Building Safety Bill – Submission to the Public Bill Committee

FirstPort
September 2021

1. Executive Summary

The Building Safety Bill represents an impressive and ambitious set of reforms to the current safety regime around residential tall buildings. As the UK's largest residential property manager, FirstPort has a unique view of the sector, and will be asked to perform many of the day-to-day safety functions which are prescribed by the bill. We have boots on the ground and understand how buildings are kept safe, how the system works in practice, and how much important work costs.

We are grateful to the Government for its work and collaboration with us and others in the residential sector over the past four years, and are pleased to see such a comprehensive piece of legislation brought forward. We have also read the Government's response to the HCLG committee and are reassured to see so many of the committee's recommendations reflected in this version of the bill.

We know that much of this committee's work will focus on the very important debate around cladding remediation, which Parliament has focused on closely in recent months. We have not covered those matters in this response. While we continue to support our residents to remediate and replace combustible materials, we want to look beyond those current issues and share our views on the wider building safety regime which is proposed by the bill and which will apply to this sector for years to come.

Key to the new regime will be accountability and responsibility. By establishing a robust framework of command at each site, led by the Accountable Person, this bill will ensure clarity in most residential property developments around the country. There are however two circumstances, based on the current bill, which we think could present problems for both leaseholders and property managers who act on their behalf under the new regime.

Those circumstances are:

i. where a building is owned or managed by the residents themselves; and
ii. where a building is governed by a tri-partite lease, under which the management obligations are given to a named property management company.

In both of these circumstances, we consider that roles and responsibilities under the new regime (including the designation of the Accountable Person) risk being confused or given to an unintended or incapable person or organisation.

Where buildings are run by residents, we are at risk of creating a situation in which lay people are expected to fill the role of the Accountable Person. Many of the lay directors of resident-owned companies will clearly lack the time, resources, and expertise to carry out this role – and some will not have the appetite to take on the onerous personal liabilities that come with it. We fear this could lead to directors being reluctant to stay in post and an abdication of responsibility.

Where leases have been granted that contractually include a named property management company – often known as "named manager" leases – it seems likely under the bill that the role of the Accountable Person will fall to these property managers. Property managers do not own or construct buildings and we will not always have the legal right to take the actions required by the bill without permission from a building's owner. This risks separating the responsibility to act with the *means* to do so.

These are the two main issues which we feel must be monitored and resolved during the legislative and post-legislative processes if the new regime is to succeed. We would like them to bring to the committee's attention, and have also identified potential solutions. There are other areas covered in this paper which we equally feel should be considered and addressed as the system is developed, and we have set out the additional guidance and information which we feel is required to make them work.

We are enthusiastic about the idea of bold, balanced, and considered reform and want to ensure that the Government's work in this area is successful and that it benefits our residents around the country by making their homes safer.

In preparing our response, we have been mindful of the desire to give residents greater ownership and autonomy over their homes, through reform work on leasehold enfranchisement and the right to manage, and the drive to increase the use of commonhold. We feel that the points raised in this response will need to be addressed for that to work effectively.

2. Our analysis of the bill

2.1. Responsibilities and duties in the new regime

- The legal guidance around identifying the Accountable Person or Principal Accountable Person needs to be established as a priority to ensure it will be fit for purpose. In particular this will be important in relation to complex sites involving multiple interests, such as mixed-tenure and mixed-use sites, as well as where property managers have responsibilities but not ownership under tripartite lease structures.

Ensuring clarity of responsibility in higher-risk buildings is something we wholeheartedly support. It is essential that legal responsibility is explicit about which entity should register higher-risk buildings and take on ongoing obligations for monitoring building safety and engaging with residents.

The position and role of the Accountable Person is key to the success of the new system and should help provide greater simplicity around liability and responsibility for building safety – something that is missing within the existing building safety regime. We are pleased the Government has recognised the complexity of ownership and management systems in its response to the HCLG Select Committee's recommendations, including by introducing the role of Principal Accountable Person.

While we are broadly supportive of the framework that is being proposed by the updated bill, we have two main observations and areas of concern:

i. The complexity and diversity of building ownership and management in England and Wales means that where there is more than one Accountable Person, establishing the identity of the Principal Accountable Person is not always straightforward. In other instances, large developments may include a number of buildings and therefore multiple Principal Accountable Persons, the interplay between them and the responsibility for the wider site is also not currently clearly defined.
ii. Much of the implementation and material changes to the building safety regime will ultimately be defined by supplementary guidance. This includes the advice being produced by the Building Safety Regulator on the responsibilities of the Accountable Person and best practice for the Building Safety Manager. We hope there will be opportunities for the property management sector to work closely with the regulator to help shape this guidance based on our practical experience. To that end, we are currently responding to PAS 8673 on the competence of Building Safety Managers, run by the British Standards Institution and sponsored by MHCLG.

Relating to point (i), it is important there is a clear process for establishing the Principal Accountable Person, and stronger rules for how multiple Principal Accountable Persons in the same area of development interact. While the updated draft of the bill specifies that the First-tier Tribunal may determine this where it is unclear or disputed we feel that further legal guidance will be needed to help answer those questions in some cases – and it would be preferable to have clarity within the legislation or guidance than to rely on the Tribunal to determine this.

Currently, there are two specific scenarios in which we remain unclear how the Principal Accountable Person would be identified and would operate:

2.1.1. Complex sites, such as mixed-tenure and mixed-use sites

It is unclear how a First-tier Tribunal would determine the identity of the Principal Accountable Person at sites where more than one freeholder/head lessee is involved – particularly in cases where there is joint ownership of a building or wider development. For example where there is a combination of residential and retail uses and / or where a development comprises private and affordable housing with multiple freeholder interests.

Equally, a potential conflict could arise where there are two separate, but closely related, buildings where the condition and safety of one has a direct impact on that of the other. In these cases each

building may have its own Principal Accountable Person, but there is no single party with oversight of the development as a whole. We need further guidance about how Principal Accountable Persons should be required to work together in these cases, including via the duty to co-operate that Government has indicated it will introduce. We also require more information about how that duty will be measured and monitored, what will be considered effective cooperation, and exactly where it will be expected. We are concerned that without stricter rules governing the way multiple Principal Accountable Persons interact, the safety of complex sites could be undermined.

As set out in our November 2020 response to the Government's consultation on the draft bill, we believe one potential solution at sites with multiple owners could be to create a single building safety management regime or specific position to act for all Accountable Persons or Principal Accountable Persons across a development – therefore creating a framework for joint delivery, which would be funded by each of the parties according to their interest as a proportion of the overall site. However, clearly this could not absolve individual Accountable Persons of their duties, and the fundamental issue of having more than one line of accountability at the site would not be addressed by this model.

2.1.2. Tri-partite leases involving a property manager as "named manager"

Central to Dame Judith Hackitt's work on building safety was the recognition that buildings and their management are complicated and often involve several parties. This can include residents, the building owner(s), its asset manager(s), property manager(s) and other advisors and specialists.

One particular model of building management which we do not feel has been properly addressed in the bill is where leases have been granted that contractually include a named property management company – often known as a "named manager". Such arrangements introduce the property manager into the lease and impose direct responsibility to deliver services in return for payment via the collection of service charges. This is unlike more straightforward lease structures, where it is the landlord who is obliged to provide the services and entitled to collect the service charges, which they may choose to do via the appointment of a property manager to act as their agent, under a simple management agreement.

We are concerned that under Clause 69(1) and (2) of the bill as it stands, many property managers in tri-partite leases would be the Accountable Person for the relevant building:

> ***69 Meaning of "accountable person" etc***
>
> *(1) In this Part an "accountable person" for a higher-risk building is—*
>
> *(a) a person who holds a legal estate in possession in any part of the common parts (subject to subsection (2)), or*
>
> *(b) a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts.*
>
> *(2) A person is not an accountable person for a higher-risk building by virtue of 35 subsection (1)(a) if—*
>
> *(a) the person holds a legal estate in possession in the common parts or any part of them ("the relevant common parts"), and*
>
> *(b) each long lease of which the person is lessor provides that a particular person, who does not hold a legal estate in any part of the building, is under a relevant repairing obligation in relation to all of the relevant common parts.*

We have reservations over the viability of the property manager being made an Accountable Person in these instances, which will be exacerbated even further in the case of smaller and less established operators.

Tri-partite contracts with named managers were established to ensure a clear way for freeholders to remove their day-to-day maintenance obligations, but were in no way intended to create any form of long-term ownership or building interest for the named manager. Regardless of lease arrangements, the role of the property manager is to deliver management and maintenance services on behalf of leaseholders, which are paid for by service charge funds, rather than to provide overall oversight or take on liabilities for buildings. Named managers have no valuable asset on their balance sheet for

the building and have no funding options to take prime responsibility for the fabric of a building. In addition, we will not always have the legal right to take the actions required by the bill without permission from the building owner.

Giving property managers in tri-partite lease arrangements the ultimate responsibility for building safety would essentially give them accountability without the necessary resources or authority – ultimately making it more challenging for building safety duties to be executed. We therefore recommend that the legislation is amended to ensure that onerous responsibilities are not placed on businesses that are neither entitled to execute those responsibilities nor able to raise the necessary capital.

2.2. Competency and skills

- Required skills and competencies for building safety must be sufficiently nuanced and take into account a range of complex building types.

Regardless of who is the Accountable Person (or Principal Accountable Person), it is imperative that they are charged with the power to carry out the functions included within the bill and provide a whole-system approach to the management of building and fire safety risks. This will require new competencies within entities acting as the Accountable Person, as well as their advisors, contractors and the wider industry.

It is clear that some Accountable Persons will not have the capacity or expertise to perform the functions of Building Safety Manager. At many buildings it will therefore make sense for the Building Safety Manager role to be carried out by a competent third party. As many from across the sector noted in response to the draft bill, there was potential for an overlap or blurring of lines between the Accountable Person and Building Safety Manager. We are reassured that the updated bill makes it clearer that ultimate legal responsibility sits with the Accountable Person.

Equally, we are pleased to see the Government has noted the importance of ensuring the appointment of a Building Safety Manager must not become a 'tick box exercise' and a register of assessed Building Safety Managers should not negate the duties on the Accountable Person to carry out competency checks. While some general competencies and capabilities will apply to all buildings, the diversity of building types that fall within scope of the new regime means it is important that Accountable Persons carry out due diligence to ensure that their appointed Building Safety Manager is suited to the specifics of the building they will manage.

2.3. Resident management

- We remain concerned over the exposure of resident managers to liabilities under the bill. Considerable work will be required to ensure that adequate support is available to assist residents in this position.

In many buildings across the country, responsibility for management of the building lies with some or all of the leaseholders themselves. This scenario can come about in several ways:

i. The freehold to the building may be owned by a company of which the members or shareholders are the leaseholders. This ownership structure may have been in place from the time the leases were granted, or as a result of a later purchase (or "enfranchisement") by the leaseholders.
ii. The leases of the individual units place the responsibility to manage the building, provide services and collect service charges on a company owned and run by the leaseholders (a "Resident Management Company", or "RMC").
iii. A group of leaseholders may have acquired management of the building through a "right to manage" claim brought by a company specifically set up for that purpose.

A small number of buildings/developments are also set up as commonholds, where ownership of and responsibility for the building/development lies with a "commonhold association", of which all the unit owners are members. For convenience, we refer to these kinds of companies collectively as "resident managers".

We work directly with over 1,000 resident-managed developments across the country – more than any other company in our sector. We recently surveyed the directors of RMCs with whom we work

and the findings confirmed concerns we raised in our response to the draft bill: 72% said they are worried about new and proposed changes to regulation and compliance in building safety.

Fundamentally, we are at risk of creating cases where it is lay people (residents) who are the Accountable Person.

Many lay directors will clearly lack the time, resources, and expertise to carry out this role – and some will not have the appetite to take on the onerous personal liabilities that come with it. We fear this could lead to directors being reluctant to stay in post. This outcome would be at odds with Government's longstanding wider desire to give residents greater ownership and autonomy over their homes, through its ongoing reform work on leasehold enfranchisement and the right to manage, and its drive to increase the use of commonhold.

We suggest that this concern will need to be addressed by way of a robust scheme of support, guidance and training for resident managers, available free of charge. We also envisage that professional entities (including property managers) are likely to play a key role in assisting resident managers to discharge their liabilities.

2.4. The Building Safety Charge

- It is important for the committee and ultimately residents to recognise that in some cases we believe building safety charges could dramatically exceed the 'average' itemised by the Government's impact assessment. Transparency in the charging process will be important to establish confidence in the system.
- Guidance is needed to understand the scope and lines of responsibility around taking steps to seek funds for remediation from third parties, ensuring that this process is transparent and has clear parameters in place to prevent it from delaying essential investment in a property.

The Building Safety Charge ("the charge") will be a vital part of the new regime and provide the resources required to make buildings safe.

However, like all costs in residential property, there will be complexities in how it is calculated and administered. We must ensure this is done fairly and proportionately to maintain the trust of property owners, and we require guidance on a number of details from government and the regulators to support that.

The bill states that the charge will only cover the ongoing costs of the new regime, and leaseholders will not be asked to pay for the remediation or mitigation of any historic fire safety defects. Leaseholders are not at fault for historic faults and we wholeheartedly agree that they should not be asked to pay for them. The bill also raises the expectation that costs can only be included in the charge if the landlord has sought to recover them from third parties first. Again, we agree with the principle of this requirement that leaseholders should not pay where funds have been made available by Government, developers, or others.

However, these requirements must be accompanied by further considered guidance to provide pragmatic solutions in cases where the circumstances are more complex. As property managers, part of our role is to communicate and explain often complex issues to residents, and will include the way the charge is collected and spent. We need support and advice to ensure the charge is affordable and transparent for leaseholders in all cases, so that everyone understands their responsibilities and liabilities under the new system.

2.4.1. The costs of the new regime

What is covered by the charge must be clearly prescribed. We anticipate that it will pay for the responsibilities of the Building Safety Manager, to monitor and carry out the safety requirements of the building. Those activities will comprise a major part of the property manager's role in the new regime. Another significant responsibility will be the management of the golden thread of information about each building.

It is our view that the creation, storage and processing of that data and information will be onerous and potentially costly. We are not clear however on whether that will be paid for through the charge. If it is, we anticipate it would cost an amount which would cause the average charge to exceed the £16 predicted by the Impact Assessment. We want to make the committee aware of these questions, and to encourage it to be taken into consideration.

The committee should also be aware of a distinction between new-build buildings and existing developments. For new-build, the golden thread will be established before flats are sold and before the charge can be levied. Supporting guidance should place the onus on developers to establish a robust method of collecting and managing golden thread information as part of the build process.

In existing buildings, it will be the landlord's responsibility to establish the golden thread, which in most cases will be carried out by the Building Safety Manager on their behalf. The MHCLG has been clear that the charge only applies to the new regime and should not be used to pay for the cost of remediating historic issues. In the context of the golden thread, at the vast majority of buildings the necessary information will not be readily available, and it is essential that the cost of compiling it is recoverable. It is our view that this would be best done as part of the charge, where it can be clearly prescribed.

We would also like to make the committee aware that the nature of the property management sector, in which operators range from large, professional service providers, to smaller, less-accredited outfits, means that in practice the process of developing the golden thread will be more cost-effective in some buildings than in others.

2.4.2. **The duty to consult third parties**

The bill places the duty on Accountable Persons, and by extension Building Safety Managers (often property managers), to take reasonable steps to ascertain whether monies can be taken from a third party before any costs are applied to the charge. We want to raise this requirement to the committee so that it can ensure it is closely scrutinised and clearly governed by supporting guidance.

Property managers do not have the legal permission, nor the funds, to pay up front costs for services which are later recouped through the charge or from third parties. Management budgets are closely calculated and services can only be rendered when there are funds in a building's accounts to pay for them. There can therefore be no expectation placed on landlords or managing agents to pay up front costs while enquiries are made with third parties.

We are particularly concerned that where third party funds are contested by private companies, such as applications for funding from developers under newly extended building warranty periods, there may be significant delays during which property managers will not be able to raise funds to pay safety costs and will require a mechanism to request those funds from leaseholders. We therefore request that the bill and its supporting guidance make clear the reasonable steps which property managers will be permitted to take in the situation and the time frame attached to those.

September 2021