Ministry of Housing,
Communities &
Local Government

Consultation on recognising residents' associations, and their power to request information about tenants

Summary of consultation responses and Government response

October 2018
Ministry of Housing, Communities and Local Government

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Ministry of Housing, Communities and Local Government
Fry Building
2 Marsham Street
London
SW1P 4DF
Telephone: 030 3444 0000

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Section 1: Introduction and summary of the issues

1. The Housing White Paper[1] was clear that the Government is committed to promoting fairness and transparency for the growing number of leaseholders. As part of that, the Government wants to make it easier and quicker for them to form Recognised Tenants' Associations, where leaseholders act together to represent common interests.

The issues

2. Leaseholders face significant barriers in getting tenants' associations recognised. We understand that there are many landlords who are happy to formally recognise tenants' associations operating in their developments. These landlords see working with associations as a positive opportunity in the aid of good governance and management of a development and as a means to secure collective or majority agreement to service charges or major works projects, and to resolve disputes quickly and informally.

3. Unfortunately not all landlords are as diligent and we understand some resist efforts of leaseholders to form residents' associations in general, or refuse to work with those that are formed in any meaningful way. This means that leaseholders are sometimes driven to use the First-tier Tribunal (Property Chamber) to secure formal recognition for their associations under section 29 of the Landlord and Tenant Act 1985.

4. We understand there are problems with that too. First to get statutory recognition of a tenants' association, a significant number of leaseholders in a development – at least 60 per cent under the current non-statutory guidelines - must be members of the association. Having to secure almost two-thirds of leaseholders as members of the association to qualify for recognition is a significant hurdle to overcome.

5. Coupled with that, tenants' associations face difficulty in making contact with leaseholders in the first place to ascertain whether they wish to join the association. Making contact can be difficult for a variety of reasons. The leaseholder may be a non-resident landlord, the leaseholder may only occupy the property irregularly. The property could be owned by a company, or the property is held as an investment. The outcome is that without being able to effectively make contact with other leaseholders within a development, it is difficult for an association to reach the qualifying criteria, especially at 60 per cent.

[1] https://www.gov.uk/government/collections/housing-white-paper

2017 Consultation on contact information

6. Recognising the problem with contacting leaseholders Parliament[2] introduced a new measure into the Landlord and Tenant Act 1985, enabling the Secretary of State through regulations to impose duties on a landlord to provide the secretary of a tenants' association with information about qualifying tenants (e.g. long leaseholders) in regard to establishing a Recognised Tenants' Association.

7. The consultation, "Recognising *residents' associations, and their power to request information about tenants"*, sought views on the Government's proposals for secondary legislation (regulations) to make it easier for tenants' associations to obtain contact information from landlords about leaseholders in a block of flats or on an estate. The consultation ran from 25 July 2017 to 19 September 2017[3] and we received 108 responses. Section Two summaries those responses and how the Government plans to take the issues forward.

What is a Recognised Tenants' Association?

8. A Recognised Tenants' Association is a tenants' association representing tenants (e.g. long leaseholders) who pay variable service charges under the terms of their lease or tenancy agreement, which has been officially recognised by a landlord or the First-tier Tribunal (Property Chamber)[4]. There is, of course, nothing to stop leaseholders forming residents' associations to represent the interests of their members with the landlord. There are no specific rules about how such an association can be set up and operated. Subject to its constitution and activities being lawful in the general sense, the terms of reference of, and how such an association conducts itself and admits membership is a matter for agreement between the members. Many associations operate effectively in this way, particularly if the landlord is open to engaging with them. However, it is not always the case that landlords will engage with an association and there is no legal requirement for them to consult with, or provide information to, an association representing leaseholders, unless the association is formally recognised.

9. Recognised Tenants' Associations carry more weight than associations that are not recognised. They have certain rights which the landlords must engage with (as explained below). Through increased scrutiny into the management of leasehold developments that a Recognised Tenants' Association can bring, landlords and their agents can be held more effectively to account for charges, management practices, and transparency of processes. Perhaps most importantly, by increasing its membership, qualifying leaseholders can find it easier go on to form a Right to Manage company or collectively enfranchise.

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[2] Section 130 of the Housing and Planning Act 2016inserted section 29A into the 1985 Act
[3] https://www.gov.uk/government/consultations/recognising-residents-associations-and-their-power-to-request-information-about-tenants
[4] Under section 29 of the Landlord and Tenant Act 1985

10. The legal basis for recognition of an association is section 29(1) of the Landlord and Tenant Act 1985 (the Act). It provides that recognition of a tenants' association can be granted directly by the landlord or, if it meets the necessary requirements for recognition, by the First-tier Tribunal (Property Chamber). There is no requirement for the association to seek recognition from the landlord before applying to the First-tier Tribunal, although doing so is not unusual. The rules around recognition explained in this paper only apply in relation to applications to the First-tier Tribunal and only to associations in England.

11. The provisions for recognition in the Act only apply to those tenants' associations whose members include "qualifying tenants" (although membership of the association can be open to other tenants). The Act describes qualifying tenants as those who pay variable service charges or other tenants whose rents vary according to the costs of services (see section 29 (4)). Thus, although primarily qualifying tenants will be long leaseholders, they can also be assured (including shorthold) tenants. In this paper we shall hereafter refer to leaseholders and tenants as "qualifying tenants".

Rights of Recognised Tenants' Associations

12. A Recognised Tenants' Association has the power to bring a collective enforcement of rights and greater scrutiny to the management of a development. In particular, legislation provides that the secretary of a Recognised Tenants' Association can act on behalf of its members in respect of a number of issues. These are to:
    - ask for a summary of service charge costs incurred by their landlord for which the members have to pay a service charge;[5]
    - inspect the relevant accounts and receipts;[6]
    - be sent copies of estimates obtained by the landlord for either long-term agreements to be entered into or intended qualifying work on their properties;[7]
    - propose names of contractors to be included in any tender list when the landlord wishes to enter a long-term agreement or carry out qualifying works;[8]
    - ask for a written summary of the insurance cover and inspect the policy;[9]
    - be consulted about the appointment or re-appointment of a managing agent;[10]
    - appoint a surveyor to advise on any matter relating to service charges payable to the landlord by one or more members of the association, including a right to inspect documents and common parts of the building.[11]

Current rules for recognition by the First-tier Tribunal

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[5] section 21 of Landlord and Tenant Act 1985 (the Act)
[6] section 22 of the Act
[7] section 20 of the Act;
[8] Service Charges (Consultation Requirements) (England) Regulations 2003/1987
[9] Sections 30 and 30A of the Act and paragraph 3 of the schedule to it.
[10] Section 30B of the Act
[11] Section 84 and schedule 4 –Housing Act 1996.

13. If the First-tier Tribunal decides to recognise an association it issues a certificate of recognition. There are no statutory rules that the First-tier Tribunal must apply in deciding whether to grant a certificate. Instead it applies its own discretion, whilst having regard to non-statutory guidance published by the Government, which it then supplements by its own guidance, practice and case law. In making a decision whether to issue a certificate the tribunal will look at such matters as the constitution of the association, and its independence from the landlord and how representative the association is of the tenants. The Tribunal must have regard to the number of qualifying tenants who are members of the association.

14. The Government's guidance dates from October 1980, after the Housing Act of that year introduced the right to obtain recognition for a tenants' association. The guidelines (as it is called) set out the recommended qualifying criteria to set up a Recognised Tenants' Association. In particular it provides that not less than 60 per cent of the relevant qualifying tenants should be members of the association. This guidance has largely (until very recently) been the starting point when the First-tier Tribunal considers whether a certificate of recognition ought to be granted.

15. In 1987 the Act was amended so the Secretary of State can by regulations specify (statutory) matters that the tribunal must have regard to in deciding whether to issue a certificate. To date no regulations have been made.

2015 Consultation on reducing the membership requirement

16. In March 2015 the coalition Government published a discussion paper "*Residential Leasehold and Recognised Tenants' Associations - non statutory guidelines*" seeking views on the current membership threshold and other rules concerning Recognised Tenats' Associations, as set out in non-statutory guidance.

17. Seventeen responses were received and not all the questions were answered by all the respondents. However twelve consultees, in response to the question about the threshold for recognition, thought this should be reduced to 50 per cent of the relevant qualifying tenants being members of the association.

The Government's Policy position

18. The measures explained in this paper, to require landlords to provide contact information to the secretary of a tenants' association and to reduce the existing membership threshold needed for an association to be formally recognised, provide a comprehensive package of reforms to make it easier for associations to obtain recognition.

19. It is proposed these measures will be brought into force through Regulations approved by Parliament. Subsequently in this paper we refer the proposals to be set out in those Regulations as the "planned regulations".

Section 2: Summary of responses to the 2017 consultation and Government response

Q1 Do you agree that the contact information suggested at paragraph 16 should be supplied? If not, what other details should be supplied and why?

	Number of responses	Percentage (per cent)
Yes	60	78
No	3	4
Other (please specify)	14	18
Total	77	100

20. There was consensus in a majority of responses that the contact information the Government recommended be specified (i.e. name, correspondence and e-mail address of the qualifying tenants) was what is needed. However, some consultees suggested that it may be helpful to provide a phone number as older individuals may have limited access to the internet.

21. The issue of data protection was raised in a high number of responses. Many respondents agreed that the principle of the provision of the information was a good one, but commented that it must be legally compliant with data protection legislation. A handful of respondents specifically referred to potential breaches of the General Data Protection Regulations, which came into force on 25 May 2018, and stressed that explicit consent should be sought from any qualifying tenant before passing on their data.

22. A further concern was raised surrounding the use of the data once it had been passed to a third party. It was suggested key members of the tenants' association should undertake data protection training to ensure they are aware of their legal obligations surrounding the handling of personal data.

23. Most consultees who responded 'No' or 'Other' did not have an issue with the specific details to be provided, but rather the necessity of the provision itself. Some consultees felt that it was unnecessary, given that the information can be collected from the Land Registry for a small fee. Others were more fundamentally concerned with involving the landlord, either because costs would be passed on to leaseholders through administration fees or because the policy of involving the landlord was wrong in principle.

Government response

24. The Government agrees with the majority of consultees (representing both landlords and leaseholders) that the name, correspondence address, and email address of the qualifying tenant are an appropriate level of detail to be provided to the secretary of the tenants' association.

25. This would ensure that those attempting to establish a Recognised Tenants' Association have adequate contact data to get in touch with potential members without being provided with disproportionate and unnecessary data which could infringe human rights and data protection legislation. It would also be data that the landlord will be in possession of, and therefore, not present any unnecessary administrative burden on them to collect.

26. The Government does not believe that landlords should be required to provide information that the tenants' association is already aware of. The planned regulations will provide that in seeking a request for contact information the secretary will be required to provide a list of qualifying tenants who are already members of the association. The information that the landlord can disclose (and only with the consent of the relevant qualifying tenant) is:
    - the tenant's name;
    - the address of the dwelling for which the tenant pays a service charge;
    - the address (if different) to which demands for those service charges are sent; and
    - the tenant's e-mail address.

27. This is called "known information" in the planned regulations, but obviously the landlord can only disclose information if they actually hold it. That may not always be the case. For example, a landlord may not hold an e-mail address for a tenant because the tenant does not have one or has not provided it to the landlord. There will be no requirement in the regulations for the landlord to seek additional, or updated, contact information from the tenant. Where, for example, a tenant uses an agent to communicate with the landlord, there will be no requirement for the landlord to ask the agent to disclose the personal address of the tenant.

28. When making a request for contact information the secretary of the association will be required to certify that the information is being sought only for the use of ascertaining whether the individual qualifying tenant wishes to become a member of the association.

Q2 How frequently should a secretary of a residents' association be able to repeat the request for contact information?

29. Views on how frequently a secretary of a tenants' association should be able to repeat requests for contact information generated two key themes. The most popular response was that annually would be an appropriate time frame. Respondents felt that asking once a year was reasonable, with some respondents commenting that

more frequently could risk the requests being misused and be a burden on the landlord.

30. Some respondents did not answer with a time frame but rather specified that the information could be requested if the association became aware of a tenant change. It was also suggested that the landlord should proactively tell the secretary when there is a change of tenant. The call for automatic updates on a change of tenancy was often suggested in conjunction with a specific timescale. For example, one consultee felt that an appropriate timeframe for a secretary of an association to request the information is monthly in the case of large developments, where there may be a high level of tenant turnover.

31. Some landlords and managing agents raised concerns about administrative burdens and felt that requests should only be repeated every two years. These respondents raised concerns about frequent requests detracting from the day-to-day work of the landlord and agent.

Government response

32. Under the planned regulations the request from the secretary of a tenants' association to the landlord to disclose contact information is called "a contact information notice". The Government does not intend to prescribe how frequently such a notice can be served. We also think that the landlord should not be required to action every request. The frequency with which a request can be made will usually depend on the size of the development and turnover of qualifying tenants' within it. Frequently made requests may be considered vexatious and as such invalid. There may also be other circumstances where it is not appropriate to seek contact information (and, therefore, considered invalid), such as if the association is already recognised, as it is not part of the landlord's role to bolster membership of an association or where a certificate of recognition of the association had very recently been withdrawn in circumstances where a new certificate was unlikely to be granted.

33. In the planned regulations it is proposed that upon receiving a request for contact information from the secretary of an association, the landlord has seven days in which to respond. They may acknowledge receipt of the contact information notice and proceed to comply with the request. Alternatively, the landlord may refuse to proceed with the request on the basis that it is not a valid request, in which case they must, within those seven days, write to the secretary giving reasons why they consider it not validly made. If the landlord has refused to deal with that request the secretary of the association may submit a further request meeting the validity concerns of the landlord or appeal to the First-tier Tribunal against the validity decision. If the First-tier Tribunal allows the appeal it may order the landlord to comply with the request on the terms it (the Tribunal) decides.

34. Some consultees suggested that the landlord could seek the information from qualifying tenants' on a regular basis. The Government agrees. As we explain in paragraph 48 below one option is that a landlord could send out the request seeking permission to disclose the known information with the next service charge demand or when next writing a letter, circular or note to all qualifying tenants. It follows, therefore, that seeking the permission to disclose from the qualifying tenant does not have to be a one off exercise. This would ensure that the secretary is updated regularly with

details of new residents interested in potentially joining the association. The Government believes this type of good practice would reduce the need for the repeat contact information notices being served on the landlord, and thus avoid associated costs in processing such applications. This would nevertheless need to be an arrangement agreed between the landlord and the tenants' association.

Q3 Are you content with the process outlined in Diagram A? [12]

	Number of responses	Percentage (per cent)
Yes	50	65
No	4	5
Other (please specify)	23	30
Total	77	100

35. Diagram A suggests a process for a landlord to respond to the secretary of a tenants' association's request for contact information of qualifying tenants. Overall there was an encouraging response to the process outlined, with over two-thirds of respondents stating that they agreed with the process. Certain respondents expanded on their opinion saying the process seemed easy to understand and self-explanatory.

36. However, some respondents were critical of specific aspects. It was highlighted that as well as the landlord providing the details of those who gave consent, it should be clear which leaseholders did not give consent compared to those who did not respond. This was deemed as important as it could provide an indication of likely future success rates, as individuals not responding could be due to extenuating circumstances as opposed to genuine disinterest. This would also be important in ensuring that those who did not want their contact details shared could avoid unnecessary future contact.

37. Some respondents also said the process looked too labour intensive, complicated and onerous. The administration costs of the process could make it prohibitively expensive for landlords to undertake, especially if the costs fall on them. Some respondents suggested the costs might be even higher where the landlord used additional methods to encourage replies, such as newsletters.

38. Lastly, a number of respondents communicated that the process outlined in Diagram A would be redundant if consent was assumed in an opt-out system (for an explanation of the difference between "opt-in" and "opt-out" see paragraphs 66 and 67 below).

Government response

[12] (Please see in the original consultation paper at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAct_consultation.pdf)

39. Diagram A is informative as to how the process should operate. The planned regulations will prescribe the detailed procedure, which is explained in more detail in this paper. In particular paragraphs 33, 48, 53 and 83 respectively set out the proposed procedure for a landlord to respond to the tenant's association contact information notice. In summary the landlord must :
    - acknowledge receipt of the notice within seven days (paragraph 33);
    - give at least 28 days for the qualifying tenants to respond to the request to disclose the known information (paragraph 54) and
    - provide a substantive response to the secretary of the association no longer than four months from the date the association's notice was received (paragraphs 48 and 83).

Q4 Do you agree with the timescales for responses outlined in Diagram B? If not, what other timescales would you suggest and why?[13]

	Number of responses	**Percentage (per cent)**
Yes	47	61
No	7	9
Other (please specify)	23	30
Total	77	100

40. Diagram B shows a suggested timeline for a landlord to request permission for the disclosure of known information from the qualifying tenants and passed on to the association. It proposes a timescale whereby qualifying tenant contact information is collected and forwarded to the secretary of the tenants' association within 35 working days of the request being submitted.

41. The timescale outlined in Diagram B produced an overall positive response. However, a large number of respondents thought that five working days was not enough time for the landlord to complete the prescribed forms and forward to all qualifying tenants. An alternative timescale of ten working days was frequently suggested, especially due to the potential volume of forms which may need to be issued.

42. It was also suggested that a reminder should not be sent out working fifteen days after the initial request. Respondents felt that the act of sending out a reminder is onerous, and imposing a tight timescale makes it more so. Some suggested imposing an additional charge for this supplementary level of service.

43. There were some calls for the timeline to be expedited. Respondents felt that the information on tenants who have granted consent should be shared as soon as

[13] (Please see in the original consultation paper at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAct_consultation.pdf)

consent is given, as opposed to the proposed sending process which shares all the information obtained by the landlord at one time.

44. Several respondents queried what would happen to responses received after the deadline. One suggestion was that these should be held and included in the next request from the secretary. Others felt that extending the timeline would help to eliminate this risk (respondents cited that a two week window for tenants to return forms was too short, especially during busy periods of the year, for example, school holidays). Conversely, it was also proposed that there should be a cut-off date, after which landlords are not obliged to forward responses to the secretary.

45. A concern was raised surrounding the penalties or incentives for landlords who do not adhere to the timescale. It was felt that as the timescale seems tight, landlords may miss deadlines and will need some level of regulation to ensure a timeline (either the timeline suggested in Diagram B or otherwise) is enforced. To avoid issues of missed deadlines, it was suggested that tenants' associations and landlords should be able to negotiate mutually agreed timescales. Variations could depend on the number of tenants to be contacted and additional complexities that may exist in collecting the information, for example, large numbers of overseas qualifying tenants.

Government response

46. The diverse range of responses demonstrated a broad spectrum of potential approaches. We note that the time frame in Diagram B is "suggested", rather than mandatory. We intend to make the timetable for responding mandatory in the planned regulations. It is important that the parties have prescribed procedures and deadlines to adhere to, which can be enforced.

47. Any mandatory timetable must be realistic for it to be delivered too. We note that some consultees thought the suggested timetable was tight and although it would be ideal if it could be met, the Government accepts that may be optimistic.

48. On balance, therefore, the Government has decided that the planned regulations should provide that the landlord has four months in which to respond to the contact information notice from the secretary of the tenants' association. This is a realistic deliverable timetable as in most cases, this would enable the landlord to seek permission to disclose the known information about the qualifying tenant at the same time as they would next be corresponding with qualifying tenants on other matters- such as through a circular, newsletter, statutory notice or service charge demand. By seeking the permission at the same time, the landlord will minimise costs by also writing to qualifying tenants on other matters.

49. It might not be possible in every case, but the landlord would have to have some justification for not seeking the permission to disclose at the same time as sending out other correspondence, unless it is impractical to do so (for example, because the time limit could not be complied with). This will particularly be the case if they are seeking to recover costs from the tenant in seeking the permission to disclose. We do not agree that landlords should be required to send reminders to qualifying tenants who do not respond to the request, since that would suggest there is some obligation on the part of the qualifying tenant to respond, which is not the case. It would also be

burdensome on landlords and increase their costs to require them to chase up nil responses.

Q5 Do you agree that the proposed form at Annex A should be used? If not, what changes should be made to the form or what other method or format would you suggest and why?

	Number of responses	Percentage (per cent)
Yes	43	56
No	2	3
Other (please specify)	32	41
Total	77	100

50. There was a mixed response to Annex A[14] with many finding it overly complicated and containing too much jargon. Technical terms may overwhelm qualifying tenants which could discourage completion. There were calls for the form to be written in plain English with more user-friendly terminology. The complexity of the form was also commented on from a design perspective, with some respondents saying that layout of the form makes it difficult to read the boxes and complete the form.

51. Suggestions highlighted that the form is only appropriate the first time a request is sent out to gather the contact details. If the tenants' association has already been recognised then the introductory copy at the top of the form will need to be updated. Moreover, in both cases (where the tenants' association was yet to be recognised and already had been) it was noted that the contact details of the secretary would be a welcome addition. This would provide tenants with the opportunity to contact the secretary to better understand the recognition of a tenants' association.

Government response

52. Having considered the variety of responses on balance the Government has decided that the use of a prescribed form is not necessary. All the landlord is doing is asking qualifying tenants if they may disclose the known information. Given that specific limited purpose, it seems unnecessary to require a prescribed form to be sent to every qualifying tenant contacted.

53. It is, of course, important that the request to disclose is put in writing and the qualifying tenant knows what contact information has been sought to be disclosed and why. The notice must also give the contact details of the secretary of the

[14] (available https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632116/s130_HPAct_consultation.pdf)

association and state that any enquiries about the association, or its functions, must be made directly to them.

54. The communication must also be clear that the known information will only be disclosed to the tenants' association and only if the qualifying tenant consents in writing to the disclosure. We also propose the planned regulations provide that the landlord must give the qualifying tenant 28 days to respond and when doing so the tenant may:

    - Consent to all the known information being disclosed to the tenants' association, or;
    - consent to some, but not all, of the known information being disclosed to the tenants' association and stating the known information that may be disclosed, or; and
    - refuse consent to any of the known information being disclosed to the tenants' association.

Q6 Do you agree that consent should be sought from the qualifying tenant before the landlord passes on contact information to the secretary? If you do not agree, what reasoning can you present to say why?

Category	**Number of responses**	**Percentage (per cent)**
Yes	48	62
No	3	4
Other (please specify)	26	34
Total	77	100

Q7 What justification might be provided for an opt-out, rather than an opt-in, system and what precedents exists to justify this?

55. This is a summary of the responses to both questions 6 and 7. 62 per cent of respondents stated that they believe consent should be sought from the qualifying tenant before the landlord passed on contact information to the secretary. Respondents frequently answered that consent should be sought, and cited data protection issues in support. This was further highlighted in responses surrounding General Data Protection Regulations which requires an indication of consent that is unambiguous and involves a clear affirmative action.

56. A small number of respondents commented that initial permission should be sought and following this consent from all tenants should be reviewed annually.

57. Although not strictly part of the question, responses examined the necessity for the landlord to be involved. This firstly focussed around the idea of opt-in/opt-out whereby the information would automatically be passed on to the secretary and qualifying tenants would need to specify in advance if they did not want this. Secondly, the Land Registry was raised as an alternative method of obtaining the information. This would by-pass the landlord and therefore was suggested as a solution for those who deem their landlords untrustworthy. Additionally, some respondents felt that consent was not needed because the information is held at the Land Registry and therefore publicly available already. It should be noted that the cost of obtaining the Land Registry information is £3 per property, and so the feasibility of this solution will depend on the size of the property block.

58. Despite the overall desire for landlords to seek consent from qualifying tenants, there were also concerns raised about the additional workload this may place on landlords and ensuring the landlord completes their portion of the work. Respondents stated that needing the secretary to ask the landlord to ask qualifying tenants for consent could produce a situation where the landlord fails to send the form out to all leaseholders in an attempt to reduce the number of tenants returning the form. Concerns about unscrupulous landlords caused respondents to suggest a process to ensure that the landlord has put in the request to qualifying tenants if it is deemed consent is required.

59. However, although 62 per cent of consultees agreed consent should be required to disclose the known information, there was disagreement on what “consent” meant. Some thought it was necessary for the qualifying tenant to expressly give the consent to disclose - “opt-in” whilst other respondents thought that unless the qualifying tenant expressly refused the consent, it should be regarded as given - “opt-out”.

60. A majority of respondents stated that an opt-out system would be inappropriate and therefore there were no justifications for it. Many of these respondents did not provide a narrative to explain their response. Some of those who did spoke about General Data Protection Regulations and overall Data Protection compliance, explaining that only opt-in ensures clear and unambiguous consent.

61. Views were expressed that an opt-in system will help residents understand exactly what they are agreeing to as membership of a tenants’ association is voluntary, not mandatory. But it was also suggested that if members of the association would be required to pay subscription fees then it is important that the system is not opt-out. A view was expressed that the opt-in option could be specified on a leaseholder’s service charge demand. This would ensure that the opt-in option reaches the correct tenant, but is also more cost effective as it is combined with other communication.

62. With regard to suggestions for why an opt-out system can be justified, these were varied. It was noted that the formation of a Recognised Tenants’ Association should aim to be as trouble free as possible, with the least amount of hurdles. Added to this some respondents commented that an opt-out process would help to ensure that cost and time were reduced for all concerned. Some respondents felt that landlords often create obstacles to prevent a Recognised Tenants’ Association from forming, and an opt-out system would circumnavigate this resistance. Other respondents commented on the wide reaching benefits a Recognised Tenants’ Association can have. The service is free and the tenant has no obligation to actively participate, so weighing up

these benefits, they believed, an opt-out approach was appropriate. On the other hand it was suggested that the powers of the Recognised Tenants' Association were not significant or influential enough to require an opt-in system and therefore opt-out would be more suitable.

63. The issue of qualifying tenants living overseas was raised as a significant concern for those favouring an opt-out system. Respondents cited blocks in central London as an example, saying that as many leaseholders are overseas investors or offshore companies, it is unlikely they will respond to an opt-in mechanism. Respondents commented that in certain developments, it will be difficult to reach the 60 per cent sign-up rate with large numbers of overseas residents, and therefore chances of forming a Recognised Tenants' Association are unfairly low, hence opt-out would provide a better solution.

Government response

64. It was clear that the majority (78 per cent) thought that the sharing of known information would be helpful for forming a Recognised Tenants' Association - see Question 1 above. It is also clear that a significant majority of respondents, 62 per cent, thought that consent should be required from the qualifying tenants' before the known information is disclosed to the secretary of the tenants' association.

65. However, there were differing views on what seeking consent from qualifying tenants meant for their details to be passed on, those being the opt-in and opt-out approaches. Clearly data protection and human rights (in respect of Article 8 of the European Convention on Human Rights [15] right to privacy), are considerations in these approaches.

66. It is worth clarifying that neither of these approaches has the effect of automatically opting a qualifying tenant into membership of the tenants' association. The fact that a qualifying tenant's known information has been disclosed to the secretary does not mean that person is deemed to be a member of the association. The qualifying tenant must make their own and separate decision as to whether they wish to join it.

67. For the opt-in approach, where the qualifying tenant would have to give express consent for the known information to be passed on there are no significant data protection or human rights issues.

68. For the opt-out approach, where the qualifying tenant's consent to disclose is implied should they fail to respond to the request for disclosure of the known information it is likely that human rights issues would arise as Article 8 of the European Convention on Human Rights would most likely be engaged. A further consideration of an opt-out approach is data protection compliance. For this approach to be lawfully included in the planned regulations it would be essential to demonstrate that such an approach was both necessary and proportionate in the circumstances. There are some circumstances where opt-out could be proportionate and justified because of their particular importance, for example, work place pensions and donor cards. In those

[15] European Convention of Human Rights. Article 8 is concerned with right to respect private and family life, the home and correspondence.

examples, necessity and proportionality are more easily demonstrated. However, in the Government's view it is much more difficult to establish a robust case of necessity and proportionality for forming a Recognised Tenants' Association, which although important to the individuals concerned, is not likely to justify an opt-out approach.

69. Having given careful consideration to the arguments for and against the competing approaches; the law as it applies to consent and the fact that the majority of consultees favoured the opt-in approach, the Government has decided that in the planned regulations qualifying tenants must actively and expressly give consent to landlords prior to them passing on their contact information details to the secretary of an association. Consequently, if the qualifying tenant does not respond in writing to the landlord's request seeking permission to disclose the known information, or the tenant's response is unclear as to whether consent is being given, the landlord may not disclose the information. However, should the tenant give unequivocal consent at a later date,[16] the known information must then be passed on to the secretary of the association as soon as reasonably practicable.

70. Section 1 of the Data Protection Act 2018[17] states that "most processing of personal data is subject to the General Data Protection Regulations", and section 2 of the Data Protection Act 2018 states that personal data must be "processed lawfully and fairly, on the basis of the data subject's consent or another specified basis" and to share this personal data would not be 'fair' as described in the General Data Protection Regulations.

Qualifying Threshold

71. The Government is of the view that it is not just difficulty in establishing contact with qualifying tenants that acts as a barrier to forming a Recognised Tenants' Association, but also the current membership requirement of needing a "significant majority" too. The current threshold set out in non-statutory guidance that not less than 60 per cent of qualifying tenants need to be members is unsustainable. Therefore, we intend to reduce the qualifying threshold to replace the non-statutory guidance.

72. The 60 per cent threshold has recently been criticised by the Upper Tribunal (Lands Chamber) in the case of Rosslyn Mansions Tenants' Association v Winstonworth (2015)[18]. In that case the Upper Tribunal determined that 60 per cent was a guideline and not a benchmark.

73. In addition, the 60 per cent guideline threshold, which dates back to 1980, is out of line with qualifying thresholds in more recent legislation. For example, the threshold for a Right to Manage company which is 50 per cent of the relevant leaseholders and

[16] That is outside the 28 day response period.
[17] http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted
[18] UKUT 11 (LC) (12 January 2015)

for collective enfranchisement, which is also 50 per cent.[19] These provisions give leaseholders more extensive rights to acquire ownership or take over management of their blocks, so it could be argued that it is difficult to justify nowadays why the threshold should be higher to form a Recognised Tenants' Association, especially when doing so can be seen as an initial step to acquiring those more extensive rights. We are, therefore, proposing to include a statutory requirement in the planned regulations[20] that an association can only normally be recognised (by a Tribunal) if its membership includes at least 50 per cent of the relevant qualifying tenants, to replace the existing non- statutory guidelines.[21]

74. The First-tier Tribunal has published guidance,[22] which it has regards to when considering whether to grant a certificate of recognition to an association. The tribunal guidance says it will consider such matters as the constitution of the association, its independence from the landlord and the extent of membership. We intend to include these considerations in the planned regulations[23]- so that in deciding whether or not to grant a certificate of recognition the tribunal, amongst other matters, must have regard to :
    - the composition of the association, including whether it is open to all tenants;
    - the rules of the association, regarding membership, decision making and voting;
    - the extent to which the constitution of the association takes into account the interests of all members;
    - the extent to which any fees or charges payable in connection with membership apply equally to all members;
    - the independence of the association from the landlord;
    - whether it has a chairperson, secretary and treasurer;
    - the extent to which the association is open and transparent and its constitution fair and democratic; and
    - the extent to which the association publishes its constitution, accounts and membership and keeps up to date lists of members.

75. We are also proposing in the planned regulations that a certificate of recognition can only be issued if the qualifying tenant members of the association all pay their service charges to the same landlord and that their dwellings are all comprised in the same development, whether that be a single block or an estate of blocks (and/or houses).

Cost implications

Q8 How should the cost charged by landlords be calculated?

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[19] See Part 2, chapter1 of the Commonhold and Leasehold Reform Act 2002 and Part 1 of the Leasehold Reform, Housing and Urban Development Act 1993, respectively.
[20] The powers to make the Regulations are in section 29 (5) and (6) of the Landlord and Tenant Act 1985.
[21] For more information about the non-statutory guidelines and the 2015 consultation on changing the threshold see paragraphs 13 to 17 above.
[22] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715235/t545-eng.pdf

[23] Made under section 29 of the Act,

Q9 Who should pay the costs?

Q10 What safeguards should be in place so that charges are reasonable?

76. Questions 8 to 10 sought to better understand views on how the financial charge for collecting and providing the contact details of qualifying tenants should be calculated.

77. There were varying responses, which were diverse with large numbers of respondents calling for the costs to be allocated to landlords, and equally large numbers calling for the tenants' association to pay.

78. A small number of respondents recommended that the costs were shared across both tenants and landlords. Alternatively, it was suggested tenants and landlords could work with a system whereby the first enquiry of each calendar year is paid for by the landlord, but subsequent enquiries are funded by the tenants.

79. Other respondents felt that if the landlord incurred costs in collecting or providing the known information then they would need to absorb this as part of their other financial duties as a landlord. Respondents remarked that if the known information is given to the tenants' association via email then there should be a limited cost, and therefore passing it on would be unreasonable.

80. Overall, these questions generated two key suggestions. Firstly, a call for obligatory financial transparency, and secondly a fixed fee. The most popular response was a call for full disclosure and financial transparency of costs. Respondents called for breakdowns of charges to be available, including the methodology behind the calculation of the charges. Secondly, there were suggestions for an external auditor or regulation for when tenants may need to contest the charges. A landlord complaints process was also recommended as an important procedure to help tenants in the first instance if a criticism arose. Some respondents felt that if the charges were charged back as service charges then costs could be challenged through a tribunal.

81. Suggestions also included a cap on costs which could be fixed by the number of tenants. Some respondents called for the Government to set a maximum charge based on what is 'reasonable'. A fixed charge was spoken about in positive terms, and per unit was discussed as a reasonable way to assess the charge.

Government response

82. Essentially these questions concerned the cost to the landlord of complying with the obligations under the planned regulations. The questions are:

- What are the likely costs?
- Who should bear them?
- If not the landlord, then how should they be recovered?

83. On the first question, some consultees have pointed out the bulk of costs would be incurred by the landlord in having to write to every qualifying tenant individually. However, those costs are substantially reduced if the landlord sends out the request to disclose the known information when they would otherwise be communicating with the qualifying tenants on other matters. By allowing a four month time frame before having to respond to the tenants' association's contact information notice most landlords should be able to do this (see paragraph 48). The Government's objective is to ensure the processes to comply with the duty should be straightforward and have minimal financial impact on all parties.

84. To the extent that the landlord incurs other costs in carrying out their obligations, these are at the beginning of the process, when acknowledging receipt of the application (as explained in paragraph 33) and at the end of the process. As we said in paragraph 48, under the planned regulations, the landlord will have four months in which to provide a substantive response notice from the date when the secretary of the association served the contact information notice. The substantive response notice must contain the known information which each qualifying tenant has agreed may be disclosed or confirm that there is no such known information. It must also give the number of relevant qualifying tenants to whom the landlord sent an information form, those who refused to consent or did not respond. The notice must also include a statement of truth, be signed and dated and sent to the secretary of the association.

85. It follows that the additional costs will be incurred by the landlord in sending out a letter acknowledging the duty to seek information, or rejecting it, and in collating the information provided and transmitting it to the Secretary. The processes involve sending one notice to a single person.

86. The Government believes that such costs can reasonably be absorbed into the landlord management costs, so we will not be making any provision that a fee can be charged by landlords for performing their obligations under the planned regulations.

Enforcement in the planned regulations

87. As previously mentioned, it is proposed a tenants' association may make an application and appeal to the First-tier Tribunal if the landlord refuses to progress the secretary's contact information notice on the ground that it has not been validly made (see paragraph 33).

88. There are two further proposed circumstances in which a secretary of a tenants' association can make an application to the tribunal under the planned regulations. The first is that if the landlord has not sent a substantive response within the maximum four months allowed (see paragraph 48). The second is that although the landlord has responded, they have not complied with their obligations under the regulations in seeking permission to disclose the known information from the qualifying tenants, and the tribunal is satisfied that the landlord has no reasonable excuse for the failure to comply. This could apply, for example, because the landlord had not contacted all the qualifying tenants they were required to, or the letter sent contained some irregularities or missing information, which might have prejudiced responses. It is proposed the First-tier Tribunal may order the landlord to provide the substantive response within such time as it allows or, it may order the landlord to provide a new substantive response following the requirements of the regulations.

89. Importantly, if the landlord does not comply with a tribunal order within the period allowed, it is proposed the planned regulations will allow the First-tier Tribunal to grant a certificate of recognition for the association notwithstanding it does not meet the 50 per cent threshold test, if the Tribunal is satisfied membership is nevertheless substantial and in all other respects the association's constitution and rules are satisfactory. This would also apply if the landlord fails at all to carry out their obligations under the regulations, for example if they ignored the contact information notice validly served upon them.

Landlord duty may be exercised by managing agent, but liability for compliance cannot be delegated

90. In the planned regulations the Government plans to provide that the secretary of the tenants' association can serve the contact information notice on a managing agent who collects the service charges for the block or the estate on behalf of the landlord, and in such circumstances the managing agent is deemed to act for the landlord in order that they comply with their statutory duty. However, the landlord's liability to comply with the obligations in the planned regulations cannot be delegated.

Section 3: Conclusion and next steps

91. The proposals set out in this response document are also intended to help leaseholders by providing a complete package of modernising reforms to assist with the formation of a Recognised Tenants' Association, which as an organisation representing a substantial proportion of qualifying tenants leaseholders can effectively challenge landlords ('and/or managing agents)' decisions and hold them to account, to increase the likelihood of members of the association getting a fair deal.

92. The Government intends to lay the planned regulations in Parliament in the autumn of 2018.