Consultation response: Alternative cost recovery for remediation works

March 2023

Under the current and deeply unfair circumstances created by the Building Safety Act 2022 – in which any leaseholder has to pay any costs at all for the remediation of building safety defects – we welcome, to some extent, the intention that landlords must explore other cost recovery avenues rather than charging leaseholders by default and that they must provide adequate evidence of this.

However, it is self-evident that the proposals in this consultation would not be needed if the Government would 'do the right thing,' as it frequently urges other parties to the building safety crisis to do, and fully protect all leaseholders from all costs caused by building safety defects.

The building safety scandal was caused by decades of collective failure by government and industry, which has been revealed in great detail by the Grenfell Tower Inquiry. Although circumstances vary from building to building and the 'web of blame' might be complex, there is widespread consensus that the leaseholders who bought defective homes are always entirely blameless.

It logically follows that no leaseholder should pay a penny to fix a problem that was not of their making and over which they had no control. **The fact that there are any routes at all by which costs can be passed to innocent leaseholders is a travesty of justice, and we continue to call on the Government to address this**.

Not only are 'non-qualifying' leaseholders unfairly exposed to uncapped costs, but qualifying leaseholders are also exposed to vastly different costs which are determined by pure luck. One leaseholder may happen to have purchased a flat in a building that is associated with a 'responsible' developer which is still in existence; while another leaseholder, in an otherwise identical building, may have the misfortune that the original developer folded their business and disappeared after selling them unsafe homes.

Additionally, although successive governments have encouraged leaseholders to enfranchise or exercise their Right to Manage, those in leaseholder-owned or managed buildings have no ability to pursue alternative cost recovery routes and therefore cannot limit their exposure to costs for the remediation of safety defects – even though leaseholders in an identically constructed building next door can do so.

All leaseholders are equally blameless and bear no responsibility for the building safety crisis, therefore we cannot accept that policies that were designed to "protect leaseholders from costs" are effectively a game of roulette, which carries the risk of life-changing costs, bankruptcy and forfeiture for some leaseholders.

The proposals in this consultation do nothing to address this fundamental issue that costs to fix life safety defects should never be 'recovered' from an innocent consumer; this would not happen in any other sector of our economy and should not be the case for our homes, which are the biggest and most personal purchase that most people will ever make. The secondary legislation does not rectify this, it is merely trying to create an illusion that apportioning costs to leaseholders is ever fair or justifiable.

Shortly after he assumed office for the first time, DLUHC Secretary of State Michael Gove told the Levelling Up, Housing and Communities Committee, "I am still unhappy with the principle of leaseholders having to pay at all, no matter how effective a scheme might be in capping their costs or not hitting them too hard at any one time. My primary question is why they have to pay at all."[1]

We agree with the Secretary of State's sentiment and strongly urge the Department to take this ideal opportunity, before enacting the secondary legislation, to fully remove leaseholders from the list of parties who should pay anything towards building safety remediation. This cannot simply remain in the "too difficult" basket which Mr Gove referred to in his answer to the Committee.

We have long maintained that the only practical and fair solution is for the Government to step up and replace leaseholders as the final backstop in the 'waterfall' approach to building safety costs. For any building where there is a remediation funding gap that has not been met by developers or building owners, the Government should provide up front funding to close the gap which will allow remediation work to begin; it should then use its ability to subsequently recover monies from other responsible parties using all available routes over the coming years. Guaranteeing that no leaseholder will have to pay a penny to fix a crisis they did not cause would remove uncertainty and restore confidence in the housing market.[2]

In Ireland, the government has recently announced that they will step up and take responsibility by paying in full for all defective apartment blocks built during decades of "lax regulatory oversight."[3] Their comprehensive funding scheme will cover all leaseholders, including retrospectively reimbursing costs that have already been incurred. Given Michael Gove's recent admission that "faulty and ambiguous" government guidance also allowed the building safety scandal to take hold in this country,[4] we believe the only fair and moral way to finally end this scandal for good is to follow the precedent set by Ireland and fully protect all leaseholders.

The Government has both the resources and the moral responsibility to fully remove leaseholders from the funding equation. It should not wait until the findings of the second stage of the Grenfell Tower Inquiry are published later this year, which may underline the extent to which successive governments contributed to the current crisis.

In summary: **charging leaseholders for building safety remediation work can never be justified**, no matter how it is dressed up.

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[1] See Q53: https://committees.parliament.uk/oralevidence/2980/html/

[2] As noted in the consultation's Impact Assessment, there are other key non-monetised benefits of removing costs from leaseholders: "There are likely to be associated positive effects on the mortgage market, based on market intelligence received to date."
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1133979/Impact_assessment_alternative_cost_recovery_for_remediation_works.pdf

[3] https://www.fia.uk.com/news/ireland-launches-2-5bn-scheme-to-repair-fire-safety-defects-in-homes.html

[4] https://www.thetimes.co.uk/article/michael-gove-we-are-to-blame-on-grenfell-5khwd60wk

Part 1 – Buildings in scope of the duty

Question 1: Do you agree or disagree with the types of building to which we propose to apply this duty?

Disagree

Question 1a: If you answered 'Disagree' or 'Something else' for question 1, please provide an explanation for your answer.

The definition of buildings in scope of this duty is different from the definition of a 'relevant building' which underpins the leaseholder protections in the Building Safety Act. A definition which only "largely aligns" and has only "a degree of consistency" will not "reduce the likelihood of misinterpretation" as suggested; it is much more likely that this will cause greater confusion.

Successive governments have encouraged leaseholders to enfranchise or to exercise their Right to Manage. Leaseholders in such buildings are equally blameless in the building safety crisis and they deserve equal protection from costs. If it is possible to recover remediation costs for such buildings through warranties, insurance, third parties or funding/grant schemes, then clearly such avenues must be pursued in order to rightfully protect leaseholders from unnecessary costs. However, because leaseholder-owned and leaseholder-managed buildings are effectively powerless to pursue alternative cost recovery avenues for themselves (unable to incur legal costs or seek Remediation Orders/Remediation Contribution Orders), the Government must propose an alternative path that will provide equal protection for these buildings. **We therefore propose that the Government's Recovery Strategy Unit is best placed to take ownership and responsibility for pursuing alternative cost recovery avenues on behalf of leaseholder-owned and leaseholder-managed buildings**.

We disagree with the exclusion of buildings under 11 metres from this new duty. Some low-rise buildings may still be sufficiently high risk to mean that remediation works are necessary to make the building safe, as noted by many other respondents to this consultation[5]. The Secretary of State has also recently acknowledged in parliament that fire safety defects in buildings under 11 metres will sometimes be "life critical".[6] Despite this admission, the Government has not provided any funding scheme to support the remediation of life critical defects in such buildings, or asked developers to remediate such life critical safety defects in order to qualify for the Responsible Actors' Scheme, or extended leaseholder protections to these buildings – and as a result of these policy decisions, leaseholders in under 11 metre buildings face uncapped costs to fix building safety defects. In this context, **the exclusion of landlords of under 11 metre buildings from the duty to pursue other cost recovery avenues before passing costs on to leaseholders is unacceptable**.

We agree with the concerns raised by the National Fire Chiefs Council that the Government's current approach has placed an unfair burden on leaseholders in buildings under 11 metres to find solutions to remediation costs and to raise concerns with DLUHC on a case-by-case basis,[7] which is not appropriate. Although the Department believes that the number of low-rise buildings that are high risk is small,

[5] https://www.housing.org.uk/resources/alternative-cost-recovery-for-remediation-works-NHF-consultation-response-march-2023/

[6] https://hansard.parliament.uk/commons/2023-03-14/debates/80741A14-4AD5-46CD-AA7C-9D296BDE9D97/BuildingSafety

[7] https://www.nationalfirechiefs.org.uk/write/MediaUploads/Consultations/2023/NFCC_Reply_Cost_recovery_remediation_Final.pdf

ironically the failure to provide a comprehensive solution for buildings of all heights will have a disproportionately large impact on the ability to mortgage and insure properties in low-rise buildings. Buyers will want to avoid potential unlimited liability for something they have no control over. Crucially, the complete lack of leaseholder protection makes it almost impossible for high-risk buildings under 11 metres to be made safe, because leaseholders cannot bear uncapped costs and they are being explicitly excluded from the duty to pursue alternative cost recovery routes.

As noted in the Impact Assessment, the Department is fully aware of the potential for "misaligned incentives", whenever "the landlord [is] responsible for making the building safe, but not for paying for the works, and so they may charge leaseholders the maximum amount… by default, rather than pursuing available options to protect leaseholders from costs they were not responsible for." [8] It is self-evident that the current proposal to exclude landlords of under 11 metre buildings will not mitigate this risk to leaseholders, which the Department says it wishes to guard against.

[8] See paragraph 26:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1133979/Impact_assessment_alternative_cost_recovery_for_remediation_works.pdf

Part 1 – Defects and works in scope of the duty

Question 2: Do you agree or disagree with the types of defect that this duty should apply to?

Not sure

Question 2a: If you answered 'Disagree' or 'Something else' for question 2, please provide an explanation for your answer.

We agree that the defects and works in scope of the new duty should align with that of a 'relevant defect' as defined in the leaseholder protections in the Building Safety Act.

However, the wording used in the draft statutory guidance accompanying this consultation does not appear to follow the exact wording used in the guidance on a relevant defect, as it excludes paragraph 6 which states that "Defects that have arisen in relation to professional services are also covered by the definition of relevant defect. This would include, for example, if an architect or building designer specified the inappropriate use of flammable materials on a building and the contractor followed those designs."[9]

There should not be any anomaly between the two definitions and it would be preferable if the wording matched exactly, to avoid any doubt.

Question 3: Do you agree or disagree that this new duty should only apply retrospectively?

Disagree

Question 3a: If you answered 'Disagree' or 'Something else' for question 3, please provide an explanation for your answer.

While leaseholders would like to be able to take it on trust that "tighter rules" for new buildings and refurbishments will diminish the incidence of building safety defects in future, we do not believe that there will be no building safety defects created after 27 June 2022. Even if new cases of building safety defects are more limited in number, there should be an equal duty on landlords to pursue alternative cost recovery routes before passing the remediation costs on to leaseholders by default; there must be a commitment to future as well as historic protection for leaseholders.

This is particularly important in the first years of the new regime. As highlighted by the NFCC, there will be a gap before full scrutiny under the new gateways process begins on 01 October 2023[10] and defects which occur in this period must trigger the same level of protection for leaseholders as historic defects.

The impact assessment notes that the policy review date is **June 2027**, therefore we propose that in the first instance **the new duty should apply for new buildings and refurbishments created up to this date**.

[9] See paragraph 6: https://www.gov.uk/guidance/definition-of-relevant-defect

[10]

Part 2 – Cost recovery via insurance, warranties, third parties and government funding/grants

Question 5 / 9 / 13 / 17: Do you think that the proposed steps in the guidance, which we have outlined in the summary adequately protect leaseholders?

No

Question 5a / 9a / 13a / 17a: If you answered 'No' or 'Not sure', please provide an explanation for your answer.

There is a significant amount of ambiguity in the guidance which gives building owners a lot of leeway to avoid thoroughly pursuing alternative routes. For example, "where possible" they "may wish to" take an action or "consider" doing something. Alternative avenues must be pursued in a "timely manner" – but what would constitute a timely manner? While this secondary legislation gives the illusion of protecting leaseholders, such ambiguous language is a suggestion rather than a duty and this will be difficult for leaseholders to challenge at tribunal.

The guidance also advises building owners to seek legal advice regarding the likelihood of successfully recovering costs or partial costs, but the threshold below which they should not proceed is unclear. What is "strong" legal advice against it? For example, is 50% chance of success the minimum threshold – or should it be less, or more? The landlord should also consider the length of time to pursue the process of litigation versus the pace of remediation and ongoing costs to leaseholders – but who will determine how much delay is reasonable? There could be a conflict of interest here because the landlord is not the party that is living in an unsafe home and/or unable to move on with their life while remediation works and unknown costs are still pending.

It is also unclear if there is any requirement to seek advice from lawyers with a minimum level of experience in such disputes, or will any legal advisor suffice? For matters of such importance, the advice is vague.

Perhaps that is because, despite the impression given in this secondary legislation that legal action can be a route for cost recovery to protect leaseholders, in reality the Department expects this to be ruled out in all but a minority of cases?

In 2020, the National Audit Office conducted an investigation into the remediation of cladding. Their report states that "The Department […] acknowledged that **only in a minority of cases would it be financially justifiable for building owners to bring legal action to recover money**… **as the legal costs are likely to outweigh the costs of remediation in a significant number of cases**."[11]

The Department's view on the limited financial justifiability of legal action has not been made clear in the draft statutory guidance. By not doing so, there is **an increased risk that landlords incur administrative, legal and 'other' costs in pursuit of routes which the Department knows will have a limited chance of success**. This does not increase leaseholder protection; quite the opposite, it puts leaseholders at further risk of costs. Administrative costs and 'other' costs can be passed on to both qualifying and non-qualifying leaseholders, while legal costs can also be passed on to non-qualifying

[11] See Key findings paragraph 19 and Part Two paragraph 2.19: https://www.nao.org.uk/reports/investigation-into-remediating-dangerous-cladding-from-high-rise-buildings/

leaseholders. There is no cap on these costs – with the exception that 'other' costs, such as investigations to understand defects, contribute towards a qualifying leaseholder's capped building safety costs (as set out in the leaseholder protections in the Building Safety Act).

At the very least, **there should be a cap on the maximum value of administrative, legal and other costs that can be passed to leaseholders** in relation to pursuing alternative cost recovery routes for building safety remediation. All such costs should count towards a qualifying leaseholder's cap on building safety costs.

Although the guidance specifies the steps that landlords must carry out before passing on costs, there must also be sufficient time for leaseholders to challenge costs. **The maximum remediation cost that can be passed to qualifying leaseholders has been spread over a ten-year period, however the same approach still needs to be extended to non-qualifying leaseholders** as this may provide a bare minimum level of 'protection' to save at least some non-qualifying leaseholders from bankruptcy.

Question 6 / 10 / 14 / 18: Are there any practical risks or issues that you think would result from landlords being expected to follow the proposed steps in the guidance, which we have outlined in the summary?

Yes

Question 6a / 10a / 14a / 18a: If you answered 'Yes', please provide an explanation for your answer.

The guidance states that landlords are expected to commence remediation works even if monies are not guaranteed from alternative cost recovery avenues. This is unrealistic. There will be many thousands of buildings – those where the landlord is not associated with the developer or does not meet the contribution condition to pay for remediation – where the landlord will not begin work until they have charged building safety costs to qualifying and non-qualifying leaseholders. As they cannot pass any costs to leaseholders before pursuing all alternative cost recovery routes, ergo they will have to pursue all avenues before any work can begin. Some alternative cost recovery routes may take several years to reach a conclusion – particularly if there are legal challenges, counterclaims and appeals.

Landlords may also delay starting remediation work before alternative cost recovery routes have been pursued because there is a risk of disagreement and challenges to the scope of work between the landlord and the insurer/warranty provider/developer/government funding body. If the landlord begins work before having confirmed funding in place, there is a risk that they invalidate the terms and conditions attached to the source of funding.

The process of applying for and receiving government funding is taking far too long; in many cases it has taken upwards of two years. This adds a further practical issue that projects may need to be re-costed due to the delays. For mid-rise buildings between 11-18 metres, the scheme is not even open for applications yet, so the delay in pursuing the government funding route for these buildings could be even longer.

All these factors could lead to unacceptable and lengthy delays to starting the remediation work that is needed to make homes safe. Meanwhile, landlords – including directors in leaseholder-owned or leaseholder-managed buildings – may face prosecution for non-compliance with enforcement notices because they cannot start the work. Most significantly, there is also a risk of a serious fire incident in the meantime.

We therefore reiterate that **for any building where there is a remediation funding gap that has not been met by developers or building owners, the Government should step in to provide up front funding to close the gap, which will allow remediation work to begin as soon as possible; it should then use its ability to subsequently recover monies from other responsible parties using all available routes over the coming years**.

Nearly six years after Grenfell, the focus must be first and foremost on the practical issue of making buildings safe and then fighting over 'who pays' later.

Part 3 – Information sharing duties

Question 20: Do you agree or disagree with these proposals?

Something else

Question 20a: If you answered 'Disagree' or 'Something else' for question 20, please provide an explanation for your answer.

We agree that landlords should demonstrate that they have taken reasonable steps to recover costs before seeking to pass any costs on to leaseholders.

There should also be **additional information provided about the admin, legal and 'other' costs incurred to date** in pursuing alternative cost recovery routes.

Question 21: Do you expect that a landlord would be unable to disclose any of the information outlined in paragraph 54 due to legal privilege or commercial confidentiality?

Something else

Question 21a: If you answered 'Yes' or 'something else' for question 21, please provide an explanation for your answer.

We anticipate that building owners will fail to disclose a significant amount of the information, not because they are 'unable to,' but because they will cite that information is legally privileged or commercially sensitive by default. There will be no ability for leaseholders to assess whether that is a legitimate excuse or to challenge it.

The statutory guidance states that landlords will need to say why information cannot be provided, but it does not say what reasons are considered acceptable for a failure to disclose or in what circumstances.

Question 22: Do you agree or disagree that leaseholders should receive both the regular update and the final summary?

Something else

Question 22a: If you answered 'Disagree' or 'Something else' for question 22, please provide an explanation for your answer.

We agree that leaseholders should receive a regular update and a final summary, however we disagree that an annual update can be considered "regular," "prompt," "best practice" or "up-to-date information to enable them to make informed choices."

Particularly in cases where alternative cost recovery needs to be pursued before remediation work can begin, it would be unacceptable for such essential information to be so infrequent. **Best practice should be an update within 28 days of action having been taken or costs incurred**.

It is almost six years since the Grenfell tragedy: it is imperative that there is a sense of urgency about remediating buildings which still have life safety risks. By setting the expectation that one update per year will suffice, the Department is tacitly admitting that leaseholders' lives will be on hold for more than a decade post-Grenfell. The laissez-faire approach to the timescale for fully removing the financial burden of the building safety crisis from leaseholders and making our homes safe is an additional scandal, which compounds the original scandal.

Part 5 – The impact of these proposals

Question 26: Do you agree or disagree with the approximate costs of complying with the statutory guidance, as found in the impact assessment?

Disagree

Question 26a: If you answered 'Disagree' or 'Something else' for question 26, please provide an explanation for your answer.

There is no real-world data to support the examples that have been given, and the estimates are unrealistically low, given the complex issues of litigation.

The case studies are also based on unrealistically low numbers of non-qualifying leaseholders. Only two scenarios are based on more than 10% of leaseholders having non-qualifying status, with a maximum of 17%. This fails to demonstrate the high proportion of costs that a landlord will be able to recover in any building which has a high proportion of non-qualifying leaseholders. In such buildings, landlords may disproportionately pursue alternative cost recovery avenues – for example, to avoid taking on responsibility for remediation themselves – in the knowledge that they can pass on a high proportion of the incurred costs to the leaseholders.

Part 6 – Demographics

Question 29: endourcladdingscandal@gmail.com

Question 30: Organisation

Question 35: Representation group; Other

Question 35a: Campaign group representing leaseholders affected by the building safety crisis.

Question 36: End Our Cladding Scandal

Question 37: National