Our Response to the Consultation on Building Safety Directors

Introduction

Before responding to the questions in the consultation, we would like to place on record our disappointment with the Government's failure to engage properly with the most relevant stakeholders, i.e. RMCs and RTMs, before the Building Safety Act Part 4 legislation was drafted and, subsequently, these regulations were proposed. Instead, the Government chose to listen most closely to groups of "industry experts", who played their own part in either causing or exacerbating this crisis and also stand to benefit from the new regime.

The Building Safety Act is a mammoth piece of legislation that was clearly rushed through Parliament with little time for the scrutiny required of the wide-ranging proposals and amendments that were laid in early 2022. The draft legislation included a mandated requirement for "building owners" of high-rise buildings to appoint a Building Safety Manager and to force leaseholders to pay an opaque Building Safety Charge. The Secretary of State was then reported[1] as saying he had "listened to… concerns, removing the requirement for a separate building safety charge and scrapping compulsory building safety managers to help avoid unnecessary costs"; however, our questions over what would replace this requirement went unanswered. The result is heavy-handed legislation that will implicitly force resident-managed buildings to appoint a building safety director or potentially face personal criminal liability, with little certainty about the costs of this, which is clearly recognised in the impact assessment for these proposed regulations.

For example, the impact assessment notes the following:

- *The policy objective is to ensure clear lines of accountability for the management of building safety risks in higher risk buildings and by also ensuring that resident-led organisations continue to be empowered to manage their buildings by mitigating against the new duties in the regime acting as a deterrent to such organisations managing their buildings.*

[1] https://www.insidehousing.co.uk/news/news/government-scraps-building-safety-manager-under-raft-of-building-safety-bill-amendments-74822

- *The regulation itself will not impose additional regulatory costs as it does not mandate that these companies must appoint a building safety director; costs will only arise if the organisation chooses to appoint a building safety director.*
- *We have not been able to monetise benefits for this policy area, but the key benefit is that resident-led organisations will continue to be empowered to manage their buildings to the new building safety regime.*
- *There is currently no accurate data on the number of in-scope buildings which are managed by resident-led organisations… Due to this lack of available data, we are unable to estimate the total number of buildings that these costs may apply to. The approach taken in this impact assessment is to estimate costs associated with appointing a building safety director for a single representative resident-led building.*
- *The regulation does not impose extra costs as it does not mandate that buildings must employ a building safety director but creates the option to employ a building safety director if desired.*
- *The costs as set out are estimates for a single, representative building for a building where the resident-led organisation chooses to appoint a building safety director and in practice costs may deviate from those estimated here.*
- *The annual salary for the building safety director role is assumed to be £66,000. It is important to note that this is not the cost of building safety director for one building, simply a yearly average wage. A building safety director may have multiple buildings they manage in their portfolio, and/or may only spend a proportion of their time on a building in question.*

We understand the policy objective and the desire for clearly identified people who are responsible for the safety of high-rise residential buildings; however, there appears to have been insufficient thought prior to drafting the legislation around how the Principal Accountable Person regime would actually work at buildings where a resident-led organisation is the accountable person under Part 4 of the Building Safety Act.

It is apparent from the vague – and seemingly contradictory – Impact Assessment that the policy thinking has not been based on robust understanding or data, with no knowledge of the number of buildings managed by resident-led organisations.

To be clear, this legislation will not "empower" RMCs and RTMs and it will not provide them with an "option to employ a building safety director if desired". It will force volunteer directors into a corner with no option other than to appoint a building safety director, at an unknown cost and with little clear benefit.

Bizarrely, the estimated annual salary of £66,000 is simultaneously based on "a single representative resident-led building" and it is also noted that the building safety director may be engaged by multiple buildings. We have previously seen such guesstimated figures in the draft Building Safety Bill, whether for the cost of a Building Safety Manager or in the long-dismissed Table 38, which noted potential costs for fire safety and had vague, underestimated costs associated with these. RMC and RTM Service Charge Budgets have already increased dramatically, often doubling, since the advent of the building safety crisis – boards have little control over major items of expenditure, such as building insurance, energy costs and managing agent fees – and yet they now face a further material charge for a building safety director.

The consultation acknowledges that resident-led organisations often employ professional managing agents to support them with meeting legislative and procedural requirements. Given that managing agents are already responsible for the safety of the buildings they oversee and, crucially, also hold the relevant professional indemnity insurance, we see no reason to deviate far from this model of property management. The imposition of a third-party building safety director will not make leaseholders feel safer, but it will have a detrimental effect on their already stretched finances.

We are fearful about the lack of clear lines of responsibility between the building safety director and a managing agent and the likely double counting of tasks and associated costs. Will management fees decrease by anything even approaching the cost of the building safety director, who will perform many of the same tasks a managing agent should do and currently does? This is unlikely to be the case, meaning leaseholders will face an extraordinary increase in service charge costs following the appointment of a building safety director, which has effectively been forced upon them.

The effectiveness of any new building management regime must also be underpinned by reform and regulation of managing agents – this is long overdue and has been called for by The Property Institute itself, yet little firm action has been taken by the Government. Without regulation, the ongoing opaque practices relating to service charges will continue, with increased opportunities for gaming of the system by bad actors.

It is also clear that little thought has been given to professional indemnity insurance and the likely cost of cover, should this even be possible to obtain. The wider building insurance market has failed, and no action has been taken by the Government to address this, which is exacerbating the misery innocent that leaseholders face. We fear the issue of extortionate premiums will continue, with those costs passed on within a building safety director's fee structure.

Furthermore, there will be no incentive for a building safety director to adopt a proportionate approach to building safety, because only the leaseholders will have to pay for any measures that the building safety director might choose to impose. The risk-averse building safety landscape that we have witnessed over the last five and a half years will only continue, as all parties focus on minimising their liability and will likely advise gold-plating of safety.

We reiterate that it is especially distressing that those who will be most affected by this legislation, and who have the lived experience to help ensure policy objectives can be implemented efficiently and effectively, have not been engaged before this point. These issues have been compounded by the apparent lack of dialogue between the Government's building safety and leasehold teams, as admitted by previous Building Safety Minister, Lord Greenhalgh[2].

Our organisation was belatedly offered a meeting with the team working on these proposed regulations, yet this was at least a year too late for any positive change to be effected in the primary legislation. The Government's view is that the Building Safety Act's secondary legislation will help to smooth the way forward and we hope our future engagement on this will be meaningful two-way consultation.

On this consultation, our firm view is that it is based on a false premise and is a consultation in name only. Our responses reflect this.

[2] https://twitter.com/team_greenhalgh/status/1611759742409490437?s=20&t=JKs7B52S1YX_xKhe8CA8jQ

Question 1. What is your name?

End Our Cladding Scandal

Question 2. What is your email address?

endourcladdingscandal@gmail.com

Question 3. Are you responding as an individual or on behalf of an organisation?

We are a national organisation representing leaseholders affected by the building safety crisis.

Question 4. *Do you agree that for a building safety director to be eligible for appointment by a RMC that they must meet the criteria set out at Section A1. above?*

- *Yes*
- *No*
- *Indifferent*
- *Not sure*

If you did not answer 'Yes' please explain why.

Question 5. *Do you agree that for a building safety director to be eligible for appointment by a RTM company, they must also meet the criteria set out in Section A1. above?*

- *Yes*
- *No*
- *Indifferent*
- *Not sure*

If you did not answer 'Yes' please explain why.

Our response

We do not agree with the decision to implicitly force RMCs and RTMs to appoint a building safety director at all.

In relation to this specific question, the proposed criteria in respect of conflicts of interest has little basis in reality – for example, there is and always has been an innate conflict of interest where third parties are instructed, as we have seen with many managing agents, as the advice provided is often based on mitigating the liability of the agent and not focused on the interests of the resident-led organisations.

There will likely be limited ability to ensure that there is genuine independence – for example, if the building safety director is to act for a RMC or RTM client while also acting separately for a third-party landlord on other sites, how will such conflicts be mitigated?

From discussions we have held with a range of stakeholders, it seems that few organisations are willing to take on the new role, meaning there will be limited supply in the market to source a truly independent building safety director.

We also note the information in the impact assessment, which says that a conflict of interest self-declaration form *may* be shared with relevant legal entities, if necessary. In reality, directors of resident-managed buildings will be obliged to ensure the form is reviewed by a legal entity, which will add further costs to the proposed procedure.

Question 6. Do you agree that prior to the appointment of a building safety director that all qualifying leaseholders should be notified?

- Yes
- No
- Indifferent
- Not sure

If you did not answer 'Yes' please explain why.

Question 7. Do you think the information (as set out in the list above) that is to be provided as part of the notification process with qualifying leaseholders is sufficient?

- Yes
- No
- Indifferent
- Not sure

If you did not answer 'Yes' please explain why and/or tell us what information we should consider including or removing.

Question 8. Do you think that 28-days is sufficient to notify qualifying leaseholders and provide a summary/response to any observations made?

- Yes
- No
- Indifferent
- Not sure

If you did not answer 'Yes' please explain why.

Our response

We do not disagree with the principle of notifying all leaseholders of the proposed appointment of the building safety director, or the information that would be provided. However, we are concerned that the suggested timescale of 28 days is by no means sufficient for both observations to be received from all leaseholders and robust observations to be provided.

We are also concerned over what the consequences would be if leaseholders in a building did not agree with the observations provided by the RMC or RTM. Do the people who will be forced to pay for the building safety director not have any right of reply to the RMC or RTM's responses?

The assumptions made in the impact assessment in respect of notification also appear to have little basis in reality, with the false expectation that there will be minimal costs for an RMC or RTM prior to the appointment of a building safety director. It is also standard practice for RMC and RTM directors to source at least two quotations for a service where the cost exceeds certain thresholds, often set at £1,000. In reality, RMC and RTM directors will have to adopt a formal procedure to document the route taken to appoint a director, interview prospective directors and review the information provided. This will certainly take far longer than the suggested 4.75 hours once each director's individual time is taken into consideration.

Further, no attempt has been made to assess the time that it will take to respond to observations that are made.

Unfortunately, the proposed process appears to be modelled upon the Section 20 process, which has itself been proven not fit-for-purpose, which has been well demonstrated in recent years when the processes have been run prior to major building safety works.

We also strongly urge the Department to be mindful of the language being used in respect of "qualifying leaseholders". While we understand that the definition is different to that being used for the Building Safety Act's leaseholder protections, we are concerned over the use of this specific label in separate legislation and what may be unintended consequences in the treatment of people who have been unfairly ruled out of the Government's protections.

Question 9. *Do you agree that no amendments are required to RTM companies model articles regarding the decision to appoint a building safety director to the company?*

- *Yes*
- *No*
- *Indifferent*
- *Not sure*

If you did not answer 'Yes' please explain why.

Question 10. *Do you agree that we should align RMCs articles of association with RTM companies' articles as set out above?*

- *Yes*
- *No*
- *Indifferent*
- *Not sure*

If you did not answer 'Yes' please explain why.

Our response

We do not agree with the forced amendment of an RMC's articles of association with what appears to be insufficient consideration of all the consequences of doing this, both intended and unintended.

Question 11. *Do you agree with our proposal, as set out above, on how remuneration for a building safety director should work for RMCs?*

- *Yes*
- *No*
- *Indifferent*
- *Not sure*

If you did not answer 'Yes' please explain why.

Question 12. *Do you agree with our proposal to align the determination of remuneration for building safety directors of RTMs fully with our proposals for RMCs?*

- *Yes*
- *No*
- *Indifferent*
- *Not sure*

If you did not answer 'Yes' please explain why.

Our response

We do not agree with the forced amendment of an RMC or RTM's articles of association. Implying terms that will enable building safety director charges to be recoverable will, implicitly and explicitly, force RMCs to appoint a building safety director and, by extension of this proposed legislation, RTMs.

We remain concerned that insufficient thought has been given to the range of complex structures at buildings where RMCs and RTMs are in operation.

Question 13. *Do you agree with our proposals on the removal of building safety director by RMCs and RTMs?*

- *Yes*
- *No*
- *Indifferent*
- *Not sure*

If you did not answer 'Yes' please explain why.

Our response

As we do not agree that articles of association should be amended to force the imposition of a building safety director, it follows that it is impossible to agree with the proposals relating to removal, however well-intentioned they may be.

It also appears somewhat obtuse that the Department wishes to "ensure that building safety directors appointed are not in post indefinitely or unnecessarily", given the consequence of the risk of personal criminal liability should one not be appointed. If these proposals go through unamended then all RMCs and RTMs will be obliged to appoint a building safety director both indefinitely and, arguably, unnecessarily.

We also note that the language used in the consultation, specifically around removing a building safety director "when all eligible directors indicate to each other by any means that they share a common view on a matter", is unacceptably vague and may lead to acrimony due to little clarity on what this would mean in practice.

Conclusion

We note the rationale that has been provided in relation to these provisions and the apparent desire to avoid RMCs dissolving; however, our firm view is that it is poorly thought-out legislation such as this that will lead to directors resigning. As we have repeatedly stated, RMCs and RTMs will be forced to appoint a building safety director, at an unknown but material cost, or face personal criminal liability.

This is not "empowerment" of volunteer directors by any definition and only adds further financial insults to the injuries many such board directors have suffered for years while trying to do the right thing for their building and their neighbours. The Government appears now, finally, to be fully aware of the devastation wrought by third-party landlords yet it is moving to ensure that such landlords will be well-placed to gain more power at resident-managed buildings.

Further, it appears somewhat insulting to state the basis of these regulations as the "limited competence of some resident directors… to effectively manage and discharge their building safety duties". The majority of RMCs and RTMs that we work with instruct a managing agent to manage the building within the terms of its lease, just as freeholders and third-party landlords do. The main difference is the nature of the opaque corporate structures used by the latter, designed to avoid liability and add layers of complexity to ascertaining the ultimate beneficial owners of buildings. This results in those third-party landlords (and the subset of rogue agents they instruct) focusing on maximising their income by treating a building as an asset to sweat, whereas volunteer directors have the impact on their neighbours foremost in mind. Historically, successive governments have focused on protecting the interests of building owners and supported the myth that professional landlords operate in anything other than their own interests. The Government appears to have now caught on to the disgraceful manner in which freeholders, many of whom are also third-party landlords, operate. As one example, we only need to see the ongoing refusal by building owners to sign grant funding agreements and make their buildings safe at any real pace. The obscene manner in which such entities have profited from this crisis through, for example, hidden building insurance commissions has also been blown wide open.

Third-party landlords have and will continue to do all they can to maximise their income and force costs onto leaseholders. The Government must look at innovative ideas to cut the gordian knot and to look to the path laid out in the Building Safety Act's leaseholder protections. As it stands, the Government has told us that such third-party landlords have responsibilities and liabilities where there are tri-partite leases – one potential fairer approach could be for those landlords to pay for the building safety director costs if this role is indeed required. Where said landlord has confirmed it has

a net worth of over £2m then they would have no argument to not pay for the building safety director. Where the net worth is under £2m and / or the third-party landlord avoids its duties, consideration should be given to the use of compulsory purchase orders and removal of the title, as previously recommended by the Departmental Select Committee in June 2020[3]. In those scenarios, one argument may be that the ground rent being paid would be put to better use by being used to pay building safety director costs rather than enriching multi-millionaire absent third-party landlords.

Consideration should have been given to such alternative solutions prior to the decision to amend RMC and RTM articles of association and look to fundamentally change the governance of their boards. If the Government wants to ensure that leaseholders are one day able and willing to call themselves genuine "homeowners", then it is time for bold action and not just more warm words.

We also wish to note our uncertainty around the timing of the new regime in relation to the Health & Safety Executive's new role as regulator. The Health & Safety Executive (HSE) has confirmed that it will be an offence if an occupied building is not registered by October 2023, with the Building Assessment Certificate process due to commence in April 2024. With over 12,000 high-rise buildings to be registered and assessed, this timeframe seems unhelpfully brief. We also have concerns over how punitive the HSE will be and whether its approach will mirror the manner we have seen to-date. Will the HSE impose fines on occupied buildings that have not registered? Will such buildings have to be prohibited from use? For a regime this onerous and with such far-reaching consequences, our view is that there must be a fair transition plan.

We remain very concerned about the implications for buildings which are only "proportionally" remediated to a B1 rating on an EWS1 assessment, i.e. combustible materials are still present on external walls. This has long been the case with applications to the Building Safety Fund, where applications to meet A1 compliance have been regularly rejected so that B1 is the only option available. This situation is set to be repeated by developers that have pledged to make their buildings safe, thanks to the unhelpful amendments that have been made to the self-remediation contract following lobbying from the developers. We have already seen the insurance industry take a dim view of buildings of B1 standard - will a building safety director err on the side of caution and therefore advise that A1 compliance should be achieved? How will the HSE act in respect of these buildings if the director does not?

[3] https://publications.parliament.uk/pa/cm5801/cmselect/cmcomloc/172/17205.htm#_idTextAnchor040 (para 59)

We are hopeful that it is not too late for common sense to prevail and the lived experience of RMC and RTM directors to finally be taken into account. We remain willing to work with the Department to discuss our concerns further and focus on solutions that will ensure the least harm is done to the countless innocent leaseholders who are trapped in the building safety crisis.