

LEASEHOLD REFORM (GROUND RENT) BILL

Memorandum from the Ministry of Housing, Communities and Local Government to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Leasehold Reform (Ground Rent) Bill (“the Bill”). The Bill will be introduced in the House of Lords on 12 May. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The purpose of the Bill is to tackle the inconsistency and ambiguity of ground rents for future leaseholders. The Government is legislating to require for the first time that ground rents in residential long leases will have no monetary demand. These will be set in law as a ‘peppercorn rent’ level.
3. The Bill aims to make homeownership fairer and more transparent by ensuring leaseholders of new, long residential leases cannot be charged a monetary ground rent for no tangible service. It does this by establishing that such leases are regulated by the Bill, and that for those leases, the only permitted rent is a peppercorn rent. The Bill sets out a number of exceptions to this policy. These are:
 - a. Business leases
 - b. Statutory lease extensions
 - c. Community-led housing schemes
 - d. Home finance plan leases
4. There are delegated powers in relation to the definitions of community-led housing and home finance plan leases.
5. The Bill makes provision for rent to be payable on the landlord’s share of a shared ownership property. It also makes provision that where there is a lease extension, the parties may agree that a rent is to be paid for the period until the original lease would have terminated, provided that rent does not exceed the rent that would have been payable under the original lease. The Bill also bans the charging of related administration fees.
6. The Bill establishes a civil penalty regime for breach of the requirement not to charge a prohibited rent. This must be enforced by local weights and measures authorities (Trading Standards) and may be enforced by a district council. Together these authorities are termed “enforcement authorities”. An enforcement authority may impose a penalty of between £500 and £5000 on

a person in breach of the restrictions on ground rents. These amounts may be varied by regulation. The enforcement authorities must have regard to guidance issued by the Secretary of State about its functions under this Bill.

7. The Delegated Powers in the Bill are:

- **Clause 2: Excepted Leases**
 - (2) Power to make provision about the form and content of the notices required to be exchanged between landlord and tenant (or prospective landlord or tenant) confirming the intention to use and continue to use the premises for the business purposes set out in the lease.
 - (6)(b) Power to specify further conditions that community-led housing must meet in order for the relevant exception from application of the Act to apply.
 - (8)(b) Power to specify further conditions that home finance plan leases must meet in order for the relevant exception from application of the Act to apply.
- **Clause 9: Financial Penalties**
 - (9)/(10) Power to amend the financial penalty amounts to reflect changes in the value of money. This is a Henry VIII power.
- **Clause 12: Enforcement authorities: supplementary**
 - (1) enforcement authorities must have regard to any guidance issued by the SOS about the exercise of functions under this Act.
- **Clause 20: Consequential Amendments**
 - (1)/(2) Power to make provision that is consequential on the Act - including provision amending an Act of Parliament (including an Act passed in the same session as this Act). This is a Henry VIII power.
- **Clause 21: Regulations**
 - (1)(a) Powers to make regulations includes power to make consequential, supplementary, incidental, transitional or saving provision
 - (1)(b) Powers to make regulations includes power to make different provision for different purposes
- **Clause 25: Commencement**
 - (2) Power to commence various provisions of the Act on such day as the Secretary of State may appoint
 - (3) different commencement days may be appointed for different purposes including for different kinds of leases.
 - (4) the day appointed for the coming into force of this Act in relation to leases of retirement homes must be no earlier than 1 April 2023
 - (6) Power to make transitional or saving provision in connection with the coming into force of any provision of this act
 - (7) Power to make regulations under this subsection (6) for different provision for different purposes including for different kinds of leases.

C. ANALYSIS OF DELEGATED POWERS BY CLAUSE

Clause 2: Excepted Leases

- (2) Power to make provision about the form and content of the notices required to be exchanged between landlord and tenant (or prospective landlord and tenant) confirming the intention to use and continue to use the premises for the business purposes set out in the lease.

Power conferred on: Secretary of State

Power exercised by: Regulations (statutory instrument)

Parliamentary procedure: Negative Procedure

Context and Purpose

8. Clause 2 sets out the exceptions to the Ground Rent Bill. The exceptions are intended to cover areas where ground rents fulfil a justifiable purpose, for example that it would be difficult for the type of lease to operate without ground rents. These exceptions were the subject of formal consultation (*Implementing reforms to the leasehold system in England, October 2018*) and ongoing engagement with stakeholders to ensure that they fulfil the intended purpose.
9. The Bill makes provision for business leases in sub-section (1) to be exempt from the peppercorn rent provision. Consideration has been given to limiting the possibility of avoidance of the peppercorn rent provision and conditions imposed accordingly. In cases where a business lease is also used for residential purposes and where the business is not a home business within the meaning of Part 2 of the Landlord and Tenant Act 1954 then the peppercorn rent need not apply if the reason for the residential use is that this significantly contributes to the business purpose.
10. It is also required that both the landlord and tenant (or prospective landlord and tenant) intend to use the premises for the purposes set out in the lease. To demonstrate this intention the landlord and tenant (or prospective landlord and tenant) will be required to exchange written notices at or before the time the lease is granted confirming the intention to use and continue to use the premises for the business purposes set out in the lease.
11. Sub-section (2) provides the Secretary of State will have the power to make provision about the form and content of the written notices.

Justification for taking the powers

12. The purpose of the power is to enable the Secretary of State to impose further conditions regarding the form and content of the notices and to update the notice over time. It is the standard approach for a statutory secondary power to

be used in regard to setting out the form and content of a notice and It is considered appropriate for this function as it is important for the notices to be flexible and respond quickly to serve the consumer protection function intended. This would not be achieved if primary legislation was required to update the notices.

Justification for the procedure selected

13. This power will be subject to the negative procedure. This power will not address matters of principle which will already have been approved by Parliament in providing for the basic exception. The Government considers that the affirmative procedure would be disproportionate changes of this type which will be technical changes regarding the form and content of the notices.

Clause 2: Excepted Leases

- (6)(b) Power to specify further conditions that community-led housing must meet in order for an exception from application of the Act to apply.
- (8)(b) Power to specify further conditions that home finance plan leases must meet in order for the exception from application of the Act to apply.

Power conferred on: Secretary of State

Power exercised by: Regulations (statutory instrument)

Parliamentary procedure: Negative Procedure

Context and Purpose

14. The clause lists two further exceptions where the Secretary of State will have delegated powers to impose further conditions if necessary in the future: for community housing and home finance products. These powers are to ensure the Secretary of State can impose further conditions where exemptions are allowed under the Bill and prevent the market from abusing the charging of rent in a way not intended under the Bill.
15. These exceptions are tightly drafted to ensure that only those parties that the Government intended to be exempt from the peppercorn ground rent provisions are eligible.
16. In the case of community-led housing, ground rent income is not used for development for profit, and it is not intended that the freehold (that is, the right to receive the ground rent) will be sold on to raise profits. Community-led developers that rely on ground rent income have explained that it is used for wider community engagement, governance and development of future initiatives. The inability to recover ground rents could therefore limit the growth of community-led housing, which would be contrary to Government objectives. The Government recognises that it may be necessary to further define this category, for example to prevent wider than intended of the exception.

17. The Bill makes provision for certain home finance plan leases to be exempt from the peppercorn rent. This exemption covers home reversion plans, and rent to buy arrangements such as those used under Islamic/Sharia compliant finance. Home reversion plans are a type of equity release product that allow consumers to release capital by selling their property to a provider, who in turn takes ownership of the freehold and grants a lifetime lease to the consumer. Under some plans, consumers agree to pay a ground rent for the duration of the lease to release a higher amount. This exemption will enable these lease-based financial products to continue. In the case of Islamic/Sharia compliant finance, under a rent to buy arrangement a lender buys the freehold of the property and grants a non-assignable lease to the consumer. Instead of paying interest on a mortgage, the consumer pays a monthly rent and completes the purchase of the freehold at the end of the lease term. The exemption ensures that such arrangements are not affected by this Bill.

Justification for taking the powers

18. The purpose of the powers is to enable the Secretary of State to impose further conditions that must be satisfied before these exceptions can apply in the event that any abusive market practices relating to ground rent were to emerge that cannot now fully be anticipated.

19. Both the community housing sector and the home finance plan providers that will be excepted from the restrictions on ground rents are niche segments of the housing market whose business models require them to grant long residential leases with a monetary ground rent. There is the potential for growth to meet societal need and so the Secretary of State does not wish this Bill to present a barrier. However, the property market is highly innovative and fast-moving and in such a market, we consider that taking a power to tighten these exceptions is justified in order to have the flexibility to quickly respond to issues of concern relating to consumer protection as they emerge.

20. The power is a narrow one. It can only be used to tighten the exception by imposing additional conditions, not to expand it.

Justification for the procedure selected

21. These powers will be subject to the negative procedure. Additional conditions that may be included in regulations will be technical provisions intended to protect consumers. They will not address matters of principle which will already have been approved by Parliament in providing for the basic exception. The Government considers that the affirmative procedure would be disproportionate for technical changes of this type.

Clause 9: Financial Penalties

- (9)/(10) Power to amend the financial penalty amounts to reflect changes in the value of money.

Power conferred on: Secretary of State

Power exercised by: Regulations (statutory instrument)

Parliamentary procedure: Negative Procedure

Context and Purpose

22. The Bill provides that an enforcement authority may impose a financial penalty of up to £5,000 for a breach of the legislation. This penalty is intended to provide a deterrent for landlords. Clause 9 contains a power for the Secretary of State to make regulations amending the amount of financial penalty that an enforcement authority may charge where the Secretary of State considers it expedient to do so to reflect changes in the value of money.

Justification for taking the power

23. The Government considers a power to amend the amount of financial penalty that an enforcement authority may charge is justified. These are changes that are intended only to reflect changes in the value of money and not to alter the intent or effect of the legislation. Permitting enforcement authorities to levy financial penalties of between £500 and £5,000 for breaches of the restrictions on ground rents is intended to serve as a significant deterrent to landlords. Ensuring the deterrent value of the penalty is maintained requires regular periodic review and adjustment of the penalty. Including a power to amend the minimum and maximum amount of penalty to reflect changes in the value of money ensures that the Government can ensure that the deterrent effect is maintained and respond to changes in the value of money without the need for primary legislation.

24. There is a precedent for delegation in these circumstances in section 23(9) of the Housing and Planning Act 2016 and section 9 of the Tenant Fees Act 2019. Including a regulation making power enables the legislation to remain relevant over time, to reflect changes in the value of money

Justification for the procedure selected

25. The Government considers that the affirmative procedure is not proportionate in the case of a power that enables the financial penalties to be amended solely to reflect changes in the value of money conferred in order to ensure that the legislation remains relevant over time. Given the very limited scope of the power the Government considers that the negative procedure is proportionate. As referred to above, there is precedent for this approach in the Housing and Planning Act 2016 and the Tenant Fees Act 2019.

Clause 12: Enforcement authorities: supplementary

- (1) Implied power to issue guidance to which enforcement authorities must have regard

Power conferred on: Secretary of State

Power exercised by: guidance

Parliamentary procedure: no parliamentary procedure

Context and purpose

26. Clause 8 establishes that an enforcement authority for the purposes of a breach of the restrictions on ground rents is the local weights and measures authority or a district council. Clause 12 provides that an enforcement authority must have regard to any guidance issued by the Secretary of State about the exercise of its functions under the Bill.
27. The Secretary of State is not under a duty to issue such guidance but intends to do so. The guidance will support enforcement authorities in understanding and undertaking their responsibilities under the Bill. In particular, the Government would expect that it will provide detail regarding practical aspects of enforcement such as the circumstances in which it would be appropriate to issue a financial penalty, and guidance on determining the level of that penalty in particular circumstances. The Government will work with Trading Standards to draft the guidance.

Justification for taking the power

28. Setting out principles in guidance to which enforcement authorities must have regard will help to ensure that the approach of different authorities is consistent whilst allowing enforcement authorities an appropriate measure of discretion as to how those principles are applied. It is considered to be more appropriate to set out these principles in guidance than to take a prescriptive approach in legislation because the factual matrix of a contravention of the ground rent restrictions may vary considerably.
29. In particular, it will be a matter for enforcement authorities to decide whether on the facts of any particular case they should impose a financial penalty under this Bill.
30. The guidance will give a level of technical detail about procedures relating to the enforcement function as well as scenarios and case studies that would not be suitable for inclusion in the primary legislation. It is appropriate that there is the ability to easily update the guidance, procedures and examples given to reflect the experience on the ground following implementation of the legislation as well as any changing circumstances in the leasehold market.
31. For these reasons, we consider it appropriate to issue set out principles in guidance to which enforcement authorities must have regard.

Justification for the procedure selected

32. It is proposed that statutory guidance under the Bill should not be subject to any Parliamentary procedure since Parliament has approved the overarching enforcement principles by enacting the legislation. The function of the guidance will be to support enforcement authorities in applying that legislation consistently, whilst allowing them a measure of discretion. It will also include detail inappropriate for parliamentary scrutiny such as how different enforcement authorities are to liaise with one another, for example if one trading standards authority takes enforcement action in relation to a breach in the area of another. As set out above, it is also important to have the ability to easily update the guidance following review of the practical operation of the

fees ban in the marketplace. There is precedent for this approach in section 23(10) of the Housing and Planning Act 2016 and section 6(4) of the Tenants Fees Act 2019.

Clause 20: Consequential Amendments

- (1)/(2) Power to make provision that is consequential on the Act - including provision amending an Act of Parliament

Power conferred on: Secretary of State

Power exercised by: Regulations (statutory instrument)

Parliamentary procedure: Affirmative, if amending an Act of Parliament, negative otherwise

Context and Purpose

33. Clause 20 confers a power on the Secretary of State to make provision consequential on the Bill, including provision amending an Act of Parliament (including an Act passed in the same session).

Justification for taking the power

34. This Bill introduces a rent limit into long residential leasehold legislation. This segment of property law is complex and interdependent. Although we have sought to make consequential amendments that have been identified as necessary on the face of the Bill (see clause 19 – amendments to Housing Act 1985), it is possible, given the complexity of the leasehold legal landscape, that not all such consequential changes have been identified in the Bill. As such we believe it is prudent for the Bill to contain a power to deal with consequential amendments in secondary legislation.

35. There are various precedents for such provisions, including section 92 of the Immigration Act 2016, section 213 of the Housing and Planning Act 2016 and section 42 of the Neighbourhood Planning Act 2017.

Justification for the procedure selected

36. Where this power is used to amend primary legislation the affirmative procedure will apply. All other amendments will be subject to the negative procedure. It is therefore considered that this provides the appropriate level of Parliamentary scrutiny.

Clause 21: Regulations

- (1)(a) Powers to make regulations includes power to make consequential, supplementary, incidental, transitional or saving provision
- (1)(b) Powers to make regulations includes power to make different provision for different purposes

Power conferred on: Secretary of State

Power exercised by: Regulations (statutory instrument)

Parliamentary procedure: See relevant related power

Context and Purpose

37. This clause provides that powers to make regulations in the Bill includes power to make consequential, supplementary, incidental or saving provision and different provision for different purposes.

Justification for taking the power

38. Clause 21 enables consequential, supplementary, incidental, transitional, saving or differential provision to be made if necessary in connection with the exercise of other powers under the Bill.

Justification for the procedure selected

39. The procedure applicable will be that of the relevant related power.

Clause 25: Commencement

- (2) Power to commence various provisions of the Act on such day as the Secretary of State may appoint
- (3) different commencement days may be appointed for different purposes
- (4) the day appointed for the coming into force of this Act in relation to leases of retirement homes must be no earlier than 1 April 2023
- (6) Power to make transitional or saving provision in connection with the coming into force of any provision of this act
- (7) Power to make regulations under this section for different provision for different purposes

Power conferred on: Secretary of State

Power exercised by: Regulations (statutory instrument)

Parliamentary procedure: Negative Procedure

Purpose and context

40. This clause contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations, and to make transitional or saving provision in connection with the bringing into force of provisions of the Bill.

41. The retirement sector will be granted a transition period whereby the provisions of the Bill cannot be commenced in relation to retirement homes before 1 April 2023. This transition is in recognition of the Secretary of State's decision announced on 7 January 2021 to reverse a previously announced exemption for the retirement sector made in June 2019.

Justification for delegation and procedure selected

42. It is appropriate to provide for commencement of the substantive powers of the Bill by regulation and to make transitional provision in connection with the

commencement of the Bill in order to ensure the orderly implementation of the provisions.

43. As usual with commencement powers and associated transitional provision, regulations made under this clause are not subject to any Parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time and in an orderly manner.

Department Name: Ministry of Housing, Communities and Local Government

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