwmgiedd.