Alternative cost recovery for remediation works

Consultation response

31 March 2023

Summary

The National Housing Federation (NHF) is the voice of housing associations in England. Our members provide homes for around six million people and are driven by a social purpose: providing good quality housing that people can afford. Housing associations also provide vital care, support and community services. We support our members to deliver their social purpose, with ambitious work that leads to positive change.

Housing associations' first priority is the safety of their residents and in recent years, the sector has been working to urgently replace unsafe cladding, carry out in-depth safety checks and put in place interim safety measures where necessary to ensure resident safety. The NHF and our members are committed to doing everything we can to ensure a tragedy like the fire at Grenfell Tower can never happen again. We have welcomed the government's proposals for an overhaul of the building safety regulatory system and a more stringent higher risk regime, and we contributed our expertise and experience to Dame Hackitt's review that set out the need for these.

Leaseholders should not have to pay for works that have been caused by a systemic failure of building regulations. We support the government's announcement that those responsible – developers, contractors and manufacturers – should make a major contribution to funding the safety work needed. We therefore welcome this consultation and agree with the principle of the government's proposals to create a duty for landlords to take reasonable steps to ensure that all alternative avenues of cost recovery have been explored before passing remediation costs on to leaseholders.

We have some concerns that the proposals, and the underlying requirements for applying to the Building Safety Fund, will cause delays to building safety works, particularly where housing associations do not have the financial capacity to begin

remediation works across all affected buildings without having alternative funding guaranteed. We also believe that these proposals will not provide equal protections for all leaseholders, as buildings below 11 metres in height have been excluded.

Response to consultation questions

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?

Response: Disagree

We disagree with the exclusion of buildings below 11 metres in height from this new duty. We are aware of buildings below 11 metres in height owned by housing associations for which a PAS 9980 assessment has recommended remediation. These assessments consider height as only one element when judging the risk of building safety issues. The overall risk in a low-rise building may still be high enough to mean remediation works are necessary.

Housing associations with such buildings are making use of appropriate alternative cost recovery avenues before seeking to pass on costs to leaseholders. However, without access to government funding schemes, the cost of some of these remediation works will have to be met by either housing associations themselves, placing additional pressure on financial capacity in the sector – or by leaseholders. If housing associations cover the costs, this will primarily be drawn from rental income. In both cases, this would mean that residents are ultimately paying to remedy defects for which they are not responsible.

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

Response: Agree

We agree that the types of defect that this duty should apply to are broad enough to provide sufficient protection for leaseholders in relevant buildings.

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

Response: Agree

We agree that the tighter rules brought in for new products and properties should provide commensurate protections to those set out in this duty and therefore that this duty should therefore only apply to historical defects.

Reasonable steps statutory guidance

Summary

We agree with the principle of pursuing cost recovery via insurance, warranties, third parties and government funding or grants before passing costs on to leaseholders. Leaseholders should not have to pay for works that have been caused by a systemic failure of building regulations.so it is right that building owners should pursue other cost recovery avenues before passing on costs to leaseholders. This is the approach that housing associations have already been taking.

However, we are concerned that without clear guidance and additional flexibility, elements of these requirements will cause unnecessary delays to remediation works. As these concerns apply mostly to the overall process, rather than any specific cost recovery avenue, we will set out each area of concern below rather than replying directly to the consultation questions.

Expectation to commence remediation works without having funding guaranteed

The statutory guidance states that ‘Landlords are not required to complete this duty before carrying out remediation works. The expectation is that landlords will commence remediation works even if the monies are not guaranteed from alternative cost recovery avenues.’

We agree with the aim of avoiding unnecessary delays to the commencement of remediation works. However, it is not realistic to expect that landlords will always be able to fund all remediation works upfront before having funding guaranteed from other sources. Many housing associations own and manage multiple buildings that require remediation works. The expectation to start a remediation programme covering all applicable blocks before having any alternative funding guaranteed

would create a significant financial burden for some housing associations, particularly those where the projected cost of their building safety programme is large in relation to their turnover.

To address this concern, we would like to see the government enable housing associations to receive funds more quickly through the Building Safety Fund and other relevant grants.

Steps required before applying to government funds

The statutory guidance is clear that landlords should attempt to achieve cost recovery through insurance, warranties and via third parties before applying to government funding schemes, specifically before applying to the Building Safety Fund.

As noted above, we are concerned that some housing associations will not have the financial capacity to begin remediation works across all relevant buildings before alternative sources of funding are guaranteed. Pursuing third parties for cost recovery can take several years if it progresses to litigation. If housing associations must complete this process before applying to government funds, it may cause significant delays to remediation works.

We also have concerns that existing government funds do not adequately cover all affected buildings. The Building Safety Fund is only open to buildings above 18 metres tall. The Medium-Rise Scheme is open to buildings between 11 metres and 18 metres in height, but only where the developer of the building cannot be traced or identified, and there is not currently government funding available for buildings below 11 metres tall. Grant funding should be made available for buildings not in scope of the developer remediation contract and where other cost recovery routes are not available. Funding should be available over several years, in light of the number of buildings which potentially require remediation and the length of time it will take to complete fire risk assessments across all relevant stock.

Housing associations should be able to apply for government grants before they have exhausted efforts to reclaim funds from developers and other third parties, particularly where this is likely to take a number of years. They could provide an overview of the steps they will take to pursue cost recovery from third parties, update the government on progress and make repayments where they are subsequently able to collect funding from third parties.

Leaseholder protections

As set out in response to question one above, we believe that excluding buildings below 11 metres from this new duty and from wider government support does not adequately protect all leaseholders. Fire risk assessments have advised that remediation works are required in some buildings owned by housing associations which are below 11 metres tall, due to historic defects. Whilst this may not be as widespread as in taller buildings, the leaseholders in these buildings are equally innocent and should benefit from equal protections.

Information sharing duties

Question 20: Do you agree or disagree with these proposals? Under our proposals, landlords will be required to demonstrate that they have taken reasonable steps to recover costs.

Response: Agree

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

However, we have concerns that it may not always be possible to provide all of the information requested about buildings, particularly for older buildings where some of the information requested may no longer be available. This requirement must be applied with sufficient flexibility to allow for gaps where information no longer exists.

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?

Response: Yes

Some of the information outlined may be of a sensitive or confidential nature and therefore should not be shared pending potential litigation claims. Landlords must be able to determine the level of detail they share based on legal advice where they are holding negotiations with third parties or progressing with litigation.

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

Response: Agree

We agree that a final summary should be included in any cost recovery service charge demand for a contribution to remediation works. Reporting on a defect-by-defect basis is a sensible approach, but some charges will be incurred across multiple defects, such as scaffolding. Landlords must have some flexibility in how they report such costs.

We also agree with the requirement to provide an annual update, but as noted above some information may be commercially sensitive while negotiations are ongoing. Guidance should be clear that regular updates do not need to provide the same level of detail as expected in a final summary.

Respondent details

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