London Councils – Public Bill Committee

Building Safety Bill - Written Evidence Submission

About London Councils

London Councils is a cross-party representative body for all 32 London boroughs and the City of London Corporation. As such, our members have a direct interest in the outcome of this Bill from the perspective of a social landlord, housing and planning authorities, and as custodians of the safety and prosperity of local communities throughout the capital.

Introduction

London Councils welcomes the opportunity to submit evidence to this committee and continue to play its part to ensure buildings across the capital are safe for London's residents.

Since the Grenfell Fire tragedy, London Councils and the London Housing Directors' Group have worked with government and other stakeholders to shape the Building Safety Bill (BSB) in such a way that delivers real change that is practicably implementable as well as effective and ambitious. The BSB is a welcome publication, but it is just one part of the wider regulatory framework which needs to be reviewed. The implementation of the Fire Safety Act, further secondary legislation, and the review of the Approved Documents are all aspects of the new regime which must work together to reform building regulations to the required standard.

We hold to our original position that creating new legislation to address gaps and discrepancies in existing legislation is not the best long-term solution for the housing sector. What is needed is a full review from first principles to develop a new, clear and decisive framework which mirrors the full life cycle of a building, addresses the gaps and duplication in regulation, clarifies roles and responsibilities, and provides a sound basis to enable councils and other land owners to create safe and sustainable housing, fit for now and the future.

Notwithstanding the above, we do believe that the BSB has the potential to broadly meet its objectives in strengthening the existing regulatory system to ensure that new and existing buildings are built and maintained to safer standards. In order to achieve this however, there are some critical issues which must first be addressed before the Bill is enshrined in law. These issues are illustrated below in our key messages.

Key messages

1. Funding/resources

- ***Costs the BSB imposes on councils as both landlords and regulators must be fully funded.***

London Borough Councils are only too aware of the financial implications of fire safety issues resulting from the systemic failings in fire safety and building regulation that have come to light since the Grenfell fire tragedy.

We believe that any new burdens imposed upon councils must be fully funded by government. Maintaining the golden thread of information and producing safety case reports, hiring and training Building Safety Managers (BSM), intrusive or otherwise building surveys, new IT and BIM models to facilitate these processes, and countless other costs both known and yet unforeseen, all constitute a rising threat to the financial stability of councils.

Council Housing Revenue Accounts are strained to unprecedented levels across the capital - making the case for new burdens' funding commensurate to the task, absolutely vital for the new building safety regime to function as it should.

2. Scope of buildings covered in the new regulatory regime

- ***Height is too narrow a risk factor to be the sole identifier for buildings of high risk. A better approach would be:***
    - ***For new buildings: The Gateways should apply to all major works, including for buildings under 18m.***
    - ***For existing buildings – adapt the Building Prioritisation Tool that has been developed for the Fire Safety Act to identify higher risk buildings based on the whole risk profile of the building.***
- ***All buildings where vulnerable people sleep i.e. care homes and hospitals - should be covered under the regime.***

The latest iteration of the BSB includes a definition in Clause 62 of a higher-risk building (HRB). Further, Clauses 66 & 67 give the regulator and the Secretary of State respectively, the right to recommend and advise changes to that definition. This is a welcome move; however, we question this rather arbitrary use of the 18m threshold and have concern for the myriad unsafe buildings under that threshold which largely escape the more rigorous scrutiny of the new regime.

Buildings under 18m have proved to be a real danger to life with a series of recent sub-18m building fires demonstrating this e.g. the Cube student hall of residence in Bolton, the fire at Samuel Garside, Barking, and the fire in Worcester Park. We continue to make the case to government to implement legislation based on the 'overall risk profile of a building', not purely based on an arbitrary height measurement.

This two tier building safety regime is also inequitable, penalising the safety of residents that live in buildings below 18m, and forcing those same residents to pay for remediation work through a government loan facility rather than a grant as happens for cladding remediation in

buildings over 18m (through the building safety fund). The insurance and mortgage sectors are demonstrating their confusion over this two-tier system, by continuing to demand EWS1 forms, despite recent government advice against the practice.

We also welcome the government including hospitals and care homes in the scope of the regime, this is something we have consistently lobbied for. It is strange however, that these buildings are only subject to the new regime if over 18m. The scope of what constitutes an HRB, should include all buildings where vulnerable people sleep (excluding private individual dwellings), such as hospitals and care homes, which are often (or nearly always) less than 18m high.

We recommend therefore, that the initial scope of the regime enshrined in the BSB be more ambitious from the outset, and based on the full risk profile of the building. This will allow building owners the certainty to best utilise their resources in preparation for the new regime. In this circumstance, the regulator must transition in the risk threshold over time to avoid resources being overwhelmed at the outset.

3. Transition period

- ***Building owners need sufficient time and financial resources to deliver the required safety improvements, and the sector more broadly needs sufficient time to upskill and develop capacity***

We understand that the HSE has been tasked with developing a transition plan and very much welcome this news. However, we urge expediency in bringing this forward. The raft of new expenses and responsibilities that councils will be subject to under the new regulatory regime are simply not deliverable without corresponding new burdens funding, and a phased roll-out of the new regime.

We strongly recommend a pragmatic approach whereby a minimum of a 5-year transition period is put in place, working towards the recommendations' full implementation in a phased approach based on a combination of height and risk profile. Building owners need sufficient time and financial resources to deliver the required safety improvements, and the sector more broadly needs sufficient time to upskill and develop capacity to service demand for technically competent professionals operating in this area.

4. Leaseholder service charges/ building safety charge

- ***Government should pay up-front for remediation costs until such a time as a cost recovery mechanism is in place - either from those directly responsible or from the private developer industry.***
- ***Any protection for leaseholders against remediation costs should also cover social housing providers – otherwise council tenants will end up paying for developer's incompetence and protecting the profits of developers.***
- ***Government must specify what "demonstration of alternative funding avenues" means in practice.***

By far the most controversial aspect of the government's approach to building safety in recent months has been its failure to commit to protecting all leaseholders from paying to fix flaws that were not of their making.

London Councils lobbied for the proposed building safety charge to exclude historical costs; government has listened to this argument and the BSB would now only allow building owners to use the building safety charge to cover the ongoing costs of the new regulatory regime. This is welcome news. However, where existing leases allow for historic remediation costs to be passed onto leaseholders, we increasingly see this happening as a host of building safety defects are brought to light which are a direct result of the decades long failure of the building safety regulatory regime. The Building Safety Fund, whilst welcome, only covers the remediation of dangerous cladding in some buildings (notably not local authority buildings) - a fraction of the total costs.

The BSB's answer to protecting leaseholders is to place additional duties on building owners to explore alternative cost recovery routes before passing costs to leaseholders i.e. the Accountable Person (AP) needs to demonstrate external funding/ cost recovery routes have been exhausted before laying charges. What exactly does this mean? Would freeholders need to pursue claims through the Defective Premises Act for example? A potentially costly legal exercise with an uncertain outcome given the difficulties with pursuing this route (see section 8 below).

This engenders a financial risk to councils who may need to expend considerable resources exploring routes to funding. Moreover, the burden of proof may prove very hard to demonstrate to leaseholders, and could lead to legal challenge, and an inability for councils to recover costs. This will also do little to help leaseholders unless there "is" a source of external funding that meets the needs of the fire safety defects being uncovered, which there currently is not.

We believe that leaseholders should be explicitly exempt from the cost of remediating historical building safety defects which are not their responsibility, and indeed the result of a poorly regulated sector. In the short term, the Government should foot the bill, until such time as mechanisms for cost recovery have been developed, moreover, local authorities and their tenants cannot afford to continue picking up the tab. Deviations from this central principal will only serve to obfuscate and delay remediation work.

Should the drafted version of the BSB proceed unchanged, as a bare minimum, government must specify what demonstration of alternative funding avenues means in practice – lest it be left to the courts to decide.

5. Choosing your own regulator

- ***Duty holder choice should be removed entirely from the building control system and replaced by a system of independent appointment.***

The Hackitt report identified the ability of dutyholders to choose their own building control body and the conflict of interest inherent in that relationship as a major weakness of the current regime. Despite this, the BSB only removes dutyholder choice from building work on higher-risk buildings and so does nothing to remove conflict of interest from the vast majority of building work (given the narrow definition of an HRB by height).

We would urge Government to remove dutyholder choice entirely from the building control system, in keeping with its pledge to implement the Hackitt recommendations. Moreover, the Regulator should be required to use local authority resource in the first instance on the face of the Bill to protect the significant investment in building control teams local authorities will be required to make as a result of the Bill.

6. Building Safety Managers

- ***Clarity is needed on when BSM exemptions apply.***

The BSB is still not clear on whether the BSM is a function for an organisation to fulfil or an individual role. It seems to say that it is both, or at least can be both. This needs clarity before coming into force.

The draft Bill now firmly puts ultimate responsibility on the AP "*we will remove statutory duties on the Building Safety Manager, vesting responsibility – and accountability – for the building safety duties solely on the Accountable Person*". This is welcome news as in previous iterations of the Bill there seemed to be some duties on BSMs, blurring the lines of accountability. The AP will, instead, be assisted by the BSM. This should go some way to clearly delineating the role of the BSM and clarify the position for professional indemnity insurance etc.

However, Clause 81 provides an exemption for the appointment of a BSM where the principle AP is qualified, individually or as an organisation, to take on the role. We are concerned that this row back position will create an opaque landscape for the BSM role requirements. We urge government to spell out and be clear on the circumstances in which they envisage this exemption being utilised.

7. The leaseholder access problem

- ***More robust powers of entry are required to maintain the golden thread of information and conduct safety works. The time and resources needed to pursue county court orders is significant, and will only grow as landlord duties increase. We do not believe that this has been adequately addressed to date.***

Gaining access to leaseholder owned properties in multi-occupancy residential buildings is a key concern of London Councils. The BSM and/or the AP will not be able to holistically manage a building without robust powers to enter, inspect, and enforce action where appropriate. Moreover, establishing and maintaining the 'Golden thread' of information will be a big challenge, particularly in older stock where little to no design or handover information is available and intrusive or otherwise surveys will be needed.

London Councils has been consistently raising this issue for a number of years. The BSB's answer comes in clauses 95-97. These clauses place duties on residents, and give the AP the duty to issue a contravention notice, and allow the AP to request access to a property for a reason relating to assessing building safety risk or compliance with residents' duties. The AP must apply to the County Court for the request for access to be required.

Whilst this is a 'step in the right direction', we believe that more robust powers of entry are required. The time and resources needed to pursue county court orders is significant, and will only grow as landlord duties increase. This is particularly true in London where many social blocks have large numbers of leaseholders.

We do not believe that this has been adequately addressed to date, and recommend that government urgently consult the sector to work up a long term and effective solution. London Councils would be willing to facilitate or participate in a working group on this issue.

8. New 15-year limitation period for certain Defective Premises claims

- ***Loopholes such as the use and accountability of SPVs (special purpose vehicles) needs to be addressed if this expansion of the Defective Premises Act is to be used effectively.***
- ***Leaseholders' capacity to bring complex claims against developers as well as freeholders' incentive to do so limit the effectiveness of this Act.***

Clause 125 & 126 add new sections to the Defective Premises Act 1972 and the Limitation Act 1980 respectively, meaning that work carried out on existing buildings, e.g. refurbishment or remediation work, will now be covered, and the limitation period to bring claims will be extended from 6 to 15 years. This will apply retrospectively. This is a positive addition to the BSB and in line with our lobbying.

It is not however, a panacea to holding developers to account. Commentators have questioned whether leaseholders will have the resources to launch complex legal claims against developers, many of whom are no longer in business. Many developers build through SPVs which they can then wind up after a few years. There is a danger that this addition to the BSB might encourage that sort of behaviour.

Additionally, who would make the claim? If individual or groups of leaseholders are to be the instigators of such a claim, the legal cost may be disproportionately high. This means that freeholders will be the protagonist in bringing claims to bear, many of whom lack the motivation to spare leaseholders the costs.

Another problem being debated is the clause that states that where a claim is made outside of the six-year limitation period, the court will be able to dismiss it if continuation would breach the defendant's human rights. The power to dismiss claims based on developers' human rights has been referred to as a "loophole" which could limit the effectiveness of the reforms for leaseholders, and thus merits some further explanation.

9. *Gateway two levy*

- ***Social developments must be exempt.***

The developer levy for HRBs which will be applied at Gateway two is welcome. However, social Housing developments must be exempt lest social tenants indirectly subsidise the failings of developers. Where mixed developments exist, this exemption must be proportionately applied.

Social housing is hugely underfunded and under provided, and already has significant hurdles in Right to Buy and social housing rent caps which adversely affect social landlords' ability to meet the burgeoning demand in London. One more financial penalty for providing an essential public good is not acceptable, particularly in London where high land and development costs already pressure the viability of many projects.

10. Introduction of Principle AP role

- ***The Bill needs to be clear on the requirements placed on APs and how those duties will work in practice in buildings with complex ownership structures.***

The freeholder or managing agent will be the principal accountable person – the freeholder where both exist. With regard to complex buildings i.e. multiple APs, Gov states '*we are*

working with stakeholders and experts to clarify accountability in buildings with complex ownership structures and will amend the Bill to ensure different dutyholders' responsibilities are clear and transparent'.

What's also not yet clear, is at what level the AP will or should sit in council landlords' organisations i.e. Chief Executive, Housing Portfolio Holder etc. Will this decision be at local discretion or mandated in secondary legislation? Clarity is needed on the requirements placed on the AP so that councils can get on with designating lines of accountability.

11. Detail/secondary legislation

Government has committed to bringing forward the relevant pieces of secondary legislation throughout the passage of the BSB to 'fill in the details'. Not least to coordinate the various parts of the building safety regime i.e. HHSRS review, the new building safety regulator, construction materials regulator, new homes regulator, the Fire Safety Act etc.

We urge government to bring this detail to the forefront asap. Councils in the meantime are trying to prepare for things like the safety case regime, but are hesitant to commit significant resources in these lean times without clarity on what exactly the requirements will be.