Building Safety Bill Team,
Ministry of Housing, Communities and Local Government,
4th Floor,
Fry Building,
2 Marsham Street,
London
SW1P 4DF

BY EMAIL ONLY

31 July 2019

Dear Sirs

LEASE response to "Building a Safer Future: proposals for reform of the building safety regulatory system, Consultation Paper".

We welcome the opportunity to provide our formal response to the consultation paper entitled: "Building a Safer Future: proposals for reform of the building safety regulatory system". We wish to highlight our standpoint is that of an organisation which prioritises the interests of residential leaseholders and to ensure those are adequately promoted and protected as the reform programme is taken forward.

As such we have confined our response to those consultation questions listed in Annex G we consider are relevant to our remit and fall within our area of expertise.

We welcome the government's plans to take forward the Hackitt proposals on building safety reform and note the intention of the proposals, if implemented, is to overhaul significantly the current building safety system during construction and occupation with the object of ensuring accountability over the life-span of the regulated buildings.

Chapter 3

A new dutyholder regime for residential buildings of 18 metres or more

Q.3.4
Which options should we explore, and why, to mitigate the costs to residents of crucial safety works?

Answer

It is important that all reasonable options are presented to residents when it comes to mitigating the costs to them of crucial safety works.

In the first instance it will depend on the terms of the lease whether the costs are recoverable through the service charges and the extent of recovery as dictated by Section 19 of the Landlord and Tenant Act 1985 is that such costs must be reasonably incurred and for the works to be of a reasonable standard.

The lease may also entitle or indeed require the establishment of a sinking fund which, subject to the terms of the lease and how much is in the fund, could be called upon to cover some or all of the costs of the works.

We note in paragraph 153 of the consultation paper the statement that "where urgent, safety-critical work is necessary for existing buildings, we want to look at how we can mitigate the cost impact on leaseholders."

Certainly we echo the view of the consultation paper that the role of building insurance or warranties should be explored to see how they could help to manage risks and costs.

We would draw to your attention the work of TPAS in particular their Leasehold Engagement Guide.
https://www.tpas.org.uk/files/1/012195_TPAS_Leasehold_Engagement_Guide_A4.V12.pdf

Section 5 of the Guide stresses that leaseholders need to be made aware of schemes available to help them with costs and we consider this should include sign-posting to financial/debt advice agencies where leaseholders are struggling to fit in payment towards safety-critical work with all their other monetary commitments.

Low cost loans are mentioned as a means whereby local authorities offer payment options to help leaseholders spread the cost of major works.

Page 47 of the Guide sets out a Best Practice Check List including options made available to help leaseholders financially should be made easily accessible through customer service centres, online and in information packs for new and potential customers and in terms of involvement and engagement there should be routine consultation on payment options available.

We would also refer to the Major Works Good Practice Guide for social landlords jointly produced by LEASE with other organisations and funded by the Welsh Government
https://www.lease-advice.org/files/2016/09/Major-Works-Landlords-English.pdf

This guide too states landlords should offer a range of payment options to help leaseholders and cites one local authority in Wales offering extended repayment periods of up to ten years for leaseholders who live in their properties.

We appreciate that extending credit to leaseholders so that they can make payments at a tolerable level towards the costs of the works may require a licence from the Financial Conduct Authority ("the FCA") and we suggest the FCA is approached for their input in developing measures to mitigate the costs to residents of crucial safety works.

Q.3.5
Do you agree with the proposed approach in identifying the accountable person? Please support your view.

Answer

We foresee problems with the proposed approach to identifying the accountable person in requiring them to be both:

- a person who has control of the building; and
- be identified by reference to their right to receive funds (whether through service charges or rack rent), directly or indirectly from leaseholders and other tenants of the buildings which contribute to the cost of the maintenance and upkeep of the building structure, and the services, plant and common parts within it, which are the responsibility of that person, whether through contract or by law.

Control of the building indicates the accountable person needing to have some form of proprietary interest in it of a freehold or leasehold nature.

A common management arrangement is the so-called floating management company whereby there is a tri-partite lease to which the said company is a party but they have no proprietary interest in the building such as would exist with a headlease or a lease of the common parts granted to the management company.

Such a management company is usually independent of the landlord and does not enjoy a landlord-tenant relationship.

Commonly, it would comprise all of the leaseholders some of whom may also be directors/officers.

As a party to the lease it would covenant with the leaseholder to undertake work and provide services to the building and common parts as well as place and maintain building/estate insurance.

Usually there would be a covenant by the landlord to carry out the obligations of the management company should it fail to do so or go into liquidation.

Applying the proposed approach to the definition of an accountable person a floating management company would not meet the description since they would not have control of the building but would have the right to receive service charge funds.

The same applies to Right to Manage Companies, being the creation of the Commonhold and Leasehold Reform Act 2002, where management functions devolve by statute on to the RTM company but they do not acquire the proprietary interest in the building.

An illustration of this distinction can be found in the 2016 county court judgment in the case of *"Francia Properties Limited v.Aristou".*

This case concerned a block of eight flats where the right to manage had been acquired by an RTM company in 2014.The landlord wished to develop the roof of the building to create another flat with the leaseholders and the RTM company objecting.

In considering whether the existence of an RTM company precluded the landlord from developing retained property(in this case the roof) the court held that it did not preclude development provided that appropriate undertakings were given by the landlord in relation to disturbance caused by the development.

We disagree with paragraph 160 of the consultation paper which indicates management companies and RTM companies have control of the building and would be an accountable person.

A potential solution would be for the building safety manager to have rights over any areas reserved to the landlord for the purposes of fire safety perhaps in the form of a statutory easement.

Alternatively the meaning of accountable person could be defined to make it clear that having a proprietary interest is not a requirement or that control means control of the management functions and not of the building.

Recently the government published its prospectus for accessing the cladding remediation fund. Applications to the fund can only be made by the "Responsible Entity". The prospectus states the responsible entity is the party with primary responsibility for the repair of the property and may embrace the freeholder or head leaseholder or a management company. For the sake of consistency we suggest this definition is used as the meaning of "accountable person".

We agree that where the accountable person is a legal entity rather than an individual there should still be a single accountable person at Board level and suggest such a person's identity be recorded at Companies House in the interests of transparency and point to the introduction of the need to register persons with significant control as a precedent.

Finally, we would highlight one issue. We foresee there may be some difficulty with finding someone to agree to be an accountable person. Would a Board member agree to step forward to be such a person? We would in any event expect a great deal of competence on the part of such a person. The analogy is with finding people to be voluntary directors which is mollified to some extent by the existence of liability insurance.

Q.3.6
Are there specific examples of building ownership and management arrangements where it might be difficult to apply the concept of an accountable person? If yes, please provide examples of such arrangements and how these difficulties could be overcome.

Answer
We refer to our answer to consultation question 3.5 where we provide some examples.

An additional difficulty with applying the concept is where the requirements result in an overseas company being the accountable person. Such companies may well display at best an inability and at worse a lack of interest in running the building.

There are also issues with identifying beneficial ownership of such companies although we acknowledge there is an attempt to address these in the draft Registration of Overseas Entities Bill.

Q.3.7
Do you agree that the accountable person requirement should be introduced for existing residential buildings as well as for new residential buildings? Please support your view.

Answer

We agree that the accountable person requirement should be introduced for existing residential buildings as well as for new residential buildings in the interests of consistency.

Chapter 4

Residents at the heart of a new regulatory system.

Q.5.1
Do you agree that the list of information in paragraph 253 should be proactively provided to residents? If not, should different information be provided, or if you have a view on the best format, please provide examples

Answer

We agree with the principle of information being pro-actively provided to residents and that the list of information in paragraph 253 is of the kind that should be delivered to them without a formal request being made. We agree with the sentiments in the consultation paper that the information provided be sufficient, relevant and capable of being used by residents and provided in an understandable way. Contact details of the accountable person and Building Safety Manager are central key information and it is important that they are readily available.

Q.5.2
Do you agree with the approach proposed for the culture of openness and exemptions to the openness of building information to residents? If not, do you think different information should be provided? Please provide examples.

Answer

We agree that there should be a presumption that all relevant information about a building should be available to residents, with exemptions. Such a presumption will only work if residents know what information is needed to help them better understand the safety features of their building and hold the accountable person and building safety manager to account. This means steps should be taken to equip

residents with knowledge about these matters and the competence to apply such knowledge in their dealings with the accountable person and the building safety manager.

The timescales for responding to requests for information should be well publicised and be short but realistic enough to ensure confidence in the process.

With regards to exemptions, examples should be provided of instances when releasing information would compromise the safety of buildings and their residents or any intellectual property rights.

Q.5.3
Should a nominated person who is a non-resident be able to request information on behalf of a vulnerable person who lives there? If you answered Yes, who should that nominated person be?

- **Relative,**
- **Carer,**
- **Person with Lasting Power of Attorney,**
- **Court-appointed Deputy,**
- **Other (please specify**)

Answer

Provided there are adequate safeguards in place, we consider a non-resident should be able to request information on behalf of a vulnerable person who lives in the building and do not disagree with any of those listed being such a nominated person and would add that an appropriate professional such as a solicitor should also be a nominated person.

Q.5.4
Do you agree with the proposed set of requirements for the management summary? Please support your view.

Answer

We note these are minimum requirements which doubtless can be expanded as the process is bedded in.

One of the requirements relates to where there are instances of intermediary landlords between residents and accountable persons and wonder whether this is a reference to where the freeholder is an accountable person and there exists a leaseholder-landlord with renting tenants.

Q.5.5
Do you agree with the proposed set of requirements for the engagement plan? Please support your view.

Answer
We agree with the proposed set of requirements for the engagement plan and would stress that engagement should be as early as possible.

What we would stress is the importance of thinking about how to get out the message and what the message is; in other words effective communication with residents.

When it comes to assessing the effectiveness of the engagement strategy, we would draw attention to the Key Lines of Enquiry that used to be deployed by the Audit Commission.

Resident involvement KLOE:

https://webarchive.nationalarchives.gov.uk/20110311074803/http://www.audit-commission.gov.uk/housing/inspection/Keylinesofenquiry/Pages/ResidentinvolvementKLOE.aspx

KLOE good practice examples – resident involvement:

https://webarchive.nationalarchives.gov.uk/20110311070809/http://www.audit-commission.gov.uk/housing/goodpractice/Residentinvolvement/Pages/Default.aspx

We should stress the importance of enough resources being properly deployed to achieve effective resident engagement and involvement. At the very least this would entail having the funding and staff in place to bring this about.

Incentives could be created to encourage expenditure by the accountable person on the empowerment of residents and we would suggest tax relief is made available to achieve this end.

We note the Residents' Voice estimated costs at Table 8 on page 127 of the consultation paper and consider that this is a cost that should not fall on the leaseholders. In the public sector it is met by the building owner so consideration should be given to exploring whether it is practical for this to happen in the private sector.

We appreciate that the consultation proposals concern residents but prospective purchasers should also be borne in mind. We consider there is a need for the accountable person//building safety manager to ensure that conveyancing solicitors receive the plan and/or the sellers include the information in the seller's pack.

A possible solution is for the building safety manager to provide prospective purchasers with the engagement plan and update on the current engagement status. Indeed Form LPE1 could be updated to include appropriate enquiries regarding the engagement plan.

Q.5.6
Do you think there should be a new requirement on residents of buildings in scope to co-operate with the accountable person (and the building safety manager) to allow them to fulfil their duties in the new regime? Please support your view.

Answer

We agree that there should be a new requirement on residents of buildings in scope to co-operate with the accountable person (and the building safety manager) to allow them to fulfil their duties in the new regime.

A requirement of co-operation already exists in current fire safety law so it would be logical for this to exist in any new regime.

Article 17(4) of the Regulatory Reform (Fire Safety) Order 2005. imposes a duty on occupiers of flats to co-operate with the Responsible Person so far as is necessary to allow them to comply with their duties under Article 17

Q.5.8
If a new requirement for residents to co-operate with the accountable person and/or building safety manager was introduced, do you think safeguards would be needed to protect residents' rights? If yes, what do you think these safeguards could include?

Answer

We do think safeguards would be needed to protect residents' rights if a new requirement for residents to co-operate with the accountable person and/or building safety manager was introduced.

If this involves access to the demised premises then an assurance that the person visiting is properly vetted and carrying suitable means of identification and an assurance of confidentiality if they are disclosing information about fire safety aspects regarding another flat.

Q.5.9
Do you agree with the proposed requirements for the accountable person's internal process for raising safety concerns? Please support your view.

Answer

We agree with the proposed requirements for the accountable person's internal process for raising safety concerns.

Q.5.10
Do you agree to our proposal for an escalation route for fire and structural safety concerns that accountable persons have not resolved via their internal process? If not, how should unresolved concerns be escalated and actioned quickly and effectively?

Answer

We agree to the proposal for an escalation route for fire and structural safety concerns that accountable persons have not resolved via their internal process.

We would stress the role and importance of technology in utilising the escalation route and indeed with the residents engagement strategy generally.

Q.5.11
Do you agree that there should be a duty to cooperate as set out in paragraph 290 to support the system of escalation and redress? If yes, please provide your views on how it might work. If no, please let us know what steps would work to make sure that different parts of the system work together.

Answer

We agree that there should be a duty to cooperate as set out in paragraph 290 to support the system of escalation and redress.

We hope that our comments prove helpful, but if you have any questions please feel free to contact me.

Yours faithfully

Anthony Essien
Chief Executive
E: Anthonyessien@lease-advice.org
T: 020 7832 2500