

Pre-legislative scrutiny of the Draft Building Safety Bill
Response from ARLA Propertymark and NAEA Propertymark
September 2020

Background

1. ARLA Propertymark is the UK's foremost professional and regulatory body for letting agents, representing over 9,500 members. ARLA Propertymark agents are professionals working at all levels of letting agency, from business owners to office employees.
2. NAEA Propertymark is the UK's leading professional body for estate agency personnel, representing more than 11,000 offices from across the UK property sector. These include residential and commercial sales and lettings, property management, business transfer, auctioneering and land.

Summary

Propertymark acknowledges and accepts the need to improve building safety after the tragic Grenfell Tower fire, but we have concerns about the practical application of the following elements contained within the Draft Building Safety Bill and costs to leaseholders. These include:

- Recruitment, training and the role of Accountable Persons and Building Safety Managers
- Gaps between the new Building Safety regime and legacy stock
- Material information and the remediation of any unsafe cladding
- Scope of the New Homes Ombudsman Scheme

Feedback

Recruitment, training and the role of Building Safety Managers and Accountable Persons

3. Propertymark has three concerns about the appropriate scope of the new regulatory regime and the role of Building Safety Managers and Accountable Persons. Firstly, we are concerned about the sheer number of Building Safety Managers and Accountable Persons who will need to be recruited and trained to meet the requirements of the Draft Building Safety Bill. Currently, there are not enough qualified individuals to fill these roles and the industry estimates that around 1,200 Building Safety Managers will be needed. Secondly, under the new regime, Building Safety Managers and Accountable Persons will have to produce a Safety Case Report to include a Resident Engagement Strategy and provide all residents with

details including fire and structural safety information on how to reduce the risk of fire in individual dwellings. However, it is unclear from the legislation as to whether this includes the Fire Risk Assessment. We would caution that this document is heavily detailed and contains very technical information. Consequently, we are concerned that it is not suitable to be provided as a consumer document and an alternative should be investigated. Thirdly, we are concerned about how under the new regime Building Safety Managers and Accountable Persons will interact with landlords, managing agents, letting agents and estate agents if there is no statutory duty to do so. Under the rules, once the building is occupied, an Accountable Person will have to be appointed to ensure the ongoing fire and structural safety of the building and to proactively engage with residents. However, it is not clear from the Draft Building Safety Bill whether this includes engagement with landlords, letting and estate agents who will be marketing, letting, and selling these types of property. For instance, under the Consumer Protection Regulations, letting and estate agents must provide all material information about the property to all prospective tenants and buyers so they can make a reasonable assessment as to whether to continue with the transaction or not.¹ To this end, a better route of communication needs to be established through the Bill between the Accountable Person and those who interact with the property and provide information on building safety. This will also help to ensure that Building Safety Managers and Accountable Persons know who owns a flat and who is living in the property as and when these change throughout the life cycle of the building.

Gaps between the new Building Safety regime and legacy stock

4. The Draft Building Safety Bill does not make a distinction between historic problems in existing buildings and new buildings going forward. Consequently, there are limited protections for leaseholders, and we have three main concerns. Firstly, we are concerned about the new Building Safety Charge and the way leaseholders will pay for fire safety works and building defects. Secondly, the appropriate funding models that would mitigate unaffordable costs for leaseholders that the UK Government is currently investigating must form part of the Bill and be legislated for. Thirdly, there is currently no statutory methodology of assessing external wall systems and there is no document that confirms the fire safety of a building in terms of the external wall system. These issues must be addressed to provide greater consumer protections and ensure leaseholders do not face excessive charges.
5. The way in which the new Building Safety Charge is structured in the Draft Building Safety Bill will make it much easier for building owners to pass the costs of remedial work to

¹ <https://en.powys.gov.uk/article/4854/Advice-for-Estate-Agents>

leaseholders. In the Draft Bill the Building Safety Charge is set out as a separate payment and not included in the existing Service Charge arrangement. We believe that this could be open to abuse, because, for instance, where remedial work is classed as 'building safety' this means that legal processes can be sidestepped. Under current laws when remedial work is needed that cost more than £250 per leaseholder certain procedures including consultations and tendering must take place. Under the new proposed regime for leaseholders to pay we do not think it is fair just to have obligations on building owners to provide accurate estimates for building safety charges, with leaseholders able to refuse payment if the charges are deemed 'unreasonable' or if the freeholder does not issue a clear breakdown of costs. Furthermore, we know from the Draft Building Safety Bill's Impact Assessment that the cost of appointing a Building Safety Manager alone is estimated to be between £6,400-£10,000 per building. This is in addition to average estimated costs per building (18 metres or higher) of between £8,000 and £17,000 that leaseholders are expected to pay.² Therefore, if actual tests for reasonableness were included in the legislation for establishing Building Safety Charges, this could help to reduce costs for leaseholders who as it stands are being left to pay for historical problems that are no fault of their own on top of the payments to cover the new measures introduced by the Draft Bill. Consequently, apart from transparency we see no reason why the Building Safety Charge is a separate cost and has not been incorporated into existing Service Charge arrangements. As a separate charge, leaseholders are likely to have even less protections than what the current system provides.

6. The appropriate funding models that would mitigate unaffordable costs for leaseholders that the UK Government is currently investigating must form part of the Bill and be legislated for. As it stands, we are concerned that the only real mechanism the UK Government has in order to fund the cost of remedial work is to charge leaseholders because this is all that has been set out in legislation. Unfortunately, the UK Government's £1.6 billion cladding remediation grants for the public and private sectors will not cover all the unsafe cladding present in thousands of properties inhabited by half a million residents.³ Consequently, this is likely to result in large numbers of leaseholders living in hazardous and unsellable properties. The UK Government must do more to reduce the financial burden on leaseholders and ensure that building owners pay towards the cost of fire safety works and building defects.

7. Propertymark is concerned that there is currently no statutory methodology of assessing external wall systems and there is no document that confirms the fire safety of a building in

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901877/Draft_Building_Safety_Bill_Impact_Assessment_web.pdf

³ <https://www.gov.uk/government/news/new-1-billion-building-safety-fund-to-remove-dangerous-cladding-from-high-rise-buildings>

terms of the external wall system. Building regulations or visual inspections do not guarantee safety of buildings and cannot confirm issues with wall systems. A new EWS1 Form has been established as a set way for a building to confirm that an external wall system on residential buildings has been assessed for safety by a suitable expert. However, this is not a statutory obligation. Furthermore, a Fire Risk Assessment does not include wall systems and changes in UK Government advice in January 2020, bringing all buildings into scope, mean some residential buildings below 18 metres which have 'specific concerns', may now require an EWS1.⁴ Examples include four to six storey buildings which may have combustible cladding or balconies with combustible materials and therefore are a clear and obvious risk to life safety and may require remediation in accordance with the latest UK Government advice. This means that there are likely to be more buildings with issues than initially expected. The process itself, involves a qualified professional, such as a fire engineer, conducting a Fire Risk Assessment on the external wall system, before signing an EWS1 form, which is valid for the entire building for five years. However, there is a finite number of competent people to carry out the inspections of the wall systems. Furthermore, there is also a huge problem with PI insurers reducing or withdrawing PI cover from fire engineers. As a result, the advice from the Ministry of Housing, Communities and Local Government (MHCLG) has created a gap between buildings going forward and legacy stock. Until the UK Government creates an alternative way of assessing and remedying buildings with flammable cladding, the blight to existing housing stock could stagnate the market and result in a rise in people losing their homes.

Material information and the remediation of any unsafe cladding

8. To achieve compliance with the Draft Building Safety Bill, residential blocks will need to ensure the remediation of any unsafe cladding. However, there is a huge lack of awareness amongst letting agents and estate agents who buy, sell, and rent property that fall within scope of the new regulatory regime. In relation to building and fire safety, once an agent holds information that a building may be unsafe, they must disclose this to a potential tenant or perspective buyer as it is material information that may affect their transactional decision. However, too often there is a hostile relationship between the freeholder and leaseholders, with little information dripping down to those whose lives are most affected. Furthermore, many agents are just not aware of the problem and although that does not relieve their responsibility as they should ask the question, many are not asking through lack of guidance and ignorance. Unfortunately, the Draft Building Safety Bill does not help to bridge this gap and it does very little to assist those who are involved in the managing and buying and selling

⁴ <https://www.gov.uk/government/publications/building-safety-advice-for-building-owners-including-fire-doors>

of property that are in scope of the new regime. There is no mention of the role of letting or estate agents within the Draft Building Safety Bill and it is not clear from MHCLG whether guidance will be provided to the sector. Extensive guidance and training will need to be provided to the sector to ensure consumers get the information they need and are protected.

Scope of the New Homes Ombudsman Scheme

9. The remit of the New Homes Ombudsman Scheme as set out in the Draft Building Safety Bill should be extended in five ways. Firstly, freeholders of leasehold properties who are not using a managing agent should be required to belong to the New Homes Ombudsman Scheme. Secondly, the New Homes Ombudsman Scheme should only cover complaints in relation to a purchaser's new build home where redress cannot be sought elsewhere. Thirdly, the New Homes Ombudsman Scheme should charge property developers as price per unit. Fourthly, in addition to the provisions to obtain and display scheme membership the Government should embark on a major communication campaign involving all the actors and partners in the sector to ensure that organisations are aware of the requirement to belong to the Scheme. Fifthly, to further enhance protections for consumers across the UK Government must extend the requirements under the Estate Agents Act 1979 to housebuilders' sales staff and include the sales staff of housebuilders in the requirements for sales agents to be qualified as set out in the Regulation of Property Agents Working Group report published in July 2019.⁵ To provide further clarity and protection for consumers these elements should be set out in the Bill.

10. The Draft Building Safety Bill says that membership of the New Homes Ombudsman Scheme is open to all developers and may also include provision for persons other than relevant owners. We believe that membership should be more clearly described and include the requirement for freeholders of leasehold properties who are not using a managing agent to belong to the New Homes Ombudsman Scheme. Currently, there is no requirement for them to do so and consumers are left without access to redress. All blocks of flats require an element of property management to deal with issues such as the maintenance of the common parts. However, most freeholders are not professional property managers and do not have the systems in place to be able to handle this work and deal with issues that arise. Therefore, it is usually out-sourced to a professional firm of managing agents who, unlike the freeholder, are required to belong to one of the two government-approved redress schemes. However, where the management of the property is not outsourced, consumers are left not knowing who to raise a complaint with and without access to independent redress should

⁵ <https://www.gov.uk/government/publications/regulation-of-property-agents-working-group-report>

they be dissatisfied with how the freeholder has dealt with their complaint. In order to ensure that consumers have access to redress we believe all freeholders of new build blocks who are not using a managing agent to manage the property must belong to the New Homes Ombudsman Scheme.

11. The New Homes Ombudsman Scheme should only cover complaints in relation to a purchaser's new build home where redress cannot be sought elsewhere. This would prevent unnecessary double redress. Where solicitors, estate agents and managing agents are already required to register with an ombudsman scheme the consumer has access to independent redress.
12. Propertymark believes that the most appropriate way for the New Homes Ombudsman Scheme to charge property developers is a price per unit. To this end, a flat membership rate and a pay per complaint system would have more of an adverse impact on smaller housebuilders than a price per unit. Introducing a levy on a per house basis is the fairest way because developers who build more will pay more.
13. In addition to the provisions to obtain and display Scheme membership as set out in the Draft Building Safety Bill, the UK Government should embark on a major communication campaign involving all the actors and partners in the sector to ensure that organisations are aware of the requirement to belong to the New Homes Ombudsman Scheme. The UK Government should do this by working with local authorities, government agencies, financial institutions, property agents, builders, developers, and professional bodies. Local authorities as planning authorities can ensure developers and builders belong to the New Homes Ombudsman Scheme before planning permission is granted. Mortgage lenders can also signpost information when consumers look to ascertain a mortgage when purchasing a new build property. The UK Government should also work with the professional bodies and warranty providers within the sector such as Propertymark, Consumer Code for Home Builders⁶ and Home Builders Federation (HBF) to disseminate information to property agents and developers who sell new build homes.
14. To further enhance protections for consumers across the UK the Government must do two things. Firstly, it must extend the requirements under the Estate Agents Act 1979 to housebuilders' sales staff. Secondly, the UK Government must include the sales staff of housebuilders in the requirements for sales agents to be qualified as set out in the Regulation of Property Agents Working Group report published in July 2019. Ensuring that everyone involved in the house buying and selling process are suitably qualified, meet minimum

⁶ <https://consumercode.co.uk/>

competency standards and the consumer has the same levels of protection is the only way to drive up standards of service. To create consistency in standards across the UK in the house buying and selling process the UK Government must extend the requirements under the Estate Agents Act 1979 to housebuilders' sales staff. The Act regulates work as an estate agent. It ensures that agents work in the best interests of their clients. This includes making sure that both buyers and sellers are treated honestly, fairly, and promptly. Furthermore, if estate agents do not comply with the law, they could be banned from working and if they ignore a ban they could be prosecuted and fined. The requirements of the Act cover estate agents working across the UK and help to ensure that selling activities they are engaging in are of a consistently high standard. In order to reduce complaints against housebuilders about their sales services and about the contents of their leases and sale agreements it is vital that they fall under the Estate Agents Act. The UK Government must include the sales staff of housebuilders in the requirements for sales agents to be qualified as set out in the Regulation of Property Agents Working Group report. Without consistency in entry requirements to work in the sector, consumers moving between property on the existing market and purchasing new build property or vice versa will face different service levels and standards. Whether consumers are purchasing property via an estate agent in a high street branch, online or a sales agent in an office on a development site, staff must be trained to an appropriate level with clear oversight arrangements in place. The focus of the new regulatory regime must be on ensuring that the same consumer protections exist across the whole industry rather than only looking at certain aspects of the house buying and selling process.