

Submissions received by the Secondary Legislation Scrutiny Committee on the Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023, and response by the Department for Levelling-Up, Housing and Communities

Submission by Mr Stephen Desmond and response by the Department for Levelling-Up, Housing and Communities

This document sets out my additional proposals for amending the text of the proposed landlord certificate, for the purposes of simplifying the process of completing the certificate, to avoid any risk of misleading leaseholders in receipt of the certificate, and to assist conveyancers when carrying out due diligence on the contents of the certificate.

In this note—

“**BSA**” means the Building Safety Act 2022

“**LP etc Amendment Regs**” means the draft Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023.

“**LP Regs**” means the Building Safety (Leaseholder Protections) (England) Regulations 2022.

“**New para 10**” is the paragraph (10) that is to be inserted into reg 6 of the **LP Regs** by reg 11(8) of the **LP etc Amendment Regs**

“**New para 10B**” is the paragraph (10B) that is to be inserted into reg 6 of the **LP Regs** by reg 8(4) of the **Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022**.

Provision	The problem/ambiguity/gap	Possible solution(s)	How Urgent do I Perceive Reform on this issue is Urgently Required	DLUHC Response
<u>Major Issue (1)</u> The new proposed Landlord Certificate in Schedule 1 of the LP etc Amendment Regs is longer than the current version, and it is not user friendly in several key respects.	The new version of the Landlord Certificate, if unamended, will exacerbate the already serious crisis in leasehold conveyancing. My proposals are not intended to change the substance of the new Certificate, but merely to make its provisions and instructions more accessible to laypersons (including landlords) and conveyancers.	My Suggestions for Making the Language of the Landlord Certificate in Schedule 1 of the LP etc Amendment Regs, More Accessible (1) The instruction to “insert the name and address of any superior landlords under the lease at the beginning of 14.02.2022” should appear immediately under the heading “name and address of any superior landlords under the lease” to avoid any possible	Urgent	<i>With regards to the points Mr Desmond has made:</i> <i>(1) We do not accept Mr Desmond’s suggestion that the description under the five rows creates confusion. This is the same format as the certificate which has been in place since July 2022 and which it replaces and we have not heard anything from landlords to the effect that it is confusing.</i> <i>(2) The certificate references “relevant defect” in the notes as being defined in section 120 of the BSA. The definition of terms used in</i>

		confusion, rather than at the end of the 5 rows currently under this heading. (2) I cannot see any definitions, or references to definitions, of “relevant defect”, “relevant works” or “relevant period” in the Certificate, <i>(though this is hard to verify as the document is currently not in a searchable format)</i>. (3) A clearer distinction should be made between “relevant period”, and the five-year period between 28 June 2017 and 28 June 2022. (4) The certificate does not cater for circumstances where a relevant building is a self-contained part of the building, as defined by section 119(5) BSA 2022. (5) The questions as to developer criteria implies that there can only be one relevant defect to which the questions apply, but this is not always the case. (6) Under the first question as to developer criteria, I submit that the definition of the word “responsible” should appear in the Certificate, rather than by reference to the provisions of para 2(3) of Schedule 8 BSA 2022. (7) In the second question as to qualifying lease, reference is made to the “qualifying lease protections” and in the next question to “lease protections”. This, wrongly, implies that there might be two forms of protection.	<i>this certificate is the same as in SI 2022/711 to which they relate.</i> <i>(3) The evidence required is clearly set out in the regulations to which this certificate relates. The “relevant period” is referenced in those regulations, and is defined in the BSA.</i> <i>(4) There is no definition for “self-contained” in section 119(5); it is instead defined in section 117(5) of the BSA. A “relevant building” includes a self-contained part of a building except where section 117(3) applies. Where the relevant building is a self-contained part of the building, then the current landlord must complete the certificate in accordance with this.</i> <i>(5) The current landlord must specify the relevant defect or defects to which this certificate relates and in relation to which costs may be passed on to leaseholders. If there is more than one defect known at the time of completing the certificate, we would expect the landlord to list them here where the statement below applies to each defect. Where the landlord is responsible for one and not the other, regulation 6(1)(c) of the Building Safety (Leaseholder Protections) (England) Regulations 2022 would apply and a separate certificate would need to be provided.</i> <i>(6) The definition is provided in the BSA as is set out in the notes. The current landlord can access this for free online.</i> <i>(7) The phrases “qualify for the qualifying lease</i>
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		(8) The first and second questions as to group net worth criteria should repeat reference to 14 February 2022, in order to avoid possible confusion. (9) The question as to determination of value of qualifying lease should not merely refer to SI 2022/859, as a layperson is unlikely to understand what this reference means; instead there should be a link to the relevant parts of the regulations and government guidance. (10) There is no question about the net worth of an individual who was the landlord under the lease at the qualifying time: see further reg 5(5) of the LP Regs. (11) The “Please Note” instruction on when the questions on “work undertaken on relevant defects” must be completed should add, as a bullet point, “there is at least one relevant defect in respect of which, on 14 February 2022, the landlord under the lease and all superior landlords were not responsible for the relevant defect or associated with a person responsible for the relevant defect.” (12) Document E should read 'statement from chartered accountant or finance director of the landlord company' (emboldened words has been taken from reg 6(4)(b) of the LP Regs). (13) I feel that new government guidance for landlords completing this Certificate will be vital if these amendments are	protections” and “qualify for the leaseholder protections” are intended to have the same meaning. The protections for qualifying leaseholders are set out in Schedule 8 to the BSA. We will be publishing guidance to clarify that the intended meaning is the same in due course. (8) Questions 1 and 2 clearly relate to the paragraph above, which states 14 February 2022 as the date to which the test applies, in accordance with the provisions in Schedule 8 of the BSA. (9) The certificate in the draft SI is not in editable form, therefore a link to the SI would not be functional. We will be publishing guidance to accompany the landlord certificate set out in these regulations in due course. (10) The landlord group is defined in paragraph 3(4)(a) of Schedule 8 to the BSA to mean the relevant landlord and any person associated with the relevant landlord. The questions as to group net worth criteria therefore applies to both relevant landlords who are individuals and those who are part of a landlord group. (11) Mr Desmond’s suggestion is not correct. Information is required under regulation 6(4)(e) and (f) of SI 2022/711 in relation to work undertaken on relevant defects in certain circumstances where the landlord did not believe at the time of completing the certificate that there was a relevant defect in the building that needed remediating in order to determine future capped
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		not to cause more problems than they solve.		costs for yet-to-be-found relevant defects for qualifying leaseholders. (12) The evidence requirements in the certificate summarise the provisions in the regulations to which they relate. Landlords should read the regulations to ensure the evidence they are providing is correct. (13) We will be publishing guidance to accompany the landlord certificate set out in these regulations in due course.
<u>Major Issue (2)</u> The new proposed Landlord Certificate in Schedule 1 of the LP etc Amendment Regs includes <u>six</u> instructions, under the heading “Accompanying documents required under regulation 6”. These instructions are likely to cause confusion to a landlord who is not instructing a lawyer to advise them on the completion of the Certificate. I do not regard these instructions as particularly user friendly for conveyancers either.	The Instructions do not use plain language, e.g. they include multiple references / cross references to paragraphs and sub-paragraphs in the LP Regs and in the BSA 2022. Many Landlords completing the Certificate will not have access to a lawyer who specialises in the Building Safety Act, so it is vital that they can fully understand what they are being required to certify. Also, the instructions need to be changed to make them consistent with DLUHC’s stated aim of making the Landlord Certificate simpler to complete.	<u>My Suggestions for Improving the Instructions, Without Changing their Substance</u> I provide one example below to illustrate what I mean. Example (i) I would have renumbered the questions as follows instead that— - Under the “questions as to developer criteria” the question / statement about whether the landlord was responsible, etc., for the defect would have been renumbered 1.1; and that for “no relevant defect” being identified would have been renumbered 1.4. - The questions / statements as to qualifying lease would have become 2.1, 2.2 and 2.3. * The questions / statements as to group net worth criteria would have become 3.1, 3.2 and 3.3.	Urgent	The six instructions simplify the exemptions which are set out in regulation 11 of the draft SI. Where one of the statements applies, the current landlord does not need to provide information or evidence under specified sub-sections of regulation 6 of SI 2022/711. A summary of these requirements is set out in rows A to J in the table. DLUHC’s aim is to reduce the information and evidence-sharing requirements landlord certificate, which this draft SI achieves through the changes made to regulation 6 of SI 2022/711 in draft regulation 11. We will be publishing guidance to accompany the landlord certificate set out in these regulations in due course.

		* The questions / statements as to the value of a qualifying lease would then have been question 4. * The questions / statements about work undertaken on relevant defects would have been question 5. (ii) Then take Instruction 2: when the developer test is met, or there is no known defect and the contribution condition is not met, reg 6(3)(a) and (b) and (4)(d) would not apply. (iii) Instruction 2 would be much simpler if it were reworded, so as to read— ‘If you placed an X in the box next to questions / statements 1.1 or 1.2 or 1.4 or 3.1, then you will not have to provide document A, B, G or H. However, you will need to provide documents C, D, E, F, I and J on this list.		
Major Issue (3) I wish to raise <u>very serious concerns</u> about the new para 10 and new para 10B (as defined above).	Despite 18 years as an author, writing on enfranchisement, lease extensions, the Right to Manage, the service charge regime under the Landlord and Tenant Act 1985, etc.; I am struggling to think of a more punitive measure than the one that is about to be introduced by the two paragraphs listed above. As a result, I fear there is now a significant risk of hundreds (if not thousands) of landlords, who are not cash- or asset-rich, being prevented from recovering significant	Tribunals do not have a say I feel compelled to register my deeply felt opinion that it should be for Tribunals, who have expertise in dealing with service charge disputes, to determine whether a prescribed costs penalty should be applied (e.g. as against an uncooperative landlord that is seriously and repeatedly flouting the regulations). I consider it to be dangerous territory for such predetermined outcomes to be prescribed by statutory instrument, without the right of the landlord to have their case	Urgent	<i>The requirement in regulations 8(4) and 11(8) is simple: the current landlord must provide a copy of an already completed/received certificate to the RMC, RTM or named manager within a week of receiving it from the leaseholder. This is needed by the RMC, RTM or named manager to be able to accurately apportion costs between the building’s landlords and leaseholders. Without it, the RMC, RTM or named manager will not be able to apportion costs.</i> <i>There is no prescription on how the current landlord must provide the copy of the certificate – it could be via post or email. This will enable to current landlord to</i>

	amounts of service charges, even if they commit a minor infraction of the new para 10 or the new para 10B. My alarming interpretation of these provisions is that if, on one occasion, the landlord or their agents omit to provide a copy of the certificate (even if the omission was accidental) or provide a copy more than seven days after the certificate was issued, to provide a copy of the certificate, within seven days, to any of the parties mentioned in the new reg 6(9) (to be inserted into the LP Regs). My reading of the new para 10 is that such an accidental oversight would automatically prevent the landlord recovering the costs of a relevant measure relating to a relevant defect in the building to which the certificate relates from the owner of a “relevant lease” (which is defined by para 16(8) of Schedule 8 BSA 2022 as ‘a lease of premises in a relevant building’; a definition wide enough to include non-qualifying leases of flats and intermediate leases that include several flats in the building). (iii) I have similar concerns about the new para 10B.	considered by the Tribunal. Lack of Conspicuous Warning of Harsh Consequences There should be a conspicuous warning of these potentially fatal consequences in the new Landlord Certificate. Indeed, I would question not only the fairness of either new para 10 or new para 10B in the absence of such a warning, but also their legality. Why should a landlord face these potentially severe consequences when the risks are hidden away in small print and the new paragraphs use language that is neither plain nor intelligible to laypersons? Furthermore, these new paragraphs are being introduced at very short notice and with little fanfare.	easily comply with the requirement. Instead of saying the landlord must provide a copy of the certificates immediately, we have been generous in giving 7 days leeway for them to provide copies of the certificates to allow for posting, weekends and bank holidays. The consequence for failure to comply with the information sharing requirement between the landlord and RMC, RTM and named manager in 10 and 10A is clearly set out and provided for in paragraph 16(4) of Schedule 8 to the BSA. It also aligns with the consequence of a landlord failing to share a completed landlord certificate with the leaseholder, as set out in paragraph 14 of Schedule 8 to the BSA. The Department considers this to be fair, as without the information contained in the certificate, the RMC, RTM or named manager will not be able to establish whether the leaseholder is fully protected (e.g. qualifies and lease is worth <£175,000 outside Greater London) or whether some costs can be passed on. The provision is therefore essential to protect leaseholders from such costs where the landlord fails to provide the necessary information in a quick, simple and easy way – via email or post. The regulations are laid via the affirmative procedure, providing time for landlords to get up-to-speed with the law before it comes into force. We will be publishing guidance to accompany the landlord certificate set out in
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				<i>these regulations in due course.</i>
<u>Textual Issue (1)</u> The Building Safety (Leaseholder Protections) (England) (Amendment) Regulations 2023 were issued in February 2023. However, the only difference between the title of the February regulations and that of these draft LP etc Amendment Regs is the mere addition of the word "etc".		I suggest that the LP etc Amendment Regs should be called The Building Safety (Leaseholder Protections) (England) (Amendment No.2) Regulations 2023.		<i>The name complies with the requirements in Statutory Instrument Practice and of course will bear a different number.</i>

16 & 20 June 2023

Submission by David Keighley and response by the Department for Levelling-Up, Housing and Communities

By way of background, I was admitted as a solicitor in 1982 and until I retired from full time practice in 2016 I spent most of my career dealing with residential conveyancing. From 2003 onward I also provided CPD seminars etc to residential conveyancers. Since 2016 I have practiced part time but my focus since then has been delivering CPD seminars etc to residential conveyancers. In doing so I focus on the practical rather than academic issues.

In the past 20 years I have delivered many hundreds of CPD seminars and have a deep understanding of the issues faced in the practice of residential conveyancing.

As I am sure you are aware the provisions of the BSA are causing practical issues in the Conveyancing market. I can assure you that those issues are very much to the fore of concerns expressed to me by those attending my seminars.

Given that I wish to comment on one proposal in the draft SI and in addition raise other practical issues.

The issue re the draft SI is in respect of the “trigger events” requiring a Landlord Certificate.

The concern is whether a landlord is prevented from recovering service charges for remediation if it fails to provide a certificate on the first of those trigger events happening. The uncertainty around the correct interpretation of Regulation 6 in that regard is causing real issues. The Regulation, as you will be aware, refers to “each” trigger event.

In a discussion re the BSA last week with someone working at the DLUHC I was told that the impact of the provisions of the draft SI would be that a landlord would be locked out if it did not provide a certificate once the first trigger occurred.

Having looked at the provisions of the amended Regs I do not think that is the case because of the drafting.

As you aware Regulation 6 sets out the triggers for a Landlord Certificate which for clarity I have reproduced below. The amended Regs introduces trigger (e) which I have italicised.

6) A current landlord must provide a certificate (a “landlord’s certificate”) to a leaseholder in each of the following circumstances—

(a)when the current landlord makes a demand to a leaseholder for the payment of a remediation service charge;

(b)within four weeks of receipt of notification from the leaseholder that the leasehold interest is to be sold;

(c)within four weeks of becoming aware (either themselves or by notification from another person) of a relevant defect not covered by a previous landlord’s certificate; or

(d)within four weeks of being requested to do so by the leaseholder.

(e) "within four weeks of becoming aware of a new leaseholder deed of certificate (as defined in regulation 6 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022) which is in relation to a lease of a dwelling in the building of which the current landlord is the landlord and which contained information that was not included in a previous landlord’s certificate.”.

The amended regs also insert 2 new provisions in addition to the one mentioned above namely:

“(9) Where a current landlord has provided a landlord’s certificate to a leaseholder they must provide a copy of that certificate to any other landlords of premises in the building, the RMC, RTM company or named manager within one week of providing the certificate to the leaseholder.

(10) Where a current landlord fails to comply with the requirement in paragraph (9) the costs of a relevant measure relating to a relevant defect in the building to which the certificate relates are prescribed costs under paragraph 16(4) of Schedule 8 to the Act and so are not to be regarded as relevant costs to be taken into account in determining the amount of a service charge payable under a relevant lease of premises in that building and must not be met from a relevant reserve fund as defined in paragraph 10 of Schedule 8 to the Act.”.

I think (10) is the clause that the DLUHC alluded to as preventing a landlord from recovering costs if they fail to provide a certificate when required.

However, the provision as drafted says that (10) only applies if a landlord fails to comply with (9). On that basis it appears that a landlord is prevented from recovering costs only if it fails to send a copy of a landlord certificate to the entities mentioned in (9).

Given that my interpretation is that the provisions in Regulation 6 appear unaffected by (9) & (10) and the uncertainty therefore remains.

My suggestion is that Regulation 6 be amended to make it clear that if a Landlord fails to provide a Certificate within 4 weeks of becoming aware of a sale by the leaseholder, they are unable to recover costs of remediation. That I think could be achieved by amending draft regulation 10 to refer to both regulations 6 & 9.

A: A current landlord must provide a landlord's certificate to a leaseholder in each of the circumstances prescribed in regulation 6(1). Failure to provide the tenant a certificate that complies with any prescribed requirements is dealt with in regulation 6(7), i.e. the condition in paragraph 2(2) of Schedule 8 to the Act (no service charge payable for defect for which landlord or associate responsible) is to be treated as met. The provision in paragraph 10 inserted by amending regulation 11(8) relates only to paragraph 9.

The powers used for regulations 6(7) and paragraph 10 of amending regulation 11(8) are different. The former uses powers in paragraph 14 of Schedule 8 to the Act, which relates to the landlord providing a certificate to a tenant; the latter uses powers in paragraph 16 of Schedule 8 to the Act, which relates to the landlord providing prescribed information or documents to another prescribed person. For this reason, the consequences for failing to provide a copy of the certificate are provided for separately.

There are other practical issues which are causing problems for conveyancers and their clients. The principal issues are:

1. Whether a Limited Company can be a qualifying Leaseholder on 14.02.22. The issue here is that a Ltd Co. will not have been "living" at the property on that date.

A: A company is a legal person and can qualify for the qualifying lease protections where it owned no more than three UK properties in total.

2. The status of executors where a leaseholder died prior to 14.02.22 or was at that date living in a Care Home. In either case the deceased will not have been living at the property on the key date.
3. The status of executors as qualifying leaseholders if the executors between them owned more than 3 homes. Does that remove the protection of the Act or is the key issue the number of homes owned by the deceased? and

A: The qualifying lease questions in Section 119 of the Building Safety Act 2022 apply to the owner of the lease on 14 February 2022. Legal title remains in the name of the deceased until the property is disposed of. Leaseholders who owned up to three UK properties in total on 14 February 2022 qualify for the qualifying lease protections, including where they did not live in any of these properties on 14 February 2022, such as where they resided in a care home.

4. What will be the position if a leaseholder who bought after 14.02.22 is unable to contact the person who did own the property on 14.02.22 & so cannot accurately complete a Leaseholder certificate and/or verify the number of homes owned by the previous owner on 14.02.22. I appreciate that the certificate requires the leaseholder completing it to do so to the best of their knowledge. However, a market hates uncertainty & I can see uncertainty arising in years to come if (say) in 2026 a leaseholder who bought (in again say May 2022) who wishes to sell is unable to establish the status of the former owner on 14.02.22.

If, for example, a leaseholder in that situation completed a certificate claiming qualifying status & it subsequently transpires that (because of the true status of the leaseholder on 14.02.22) the lease isn't qualifying will the incoming owner have the protection of the Act which they thought they had removed from them?

A: Prospective buyers and their conveyancers should ask for a copy of the leaseholder deed of certificate prior to completion, which will remove the uncertainty down the line if a defect is discovered and the information cannot be gathered from the former owner. Leaseholders who purchased a property after 14 February 2022 and before the regulations came into force in July 2022 should seek to collect that information from the previous owner as soon as possible, to avoid future information gathering issues. Leaseholders seeking to complete the leaseholder deed of certificate in the absence of information from the owner on 14 February 2022 should seek legal advice on how to complete the certificate. Where the leaseholder dishonestly makes a false representation or fails to disclose information required it may be a criminal offence under the Fraud Act 2006.

I suspect some of the issues above may require primary rather than secondary legislation and will take time to address. However, as it stands conveyancers are unable to confidently advise clients on these & no doubt other points and, in many cases, are simply declining to take on the work causing further issues for homebuyers. Against that background some guidance from within Government on these issues would, I suggest, ease the concerns of buyers, sellers and their conveyancers.

18, 21 & 26 June 2023