# Written evidence submitted by the Leasehold Knowledge Partnership [CPR 033]

## A catastrophic failure of regulation

Since the Grenfell tragedy nearly three years ago two diametrically opposing views seem to have emerged.

- The government and Dame Judith Hackitt have argued we have had a longstanding failure of regulatory compliance by the construction industry, engineers, architects, buildings inspectors and product suppliers. These failures have resulted in a need for fundamental culture change which sees the proposal of new building safety legislation together with updated regulations.
- Many elements on the supply side of the sector have, on the contrary, argued that they complied with regulations applicable at the time and that those regulations were often confusing and open to interpretation.

LKP is not qualified to know who might be right but we can say the net result is that, while everyone accepts that no fault sits with the leaseholders, they are often the only ones who face the costs. Many leaseholders have had to pay large and ongoing costs as almost all leases allow the landlord to pass these charges on[1] while neither the developers nor the govenment have faced any litigation for their potential failings.

The authorities have imposed conditions to permit the continued occupancy of these buildings which they now deem unsafe, meaning leaseholders have faced the additional costs for "interim measures" such as waking watch, which in some cases have already lasted for years.

The LKP detailed survey of 148 cladding sites[2] earlier this year demonstrated that a large number of sites have faces very high interim costs, which have detracted from the leaseholders' ability to pay for remediation. The survey also showed that the interim measures have been in place far longer than the NFCC envisaged when their guidance was updated in 2018. It shows that people are unable to sell their home, change their job or change their mortgage supplier. And many live in fear.

### LKP's work on cladding issues

LKP is a charity that helps provide support to leaseholders on many issues. We have been helping on cladding since September 2017. We have also tried to raise awareness of cladding related leasehold issues with officials in our role as a charity and in our capacity as secretariat of the leasehold and commonhold APPG. The APPG have also encouraged the Select Committee to look at both cladding issues and wider leasehold matters, and have been very supportive of the reports produced by the SC on this work. So far, the APPG has held four separate meetings to consider cladding issues.

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[1] Although small number of landlords have paid towards costs these seem to be mainly in the circumstance where either the landlord linked to the developer, of where the landlord owns a substantial part of the site. Most landlords who are ground rent investors appear to have offered very limited and in many cases no support.

[2] https://www.leaseholdknowledge.com/full-lkp-survey-of-148-cladding-scandal-sites/

In November 2017 LKP warned officials of three key problems:

- If they allowed cladding cases to go to the Tribunal the law would inevitably pass the costs to the leaseholders. Officials felt that justice should be allowed to follow its course. We now know that every case that has gone to the Tribunal has found against the leaseholders. Professor Sue Bright has explained at two of our APPG meetings that, in the event that the leaseholder could show they were not obliged to pay, they would then have no means under legislation to force the "building owner" to carry out the works.
- ACM cladding would open a Pandora's box that would see the problem expand way beyond ACM cladding. Officials felt that "building owners" would do the right thing. In the vast bulk of cases the "building owners" have declined to do the right thing and passed costs to the leaseholders instead. The problem has now expanded way beyond ACM cladding.
- We advised that officials needed to do more to help ensure that residents on cladding sites could organise themselves as a group, to help each other. The officials felt it was not their job to assist. We have seen many cladding sites where the leaseholders have been isolated and, even worse, some where supposedly professional landlords have actively resisted the formation of formal residents' groups. In one case the landlord found reasons to resist recognition of the leaseholders' group for 15 months. In another case the residents held their first ever group meeting on the Sunday before going to the Tribunal two days later to be found liable for the costs. Since 2017 we are now on the second generation of leaseholder cladding support groups. As is inevitable with voluntary groups, sustaining momentum is very difficult. We saw the first groups fall away after James Brokenshire announced the £200 million fund. It is sad to now see that among the new cladding self help groups one has chosen to work alone, resulting in mixed messages being sent to government.

In December 2017 Minister Sharma wrote thanking LKP and the APPG for our work on cladding, and advising that he had decided to give an additional £465,000 to the government body LEASE to help offer support to leaseholders on cladding sites. It was always fairly inevitable that the only advice that LEASE could give would simply reconfirm that the individual leases would make the leaseholder liable to pay. Figures from LEASE show that, in their first year after being provided with these additional funds, just 141 cladding enquiries came from cladding leaseholders. Because the data was classified by area this strongly suggests it represented far fewer than 141 sites.

- Since November 2017 we have warned repeatedly that the term "building owner" does not follow leasehold law. Officials assured us that they were happy with the term, but have since also referred to freeholders and landlords. Officials eventually needed to create the new term "responsible entity" to reflect the fact that there are many different types of body responsible for leasehold buildings in the private sector. In reality, often there is no "building owner" who is responsible for costs at the building. In the case of ground rent "building owner" investors, the Select Committee has observed they have no interest in the fabric of the building, and they are often offshore entities which means they are used to being unaccountable.
- In late 2018 we warned that building insurance was becoming a big problem. The officials "noted" the comments. We are now in the position where it is difficult or even impossible for managing agents and contractors to obtain relevant PI cover for fire safety related work.

We have seen insurance costs increase enormously on many sites and are now in the position were some sites may not even be able to obtain full cover.

- We have consistently warned that the "building owner" would not do the right thing because in many cases they had no financial interest and no legal responsibility to do so. The officials assured that there were sufficient powers to ensure that "building owners" could be required to rectify their buildings. Since 2017 we have seen repeated changes to guidance, regulation and advice from the government to allow both Local and Fire Authorities to enforce remediation, despite the fact that government had previously asserted that they already had these powers.

As the result of government decisions leaseholders have faced huge bills for remediation, waking watch and increased insurance bills. This situation seems most egregious in the social sector where some supposedly not for profit ethical landlords have sought to pass on 100% of the costs to shared ownership leaseholders who may only own 25% of the lease to their flat.

The current position now clearly contrasts with the advice from the expert input to government, provided by the Building Research Establishment (BRE) in 2016 when they wrote "With the exception of one or two unfortunate but rare cases, there is currently no evidence from these investigations to suggest that the current recommendations, to limit vertical fire spread up the exterior of high-rise buildings, are failing in their purpose."[3]

**3 years on from Grenfell**

While the inquiry is still ongoing the Inquiry has already accepted that the building work was not compliant with regulations. However, if the government is right and everyone has also failed to follow the regulations on thousands of other sites, the question arises: how can many thousands of professionals working for multiple social and private developers over many years in all parts of the country all have made the same mistakes, and how can the experts in other countries also have made the same mistakes?

If the government is right and that everyone has failed to follow the regulations then that in turn implies a huge failure in the government's oversight of those regulations.

Whatever the position, we now end with more than 2,000 buildings higher than 18 metres (and many more at lower heights) which are now deemed to be in breach of regulations and in need of remediation. We have hundreds of thousands of flats which can't be sold. We have hundreds of thousands of leaseholders facing the stress of not knowing whether the home they live in is safe, and unable to leave it.

As can be seen from Australia and some other countries, they have faced similar problems to ourselves, but their approach to solving them has been different. The government of New South Wales completed its final report into building regulation and remediation at the end of last month[4]. The report makes 22 recommendations, many of which could equally apply in England and Wales.

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[3] https://www.bre.co.uk/filelibrary/Fire%20and%20Security/FI---External-Fire-Spread-Part-1.pdf page 6

[4] https://www.parliament.nsw.gov.au/tp/files/77477/PAC%20-%20Regulation%20of%20building%20standards%20quality%20disputes%20-%20Final%20report%20-%20Report%20no%206.pdf

While England and Wales have set out a single funding model for government support, and a binary approach to which deciding cladding materials need to be remediated, the government of Victoria in Australia has adopted a risk based approach.

As a result they allocated the relevant developments as follows:

**72** were considered to pose an extreme risk to residents.
**409** are deemed high risk.
**388** are moderate risk.
**200** are low risk.

They also set out a range of funding models: some sites had remediation funded by the government; some were funded by the flat owners (via their strata company using loans); in some sites developers have faced litigation; while on others the developer has volunteered to pay.

This approach seems to have allowed a more effective and phased approach to remediation, with a sub-set of developments considered to be in need of interim measures to avoid prohibition.

In England and Wales we have taken more of an arbitrary approach based on cladding material type.

In terms of legal rights, leaseholders who had purchased a new flat more than 6 years ago have lost their protection under the Defective Premises act. Developers may be liable to remediate for the first 2 years after completion. After 2 years they will seek to limit that liability by passing responsibility to a warranty scheme which normally applies up to 10 years after completion. However, those polices have shown themselves to be less than ideal with many claims being repudiated. It would appear that warranty policies have only paid out on a dozen or so claims which cover about 35 blocks. It is suggested that no claim has been paid by the warranty provider unless they also acted as building inspector.

The position in England and Wales is that if someone had purchased a new flat and a new tumble dryer in 2004

- The flat would have been sold on long lease of up to 999 years. But the leaseholder would have no rights to make the developer pay after just 6 years, even when the developer was clearly at fault.
- The average life expectancy of a cheap tumble dryer is just 6.5 years according to Which?[5] Yet a 2004 tumble dryer from Whirlpool which is currently the subject of a safety recall[6] sees the manufacturer offer a range of choices “to have it replaced free of charge, to opt for an upgrade from £59, to have it fixed by an engineer or to choose a refund, which will be dependent on the age of your tumble dryer”.

**Cladding Remediation**

The government initially said they would offer no support in the private or social sectors on cladding sites. Then the government agreed to provide £400 million to help remediate social sector blocks with ACM cladding, followed by an offer of £200 million to support ACM sites in the private sector in May 2019.

[5] https://www.which.co.uk/reviews/tumble-dryers/article/top-tumble-dryer-brands
[6] https://www.electricalsafetyfirst.org.uk/product-recalls/2019/07/whirlpool-tumble-dryer-recall-program-july-2019/

While the social sector has moved forward with remediation in many sites, a much smaller proportion have done so in the private sector. Despite the ACM funding applications opening in September 2019 for private blocks we have had just £1.2 million of that funding approved as of May 2020 according to government officials.

**Lessons to learn from the ACM fund**

All groups in the sector accept the funding application process has been complex and even opaque. LKP had warned officials long before the fund was launched that contacting 100% of leaseholders on any large site would be impossible. The officials still decided the ACM funding required that 100% of leaseholders sign up. To our understanding no large site has met that target. We understand that the requirement for 100% was then only informally dropped after months of delay.

The government has also been inconsistent in its approach, advising at one point that it expected landlords to still follow a s20 major works procurment as part of the funding conditions, only to decide shortly afterwards that it was for the landlord to decide how to proceed.

More recently the government has appointed a firm of external consultants to help speed up the process, but to date there is no evidence showing whether this in fact helps, or adds yet another layer of administration.

The government continues to deal with the issues in silos. While many of us have argued for the need for collaboration across the sector, and in particular for the inclusion of those who represent the leaseholders' interests, the government has often chosen to deal with groups in isolation. The net result is that there is little evidence that those looking at issues from the perspective of building or fire safety will fully undertand the impact of leases or of leasehold legislation.

Many leaseholders, local authorities and even landlords and managing agents continue to complain there in a lack of clarity regarding the process.

There seems to be a danger that some of the new legislation may even exacerbate the problems. The recent fire safety enabling legislation will give the fire authorities more powers to act on fire doors and the external fabric of the building, but these new powers do nothing to stop costs being passed to the leaseholders.

Those administering the new fund of £1 billion will hopefully learn from the administrative difficulties faced by the ACM fund, but they also face a number of potentially new issues:

1) It is clearly accepted that £1 billion will only cover a small fraction of the remediation costs. At best the figure represents a third of expected costs. Alternative figures suggest it may cover a far smaller proportion with the vast bulk still passing to the very people that everyone agrees are not responsible for the problem i.e. the leaseholders.
2) The government has made clear that the fund will not pay for additional works that may be needed, for example compartmentation rectification.
3) Unlike the ACM fund, where the government committed to rectify all buildings, the £1 billion fund is fixed and the government has said that payments will be made of a first come first served basis. This sets social landlord against the private sector and potentially disadvantages those with a ineffective landlord or one not able to obtain professional guidance.

4) The fund punishes all landlords and leaseholders who have remediated the building at their own cost. In contrast, the govenment will fund the delinquent landlord, who in the private sector may well also be an offshore entity.

**EWS1**

The External Wall System 1 valuation model was launched by RICS at the end 2019, in consultation with the lenders, the government and a few other supply side sector groups. It is a system that requires an intrusive survey to carried out by specialist fire safety firms to confirm the adequacy of the external wall system.

The EWS certificate system is needed because valuers no longer feel able to assess the worth of a flat without expert input.

The govenment has argued that the EWS system is the result of the lenders loss of confidence. This is perhaps a partial view.

The govenment expert panel provided a second iteration of advice note 14. This advice note required "building owners" to establish the safety of their wall systems. The sector interpreted this as effectively replacing their long-standing reliance on the fact that, if a building had complied with buildings regulations and been signed off, then it could be assumed that the building was safe. Initially the government argued that the advice note was only intended for the "building owner", but it is was at best naïve to think that others would not consider the advice something which had to be followed.

EWS required fire safety engineers/surveyors to satisfy themselves that what was installed perhaps more than 20 years ago is compliant with regulations.

For fairly obvious reasons these surveys are taking a cautious approach and the vast bulk recommend some form of remediation.

The system is not working well and there are huge delays. Some social sector sites have been told they will need to wait for two years which means two years when a property cannot be sold.

Some companies have had to withdraw from working to produce EWS reports because they are unable to obtain PI cover.

Although EWS was designed for >18m buildings an increasing number of lenders are demanding reports for buildings <18m.

Concurrent with the introduction of the EWS system we have seen growing problems with obtaining buildings insurance with premiums leaping. In the worst cases premiums have jumped by two or even three hundred percent, and in some cases it has become impossible to obtain cover without restrictions on the policy.

The insurance industry argues there is a change in the perception of risk.

**Covid**

There have been two very clear impacts from Covid. Remediation came to a stop. According to government this happened on 70% of sites. More recently Ministers and Mayors have encouraged

that work should recommence. However that start-up seems slow with some developers beginning works on their newbuild sites before returning to cladding remediation

Covid has also had a huge impact on those living in these buildings. Families with young children have been locked down in sites with cladding risks week after week. A growing number of leaseholders report mental health issues.

**Ways forward**

Although the call for evidence does not ask for solutions it seems relevant to set out some of the issues that could or perhaps should be considered.

It has been clear from the inception of Dame Judith Hackitt's work that "independence" has meant working very closely with the very groups who, it is suggested, are part of the failure. From the outset this has been seen as a buildings and fire safety matter, while the issues of leasehold tenure have been ignored. Dame Judith said to LKP early in the process that she was not focused on the impact of leasehold law. In her report she refers to this as adding complexity.

This approach should be contrasted with that of Australia where the tenure and building occupants have been considered in far more detail as relevant to the ways forward.

The APPG on leasehold and commonhold reform has said that it is happy to convene a roundtable among the many sector experts who might offer potential solutions, but this offer has not been accepted.

**Recommendation – all parts of the sector must work together to find long term solutions.**

When James Brokenshire agreed the £200 million ACM fund he was required by the then permanent secretary to sign a letter taking responsibility for the fund as being in breach of green book rules. That same position must apply to the £1 billion fund and there is a legitimate argument to consider whether it is right for the government to pay to remediate private property.

This problem takes us back to the beginning. Everyone accepts it is not the leaseholders fault but nobody is able to take action against the person who might be responsible.

An alternative approach and one being adopted in Australia looks at creating a bond to help fund remediation. A fund paid for as part of newbuild construction.

**Recommendation – consider the options for the sector to create funds that would pay for future problems.**

A more radical approach might be to look at the one pot of money already paid for by the very people who might benefit from that fund. The 'Pool re:' insurance fund was created to provide shared terrorism cover for residential and commercial buildings in 1993. The figures show that a total of £635 million has been paid out for claims over the 27 years the scheme has existed. In contrast £6 billion of funds has been accumulated and a further £990 million paid to HMT, which the rules say is recoverable by the pool system if needed[7].

The ONS has recently decided that 'Pool re:' should become a government subscriber.

**Recommendation – consider whether the accumulated 'Pool re:' funds could be used to pay for**

[7] https://www.poolre.co.uk/about/

**remediation, and the scheme then expanded to cover both terrorism insurance and building defects going forward.**

It is argued by some leasehold landlords that their professional status has allowed for the more effective remediation of the blocks they control, compared to that of sites run by the leaseholders. We see no evidence to support this assertion. In other countries where they have a commonhold ownership system we see a more effective means for seeking recovery from the developer and resolving the underlying problems.

**Recommendation – review the rights to bring action against the builder of a defective building and consider the extent to which commonhold may have helped offer a better solution.**

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