

**Department for Levelling Up, Housing and Communities consultation on alternative cost recovery
for remediation works
Response from Propertymark
March 2023**

Background

1. Propertymark is the UK's leading professional body of property agents, with over 17,000 members. We are member-led with a Board which is made up of practicing agents and we work closely with our members to set professional standards through regulation, accredited and recognised qualifications, an industry leading training programme and mandatory Continuing Professional Development.

Overview

2. The Department for Levelling Up, Housing and Communities is seeking views of statutory guidance and policy proposals for legislation that would create a duty for landlords to take reasonable steps to ensure that all alternative avenues of cost recovery have been explored before passing remediation costs on to leaseholders. Propertymark is particularly interested in responding to this consultation as we continue to campaign for greater protection for leaseholders¹.

Summary

3. Propertymark is concerned that the current UK Government proposals do not sufficiently protect leaseholders, as many could still be faced with large bills, even if landlords have taken the time to seek alternative avenues to cover remediation costs. Ultimately, if alternative avenues have been explored, we would expect the building developer or freeholder responsible for the defect to pay for the remediation, rather than any costs being passed onto leaseholders or the taxpayer.
 - **Those who are responsible for defects must pay for the remediation costs** – any proposals must ensure that as few leaseholders as possible cover remediation costs.
 - **The scope for protections must be as broad as possible** – this will ensure that fewer leaseholders face additional charges due to the building being slightly smaller than the required height or the defect not quite meeting the scope.
 - **Proposals must be reasonably achievable within the current system** – any proposals must take into account current capacity of services or organisations expected to follow these proposals. If the proposals lead to a substantial backlog of cases, then cases could be dropped or fail to cover remediation costs which would be passed onto leaseholders.

¹ [Greater support needed for leaseholders | Propertymark](#)

Definitions

4. For the purposes of this response, we have used the term “landlord” synonymously with freeholder of the entire building. We use the term “leaseholder” to describe owners of individual residential properties within the building that the landlord owns, and occupiers to describe individuals living in the building who may or may not own the individual residential properties.

Questions

Question 1: Do you agree or disagree with the types of building to which we propose to apply this duty?

- **Agree**
- **Disagree**
- **Not sure**
- **Something else**

5. Propertymark disagrees with the current proposed types of building where the duty for landlords to seek alternative methods to recover remediation costs can be applied. We think this for two reasons and offer an alternative solution. Firstly, we believe that leaseholders nor landlords who are not responsible for defects should not cover any of the costs. Secondly, the current scope is too limited and would therefore lead to some leaseholders arbitrarily covering remediation costs, even if they were not responsible, just because the building fell slightly outside the scope of the scheme. We therefore propose a broader scope of the duty that includes all buildings, with no limit on the height or type of the building. The only conditions to be covered by the scope would be that there are at least two separate residential units and that the leaseholder(s) were not responsible for the defect. This would minimise instances where those who were not responsible for installing defects have to contribute to remediation costs.

Question 2: Do you agree or disagree with the types of defect that this duty should apply to?

- **Agree**
- **Disagree**
- **Not sure**
- **Something else**

6. We disagree with some types of the criteria that the defect will have to meet in order to be covered by this duty. Firstly, limiting safety risks to only those that arise from a spread of fire or from structural collapse excludes other safety risks where a freeholder may still charge leaseholders to remedy. Secondly, limiting the defects to only those created in the past 30 years increases instances where leaseholders can be charged, which we believe is unfair and should be removed. Expanding the scope of where duty applies to all safety risks without a limit on the age of the defect would further protect leaseholders from unnecessarily covering the costs for defects, they were not responsible for. While we understand the reasons behind ensuring consistency with wider leaseholder protections, we argue that setting more

restrictive rules on what constitutes a relevant defect creates unnecessary complexity while providing fewer protections for leaseholders.

Question 3: Do you agree or disagree that this new duty should only apply retrospectively?

- Agree
- Disagree
- Not sure
- Something else

7. We disagree that the new duty should only apply retrospectively. We see no reason why protections cannot apply to future defects, even if there are tighter rules for new products and properties. Applying protections to new buildings and defects from 28 June 2022 will provide protections during the period where the legislation is new and not fully understood but also ensures that leaseholders continue to be protected when the new tighter rules are not followed.

Question 4: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 41), are reasonable?

- Yes
- No
- Not sure

8. Yes, we agree that the proposed steps are reasonable. We are particularly supportive of the recommendations for landlords to follow their insurer's appeals process and to raise a complaint with the relevant Ombudsman, which would increase chances that costs are covered. However, we are concerned that the New Homes Ombudsman is not the most suitable Ombudsman, given that the New Homes Ombudsman only covers issues during the first two years of a new home purchase. Considering that the proposed scope of the remediation scheme is to cover defects that have been created between 28 June 1992 and 27 June 2022. We would recommend that a more suitable ombudsman be appointed to resolve instances when claims are not in the landlord's favour, especially in cases where the alternative ombudsman suggested, the Financial Ombudsman Service, is also not suitable.

Question 5: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 41) adequately protect leaseholders?

- Yes
- No
- Not sure

9. Yes. We agree that the steps are mostly reasonable, however, we do not agree that the steps adequately protect leaseholders for two reasons. Firstly, challenges through the courts are expensive and there is no guarantee of success, even for more wealthy landlords. Secondly, the success of an insurance claim largely depends on the individual policy terms, which will lead to inconsistencies in the number of successful claims.

Question 6: 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)?

- Yes
- No
- Not sure

10. No, we do not think that there are practical risks involved if large numbers of claims occur in a short period of time. This could result in insurers being less likely to approve claims, which would then be passed onto the Ombudsman and the courts. This would cause substantial delays within the process of organising monies required to cover remediation costs. If such a situation occurs, it may be prudent to recommend alternative methods of cost recovery over insurance. Many of these issues can be resolved through an centrally-funded remediation scheme, where resources can be used to identify fault behind defects and issue claims on behalf of landlords and leaseholders. If the scheme makes an insurance claim on the landlord's behalf and their decisions are legally binding, then insurance requests can be more consistently approved.

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.

11. We would call for additional guidance on the steps to follow if claims are substantially delayed, as delays may cause landlords to feel that they have explored all options and pass on the remediation costs to leaseholders. For example, the guidance should state the time from the start of the claim that can be considered sufficient before the landlord can pursue alternative avenues to cover remediation costs, or steps they can take to help speed up the process if claims are not progressing as expected.

Question 8: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 44), are reasonable?

- Yes
- No
- Not sure

12. Yes. We agree that these are reasonable steps to ensure that a warranty claim is accepted and covers remediation costs. However, we have the same reservations on the suitability of the New Homes Ombudsman, which we have already covered. Much like with insurance claims, our main issue lies with the reliability of the method itself covering the costs rather than the instructions that landlords must follow.

Question 9: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 44) adequately protect leaseholders?

- Yes

- No
- Not sure

13. No. We are concerned that home warranties may not be able to sufficiently cover all defects, since the scope of defects that can be covered depends on the terms and conditions of individual warranties. This could make this approach very unreliable and inconsistent at a national level. Older defects that may have existed before warranties were put in place may not be covered and warranties that do not cover individual properties, only common parts of the building, could still leave leaseholders covering remediation costs that are not covered by the warranty.

Question 10: 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)?

- Yes
- No
- Not sure

14. No. We have similar concerns to the impact of delays and the length of time it can take for warranties to be approved, as we do with recovering costs via insurances. We would call for the same amendments to the guidance in this case.

Question 11: Please provide any comments you have on the full draft guidance on recovering costs via warranties. The chapter on cost recovery via warranties can be found on pages 7-8 of the draft statutory guidance (PDF, 327KB).

15. Similarly with recovering costs via insurance, we ask for the inclusion of guidance for when to pursue alternative methods of remediation and how they can ensure the process of issuing a warranty can progress when facing significant delays.

Question 12: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 47), are reasonable?

- Yes
- No
- Not sure

16. Yes. We agree that landlords should seek independent legal advice as any failed claim fought in court would lead to unnecessary costs for the landlord, which may incentivise them to pass more costs on to leaseholders.

Question 13: Do you think that the steps in the guidance which we have outlined in the summary (paragraph 47) adequately protect leaseholders?

- Yes
- No

- **Not sure**

17. No. We do not believe that the steps outlined will adequately protect leaseholders as we are concerned that landlords who lose legal cases will incur substantial costs and be less incentivised to cover remediation costs. Many developers have already agreed to cover remediation costs, therefore any cost that has not already been covered has likely already been rejected by the developer and they will likely fight any claim made against them. If the landlord then loses the case, they will be less likely to seek alternative methods to cover remediation costs out of concerns of further rejections of their claims and additional costs for them.

Question 14: 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)?

- **Yes**
- **No**
- **Not sure**

18. Yes. The costs associated with taking legal action, particularly with large developers, may lead to legal advisers suggesting extreme caution. This could lead to fewer cases being brought against larger developers, making this avenue of cost recovery ineffective if landlords follow the proposed steps.

Question 15: Please provide any comments you have on the full draft guidance chapter on recovering costs via third parties. The chapter on cost recovery via third-parties can be found on pages 9-11 of the draft statutory guidance

19. A centrally funded remediation scheme would alleviate many of the issues we have highlighted with the cost recovery method. An official remediation scheme, backed by legislation that makes any decision binding, can reduce the instances where decisions can be successfully challenged. This is due to the greater authority of the scheme and greater access to legal support where individual landlords may struggle to cover court costs against large developers.

Question 16: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 50), are reasonable?

- **Yes**
- **No**
- **Not sure**

20. Yes. We agree with the proposed steps and are satisfied that, if followed correctly, this can help ensure any remaining remediation costs are covered. This provides some reassurances that if all other avenues are explored, there are still ways in which landlords can cover their remediation costs and not pass them on to leaseholders.

Question 17: Do you think that the proposed steps in the guidance, which we have outlined in the summary (paragraph 50) adequately protect leaseholders?

- Yes
- No
- Not sure

21. No. In order to fully protect leaseholders, the language used in the guidance must make it clear that pursuing grants and funding is mandatory. This will prevent instances where landlords would prefer to pass on costs to leaseholders than go through the process of applying for grant funding.

Question 18: 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
- No
- Not sure

22. Yes. The effectiveness of this method to cover remediation costs relies on the landlord's ability to apply to the schemes. This leads to several issues, such as landlords not having access to all the information required to receive funding or refusing to apply to the scheme while claiming they have followed the necessary steps. If a landlord does not apply when they do qualify for the scheme, the leaseholder is often responsible for taking action against the landlord. This is an unreliable way to protect leaseholders as leaseholders may be unaware of the rules, nor may they be able to afford adequate legal support. We again urge the UK Government to consider adopting a remediation scheme in order to assess whether specific cases can be funded through government programmes. This would prevent instances where landlords intentionally do not apply for funding but rather pass costs on to leaseholders.

Question 19: Please provide any comments you have on the full draft guidance chapter on recovering costs via government funds or grants. The chapter on cost recovery via government funding or grants can be found on page 11 of the draft statutory guidance.

23. We urge that grant funding should be used only as a last resort when no individual or organisation can be found to be at fault for the relevant defect. That way, costs can be passed onto those responsible rather than the taxpayer.

Question 20: Under our proposals, landlords will be required to demonstrate that they have taken reasonable steps to recover costs. Do you agree or disagree with these proposals?

- Agree
- Disagree
- Not sure
- Something else

24. Something else. While we agree that landlords must disclose information to leaseholders and with the information laid out, we have concerns over the effectiveness of enforcing these proposals for two reasons. Firstly, enforcement relies on leaseholders being aware of the regulations and exactly what they should receive, which is not guaranteed. Secondly, leaseholders will be required to query if the information received is accurate or not, which may be difficult for leaseholders to do without taking the landlord to court. An official remediation scheme would prevent these issues, as they will have a full understanding of what the landlord is required to provide and will be more able to effectively challenge any information that they believe is incorrect or missing.

Question 21: 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
- No
- Not sure
- Something else

25. Not sure. We are unable to accurately answer this question.

Question 22: Do you agree or disagree that leaseholders should receive both the regular update and the final summary?

- Agree
- Disagree
- Not sure
- Something else

26. We agree that leaseholders should receive regular updates and a final summary in order to ensure they receive as much information as possible. This will help keep leaseholders informed of the current situation regarding remediation cost recovery and enable them to better challenge information they believe to be incorrect.

Question 23: 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?

- Agree
- Disagree
- Not sure
- Something else
- I am not involved

27. We are not involved.

Question 24: Please provide any comments you have on the draft guidance chapter on the information sharing duties. The chapter on information sharing duties can be found on page 12 of the draft statutory guidance.

28. We have no further comments.

Question 25: Do you have any other feedback on the proposed statutory guidance?

29. Overall, we still believe that an official remediation scheme would be more effective at ensuring those responsible for causing relevant defects cover the costs, while limiting the costs for leaseholders for four reasons. Firstly, the recovery of remediation costs would not have to rely on landlords initiating the recovery process, who may not be aware of the requirements and are more likely to misinterpret the legislation. Secondly, an official remediation scheme can have binding decisions, which increases the likelihood of warranties, insurance and recovery via third-parties being successful. Thirdly, any legal action or appeals against decisions can be funded through the scheme, rather than by individual landlords who may not have the capacity to do so. Fourthly, any grant funding can be reviewed and applied by those more familiar with the grants who can ensure that landlords provide all the information required.

Question 26: Do you agree or disagree with the approximate costs of complying with the statutory guidance, as found in the impact assessment?

- Agree
- Disagree
- Not sure
- Something else

30. We disagree. Any programme that portions remediation costs to those who are responsible should lead to no costs to leaseholders.

Question 27: What do you consider to be the impact on individuals with protected characteristics of any of the proposed details to be included in the regulations? Please give reasons and any evidence that you consider relevant.

31. We do not consider PropertyMark to be suitably qualified to answer this question.