Alternative cost recovery for remediation works: consultation on proposals to make regulations and statutory guidance under the Landlord and Tenant Act 1985

G15 Response

About the G15

The G15 is made up of London's largest housing associations. The G15's members provide more than 715,000 homes across the country, including around one in ten homes for Londoners. Delivering good quality safe homes for our residents is our number one priority. Every year our members invest almost £900m in improvement works and repairs to people's homes, ensuring people can live well. Together, we are the largest providers of new affordable homes in London and build around 15% of all affordable homes across England. It's what we were set up to do and what we're committed to achieving. We are independent, charitable organisations and all the money we make is reinvested in building more affordable homes and delivering services for our residents.

Find out more and see our latest updates on our website: www.g15.london

The G15 members are:

- A2Dominion
- Catalyst
- Clarion Housing Group
- The Guinness Partnership
- Hyde
- L&Q
- MTVH
- Network Homes
- Notting Hill Genesis
- One Housing
- Peabody
- Southern Housing

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Contents

Introduction

As the cost of remediation works are continuing to place significant strain on the resources of housing associations. We are acutely aware of the importance of protecting leaseholders from excessive costs associated with these works and we are broadly supportive of the Government's proposals with regards to alternative cost recovery.

The safety of G15 residents is our absolute priority. The tragedy at Grenfell Tower in 2017 must never be allowed to happen again and, following the tragedy, at least £3.6bn has been earmarked across the G15 for investment in the safety of our homes, including fire safety and prevention, from 2021 - 2036.

The legal responsibility for remediation lies with contractors and this must be the first port of call for cost recovery. Along with the £3.6bn mentioned above, all G15 members are diligently and rigorously pursuing contractors and developers to recover costs where it is possible to do so, as well as applying for Government funding where it is available.

We have been clear throughout this period that cost recovery from leaseholders will only ever be an absolute last resort.

Though broadly supportive of these proposals, the G15 is concerned by the proposals to require housing associations to demonstrate that "all reasonable steps have been taken to recover costs from other parties" when applying for Government grants.

These risks delaying remediation work – potentially for years – as providers gather the necessary evidence to demonstrate their efforts. This also risks leading to increasing costs for providers and greater uncertainty for both landlords and residents as we await the outcome of our applications for an extended period of time.

Comments on specific consultation questions

Defects and works in scope of the duty

Q1: Do you agree or disagree with the types of building to which we propose to apply this duty?

We propose that, for a landlord to be required to take reasonable steps to pursue other costs recovery avenues, the building must meet all of the following criteria:

- **It is a self-contained building, or self-contained part of a building, that contains at least 2 dwellings**
- **It is at least 11 metres in height or has at least 5 storeys. It is not a leaseholder-owned building**
- **It is not a leaseholder-managed building**
- **It is not on commonhold land**

These proposals are the same as those in place for the wider statutory leasehold protections, with the addition of excluding leaseholder-managed buildings (as explained in paragraph 24, above).

The G15 support these proposals. However, we do not think there should be any height restrictions. Leaseholders should be protected from costs to fix historical safety defects irrespective of height of their building.

The 11-metre criteria is consistent with the Building Safety Act 2022. This is because the Government concluded that “there is no systemic fire risk in building under 11m and is unlikely to require costly remediation”.

However, if remedial works have been recommended under PAS9980 code of practice the building owner should pursue costs from those responsible before passing down to leaseholders.

Removing the 11-metre height restriction will ensure all leaseholders are treated the same. If landlords of buildings above 11-metres are not obliged to take steps to recover costs (before charging leaseholders) then the Government should make grant funding available for these buildings to protect leaseholders.

Q2: Do you agree or disagree with the types of defect that this duty should apply to?

We propose that a defect in scope of the new duty must meet all of the following criteria:

- **It puts people's safety at risk from the spread of fire, or from structural collapse**
- **It has arisen from work done to a building, including the use of inappropriate or defective products, during its construction, or any later works (such as refurbishment or remediation)**
- **It has been created in the 30 years prior to the leaseholder protections coming into force (meaning the defect had to be created from 28 June 1992 to 27 June 2022)**
- **It relates to at least one of the following types of works:**
    - **The initial construction of the building**
    - **The conversion of a non-residential building into a residential building**
    - **The proposed defects and works in scope of this duty are the same as those in scope of the wider statutory leasehold protections**
    - **Any other works undertaken or commissioned by, or on behalf of, the building owner or management company**
    - **The proposed defects and works in scope of this duty are the same as those in scope of the wider statutory leasehold protections**

The G15 agrees with this proposal.

Q3: Do you agree or disagree that this new duty should only apply retrospectively?

In addition to the criteria outlined in question 2, we propose that this duty should apply to defects created from 28 June 1992 to 27 June 2022 (that is, the 30 years before the leaseholder protections came into force).

This means the duty would only apply retrospectively (meaning the protections deal with historical defects, and not future ones), in alignment with the wider statutory leaseholder protections.

The G15 agrees with this proposal.

Cost recovery via insurance

Q4: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 41), are reasonable?

Yes, we feel these are reasonable steps.

Q5: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 41) adequately protect leaseholders?

Yes, we feel these steps are adequate to protect leaseholders.

Q6: 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 (paragraph 41)?

G15 members have expressed some concerns with these proposals. Most developers and contractors use the local authority building control function to inspect buildings during construction. Where the warranty provider has not inspected the building there is normally a limited claim available to landlords unless the inspection by building control is considered sufficient within the cover taken out.

Where the home warranty does not cover potential problems because the developer or contractor has relied on building control to inspect the building during construction, it would be unreasonable to expect landlords to appeal against this or seek resolution via the New Homes Ombudsman scheme, the Financial Ombudsman Service nor the courts.

These options are unlikely to lead to a successful resolution and are time consuming and expensive.

Buildings insurance, like most landlords' policies, does not cover the costs of all works found within external walls that compromise buildings fire integrity. This is a standard exclusion in most, if not all, buildings insurance policies.

Where defects are not covered by buildings insurance it is not reasonable to require landlords to follow lengthy appeals processes that are extremely unlikely to be successful. Any requirement to appeal insurance decisions is likely to delay landlords' ability to remedy defects and make buildings safe.

Question 7: Please provide any comments you have on the full draft guidance on recovering costs via insurances and indemnities. The chapter on cost recovery via insurance can be found on pages 6-7 of the draft statutory guidance (PDF, 327KB).

Page 6 – 7
8. Insurance

We feel that the approach described in Section 8 is sensible. However, without broader context it may potentially present significant financial risk and additional costs to the landlord, which would require due diligence prior to such a decision being taken. Under such considerations, it may be appropriate to take a legal view, which may determine if the claim would be upheld, against the resources and time required to claim.

Cost recovery via warranties

Q8: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 44) are reasonable?

Yes, we feel these are reasonable steps (noting there may be some considerations required where the landlord / building owner, was the developer / PC / PD)

Q9: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 44) adequately protect leaseholders?

Yes, we feel these are adequate to protect leaseholders.

Q10: 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 (paragraph 44)?

A stated above, most developers and contractors elect to use the local authority building control function to inspect buildings during construction. Where the warranty provider has not inspected the building there is normally a limited claim available to landlords unless the inspection by building control is considered sufficient within the cover taken out.

Where the home warranty does not cover potential problems because the developer or contractor has relied on building control to inspect the building during construction, it would be unreasonable to expect landlords to appeal against this or seek resolution via the New Homes Ombudsman scheme, the Financial Ombudsman Service nor the courts.

These options are unlikely to lead to a successful resolution and are time consuming and expensive.

Cost recovery via third parties

Q12: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 47), are reasonable?

A summary of the proposed steps that landlords should take to recover remediation costs through third parties can be found in paragraph 47.

We do not feel these are reasonable steps. Where remediation works are required as a result of incorrect design or specifications by architects or other consultants, contractors will be able to claim from the architects of other consultants' professional

indemnity insurance. We would expect contractors to make these claims where designs or specifications or shown to be at fault.

However, in G15 members experience, most defects are found to arise from poor workmanship, failure to follow the approved design or the substitution of inadequate materials for those specified in the design. Contractors' insurance cover will not cover defects caused for these reasons.

This means that the cost of remediation will fall on contractors who will have no choice but to pay directly or try to claim from their sub-contractors. Where this is the case taking legal action may be counterproductive as it could adversely affect a third party's financial viability and, depending on the number and nature of claims against them, could result in the third party becoming insolvent, losing any possibility of achieving cost recovery.

Q13: Do you think that the steps in the guidance which we have outlined in the summary (paragraph 47) adequately protect leaseholders?

We are unsure. Following the introduction of PAS9980 code of practice for the fire risk appraisal of external walls, the third-parties responsible for the defects seek to only address 'life-safety' risks. However, where the 12-year contractual liability period has not expired, and a breach of contract claim is possible the claim should include all defective works and not just the 'life safety works'.

Q14: 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 (paragraph 47)?

The uncertainty over the success of pursuing cost recovery under the Defective Premises Act and Contribution Remediation Orders does pose some risk.

Cost recovery via government funding or grants

Q16: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 50), are reasonable?

The proposed steps that landlords should take to recover remediation costs through government funding or grants can be found in paragraph 50.

Yes, the G15 believes these are reasonable steps.

Q17: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 50) adequately protect leaseholders?

Yes, we believe these steps are adequate to protect leaseholders.

Q18: 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 (paragraph 50)?

Yes

Q18a: If you answered 'Yes' for question 18, please provide an explanation for your answer.

We are concerned about the possible delays which may result from the requirement to demonstrate that "all reasonable steps have been taken to recover costs from other parties" when applying for Government grants.

G15 members are diligently and rigorously pursuing contractors and developers to recover costs where it is possible to do so, as well as applying for government funding where it is available along with making significant investment from our own resources.

Delays caused by this requirement could potentially hold up remediation works for years.

The information that landlords have to provide

Q20: 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. We propose that landlords must provide the information specified in paragraph 54 in order to demonstrate that they have complied with this duty.

The G15 support these proposals.

Q21: 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?

Yes.

Q21a: If you answered 'Yes' or 'something else' for question 21, please provide an explanation for your answer.

Some of the information contained within contracts and settlements may be privileged.

When landlords should provide the information

Q22: Do you agree or disagree that leaseholders should receive both the regular update and the final summary?

The regular update would provide an update on the progress of the landlord's claim, at least annually. The final summary would be included alongside the service charge demand for the contribution to remediation works.

The G15 supports these proposals.

Implementing the information sharing duties

Q23: If you would be involved in implementing the proposed information provision duties, do you agree or disagree that it would be simple for you to implement these changes?

The G15 agrees with these proposals.

Conclusion

The G15 is broadly supportive of the Government's proposals with regards to alternate cost recovery for remediation works. The safety of our residents is our absolute priority, and we are continuing to undertake the vital remediation works which will continue to safeguard this.

The costs of remediation works are placing significant strain on the resources of housing associations and a combination of providers' own resources, Government funding and developer and contractor responsibility must be pursued before leaseholders are asked to contribute.

As the G15 is continuing to make clear, all other means of cost recovery must be exhausted. Charging leaseholders will only ever be an absolute last resort.

However, the G15 is concerned by the proposals to require housing associations to demonstrate that "all reasonable steps have been taken to recover costs from other parties" when applying for Government grants.

We are clear that this could potentially delay vital remediation work for years and further stretch providers' resources as they gather the necessary evidence to demonstrate their efforts. This also risks leading to increasing costs for providers and greater uncertainty for both landlords and residents as we await the outcome of our applications for an extended period of time.