



## BRIEFING PAPER

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# Leasehold high-rise blocks: who pays for fire safety work?

By Wendy Wilson

## Summary

Following the Grenfell Tower fire in June 2017, the Government established a Building Safety Programme with the aim of “ensuring that residents of high-rise residential buildings are safe, and feel safe from the risk of fire, now and in the future.”

At 31 March 2019, 345 residential blocks and public buildings over 18 metres in England had been identified as having Aluminium Composite Material (ACM) cladding installed or previously installed, i.e. of the same or similar type to that applied to Grenfell Tower blocks and are described as “unlikely to meet current Building Regulation guidance.”

Remediation work is complex, and the associated costs are significant. The question of who is responsible for paying for remedial works has been described as “a legal quagmire” and has been at the forefront of debates about how quickly the necessary work can be carried out and the financial implications for some residents, particularly those living in privately owned blocks.

On 16 May 2018, the Government announced that it would meet the reasonable cost of the removal and replacement of unsafe cladding by councils and housing associations. Although the Government argued that the cost of remediation work should not fall on individual leaseholders in affected private blocks, not all developers/freeholders responded positively to these calls. On 9 May 2019, James Brokenshire announced that the Government “will fully fund the replacement of unsafe aluminium composite material (ACM) cladding on high-rise private residential properties where building owners have failed to do so.”

This short note considers the debate leading up to the 9 May 2019 announcement and provides information on the Government’s decision to fund remediation work in both the social and private sectors. The final section provides brief information on the position in Wales, Scotland and Northern Ireland.

Affected long leaseholders should seek professional legal advice and assistance. The [Leasehold Advisory Service](#) and the [Leasehold Knowledge Partnership](#) (which also acts as the secretariat for the All-Party Parliamentary Group (APPG) on leasehold reform) are potential sources of advice. The LKP has a dedicated email address: [cladding@leaseholdknowledge.com](mailto:cladding@leaseholdknowledge.com)

# 1. Who owns the affected blocks?

The Ministry of Housing, Communities and Local Government (MHCLG) releases a monthly Building Safety Programme bulletin which contains data on progress in identifying high-rise residential buildings with unsafe cladding combinations. The [April 2019 bulletin](#) notes that, as at 31 March 2019, 345 buildings over 18 metres had been confirmed as having ACM cladding which were “unlikely to meet current Building Regulations guidance.”<sup>1</sup> 112 of the affected buildings are social housing blocks owned/managed by a local authority or housing association, while 226 are privately owned residential blocks, including hotels and student accommodation. The Bulletin provides a progress report on remediation work:

Of the 112 social sector residential buildings with ACM cladding systems unlikely to meet Building Regulations yet to be remediated:

- 89 have started remediation;
- 22 have a remediation plan in place but works have not started; and
- 1 building has reported an intent to remediate and is developing plans

Of the 226 private sector buildings (residential, student accommodation, and hotels) with ACM cladding systems unlikely to meet Building Regulations yet to be remediated:

- 16 have started remediation;
- 126 have a remediation plan in place but works have not started;
- 37 have reported an intent to remediate and are developing plans; and
- 47 buildings remain with unclear remediation plans – this number has fallen from over 200 buildings in June 2018.

There remain 15 private sector buildings where the cladding status is still to be confirmed – this has fallen from approximately 170 buildings in June 2018.<sup>2</sup>

## 2. Blocks owned by social landlords

When major works are carried out on blocks owned by social landlords there is no additional cost to be met by secure and assured tenants.

Long leaseholders in these blocks *could* be liable to pay a contribution towards the cost of the works depending on the wording of their lease agreements. As a rule, lease agreements will provide for the recovery of the cost of major works from long leaseholders; this can result in individuals facing some substantial bills, e.g. for roof or lift replacement. More information can be found in the Library briefing paper: [Leaseholders in social housing: paying for major works \(England\)](#).

The Government made repeated references to a commitment by social landlords not to recover the cost of remedial works associated with cladding safety from long leaseholders:

**Just as social landlords are not seeking to pass on costs for cladding remediation**, in the private sector we believe that the morally right thing to do is for landlords to not pass these costs onto leaseholders.<sup>3</sup>

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<sup>1</sup> MHCLG, [Building Safety Programme: monthly data release – March 2019](#), 11 April 2019

<sup>2</sup> Ibid.

<sup>3</sup> [Flats: Safety: Written Question: HL4910](#), 5 February 2018

David Orr, then CEO of the National Housing Federation, the representative body of housing associations, responded to this saying:

As freeholders of leasehold properties, our members have legal responsibilities as part of their leases and are therefore legally entitled to recoup the reasonable costs through service charges.<sup>4</sup>

Some social landlords *are* seeking to recover a proportion of the cost of associated fire safety works from their long leaseholders. For example, the London Borough of Wandsworth (LBW) is seeking to retro-fit sprinklers in all its blocks of 10 storeys or higher and obtained legal advice to the effect that the cost, estimated to be around £3,000 to £4,000 per unit, is recoverable:

Legal advice has been received that the cost of these works would be recoverable from leaseholders by way of service charges and the sprinkler systems would be maintained by the Council. Of the 6,401 properties that would benefit from the installation, 2,358 are leasehold. There are 1,315 resident leaseholders and 1,043 leaseholders living away from their property.<sup>5</sup>

A further LBW report prepared by the authority's Director of Housing and Regeneration, referred to the council's fiduciary duty to recharge long leaseholders:

The Council is of the view that if works are necessary and chargeable under the terms of the lease **then the Council is under a strict fiduciary duty to recharge** and that meeting leaseholders' contributions from the Housing Revenue Account (HRA) or the General Fund is likely to be challengeable.<sup>6</sup>

LBW resolved to refer the decision to recharge long leaseholders to a First-Tier Tribunal (FTT):

In recognition of concerns raised by some leaseholders over the proposed works, the report recommends that the Council makes a proactive application to a First Tier Property Tribunal to ensure that the leaseholders' voice is listened to and to seek a clear decision on the Council's ability to undertake the works.<sup>7</sup>

The case has been taken forward – the FTT [issued directions](#) on 5 November 2018.

There was little reference to the potential for authorities to be challenged for breach of their fiduciary duty where no attempt is made to recover contributions from long leaseholders if the leases in question allow for this. During a Westminster Hall debate on fire safety and cladding on 6 March 2018, Andy Slaughter made the point that not charging leaseholders in social housing blocks for fire safety works means that “ultimately the money for them will come from tenants.”<sup>8</sup> This is less of an issue in light of the Government's decision to fund certain remedial works in the social housing sector (see below).

## 2.1 Government funding for the fire safety works

The question of whether the Government would make additional funding available to assist social landlords in carrying out fire safety work was controversial up to the point at which Government announced that it *would* meet the reasonable cost of the removal and replacement of unsafe cladding by councils and housing associations. The cost has been estimated at £400 million:

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<sup>4</sup> HC Deb 21 December 2017 c455WH

<sup>5</sup> [LBW, Paper 17-269, September 2017](#)

<sup>6</sup> [LBW, Paper 18-12, 2018, para 5](#)

<sup>7</sup> Ibid.

<sup>8</sup> [HC Deb 6 March 2018 c83WH](#)

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When pressed on this issue the Government initially said:

My Department has made clear that it considers that building owners should take responsibility for funding fire safety measures including replacement of dangerous cladding. Government will consider financial flexibilities for local authorities who need to undertake essential fire safety work to make a building safe.<sup>9</sup>

On 15 January 2018, Tamara Finkelstein, Director-General, Building Safety MHCLG, confirmed that 36 requests for assistance had been received from local authorities when giving evidence to the Communities and Local Government (CLG) Select Committee:

Nine of them are authorities that have aluminium composite material cladding; others have other work they are looking to do. The criterion is that, if there is essential work that is required to make a building safe, we can look at financial flexibilities in terms of having more borrowing headroom or accessing other general funds that normal restrictions would not allow them to use in order to fund the work.<sup>10</sup>

The number of authorities requesting assistance rose to 41 according to a PQ response provided on 8 March 2018.<sup>11</sup>

Tamara Finkelstein went on to confirm that discussions were ongoing with four of the authorities to determine what flexibilities might be right in their circumstances.<sup>12</sup> Melanie Dawes, Permanent Secretary at MHCLG, confirmed that no flexibilities for any authority had been confirmed at 15 January 2018 because discussions had not been concluded.<sup>13</sup> That was still the case on 8 March 2018.<sup>14</sup>

Brent Council wrote to the Secretary of State in July 2017 – the council's stock is not affected by ACM cladding but a decision has been made to undertake further fire safety works in high rise blocks at an estimated cost of £10 million. Brent's letter outlined the potential impact of funding the work on its planned and reactive repairs service:

The funding of these improvements needs careful consideration. The Council will reach its Housing Revenue Account (HRA) borrowing cap for capital purposes in 2018/19. You will already be aware that your department's policy of reducing social housing rents by 1% per year until 2020 has put councils' HRAs under considerable strain - the cost of this policy change in Brent is in aggregate £23.3m to 2020. The impact of your department's, policy on high value voids will also increase that pressure. The Council does not believe that social housing tenants should have to pay for these improvements to the stock through a deprioritisation of both planned and reactive repair and maintenance works. For example, £10m equates to 40 new homes or the replacement of 4000 boilers. As such, the Council resolved to request the Government to provide the direct financial support to meet the costs incurred. This letter acts as our official request.<sup>15</sup>

The then Secretary of State wrote to local authorities and housing associations on 26 July 2017 saying:

Where a local authority has concerns about funding essential fire safety measures, they should approach us as soon as possible to discuss their position.

Where works are necessary to ensure the fire safety of a building, we will ensure that lack of financial resources will not prevent them going ahead. It would not include general improvements or enhancements to buildings which go beyond this.<sup>16</sup>

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<sup>9</sup> [High Rise Flats: Fire Prevention: Written Question – 127874](#), 27 February 2018

<sup>10</sup> [HC 553, 15 January 2018, Q34-35](#)

<sup>11</sup> [Local Government Finance: Fire Prevention: Written question – 130236, 8 March 2018](#)

<sup>12</sup> [Ibid., Q35](#)

<sup>13</sup> [Ibid., Q38](#)

<sup>14</sup> [Local Government Finance: Fire Prevention: Written question – 130236, 8 March 2018](#)

<sup>15</sup> [Brent Council's letter to Sajid Javid](#), 13 July 2017

<sup>16</sup> [Inside Housing, "Javid responds to councils on fire safety funding"](#), 27 July 2017

Melanie Dawes was pressed on the Ministry's position on funding the retro-fitting of sprinklers by CLG Select Committee members on 15 January 2018. She said:

We are primarily dealing with a problem of faulty cladding here. It was put up and it is now clear it was not safe, particularly when combined with certain types of insulation. That is our primary focus for this work. For any government support on funding, that has to be our primary focus. As Tamara said, in some circumstances local authorities are very clear that sprinklers are an important part of that package. We have not ruled that out, but we are having individual conversations with individual local authorities about that.<sup>17</sup>

During a Westminster Hall debate on leasehold reform on 21 December 2017, the Shadow Secretary of State for Housing, John Healey, called on the Government to fund some of the costs social landlords were facing:

The consequences of Grenfell for residents and owners in other high-rise residential tower blocks are becoming clearer, and the wider weaknesses in the leasehold system are thrown into sharp and urgent relief by the challenges that come from Grenfell: the immediate fire safety measures that need to be put in place, the substantial remedial work required in many cases, and the question of who really is responsible and who really should be paying for that.

There is also the question of whether some freeholders will abuse or misuse the first-tier tribunal system to try to prove themselves against any challenge for passing on these very heavy costs to leaseholders. There is a concern among some social landlords that such practices will be followed and certainly a concern about privately-owned residential blocks.

The Grenfell Tower fire was a national disaster. People expect national leadership and a national response from Government. It exposed—we had only really had warnings from coroners' reports on earlier fatal fires—the complete collapse of the national system of building control and regulation. Therefore, the national Government must take some responsibility by putting in place measures immediately to ensure that it does not happen again.

If the Government were willing, for instance, to reconsider their point-blank refusal to help fund some of the costs that social landlords face in completing essential remedial fire safety work, they could make it a condition of any funding help they give that leaseholders are protected from bearing any of that cost.<sup>18</sup>

The point was repeatedly made by Members during the Westminster Hall debate on 6 March 2018, that the installation of combustible cladding had arisen due to a failure of the regulatory system and that that it should not be left up to tenants, via their rent payments, nor long leaseholders via service charges, to meet the cost of the necessary remedial work.<sup>19</sup> On 10 May 2018, the Guardian reported that 44 MPs had written to the Secretary of State, James Brokenshire, calling on the Government to release cash to fund remedial fire safety works.<sup>20</sup>

**On 16 May 2018, the Government announced that it would meet the reasonable cost of the removal and replacement of unsafe cladding by councils and housing associations.** The estimated cost is £400 million:

The fund follows the government's offer last year of financial flexibilities to assist local authorities with essential fire safety work. From conversations with social sector landlords, it has become apparent that they are having to take decisions about how to prioritise important services, repairs and maintenance work and investment in new homes.

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<sup>17</sup> [HC 553, 15 January 2018, Q52](#)

<sup>18</sup> [HC Deb 21 December 2017 c490WH](#)

<sup>19</sup> [HC Deb 6 March 2018 c78WH](#)

<sup>20</sup> Guardian, "[MPs urge government to release cash for removal of Grenfell-like cladding](#)", 10 May 2018

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The government has listened to their concerns, discussed the issue in Cabinet, and decided that, although social landlords have made good progress on replacing unsafe cladding, it is right to provide further support. It is therefore today announcing additional funding for the social sector. It recognises the tough decisions that are being made to carry out fire safety work as well as the potential impact on other services.<sup>21</sup>

[Guidance](#) on applications for funding was published by MHCLG in July 2018. *Inside Housing* reported that the funding is coming from the Affordable Homes Programme:

The cash will come out of the current Affordable Homes Programme, the next programme in 2021/22 will be boosted by the same amount to compensate.<sup>22</sup>

The funding does not cover works other than the removal and replacement of unsafe cladding:

The government will also continue to provide financial flexibilities to councils for other essential fire safety measures and is directing local authorities to take cladding-related issues into account when carrying out reviews of housing conditions in their areas.<sup>23</sup>

The first funding allocations were announced on 17 October 2018 for 12 local authorities and 31 housing associations.<sup>24</sup> The press release contained information on the allocation process:

Applications for 159 buildings have been received to date and 135 applications have been approved in this first tranche of funding.

Twelve applications were not eligible for funding because they didn't meet the application criteria – for example the buildings are below 18 metres, owned by commercial freeholders or the cladding is not ACM.

Twelve applications have been deferred while building owners provide further information so that we can confirm eligibility.

There is nothing more important than ensuring people are safe in their homes and so the department has taken the view that applications received after the 31 August deadline will still be reviewed.

The government is paying 80% of the estimated eligible costs up front when work starts, with the remaining 20% when the work is complete and final costs are known. The funding allocated so far comes to £248 million.<sup>25</sup>

The funding announcement in May was welcomed by social landlords, although some questioned the £400 million estimate. Landlords also questioned whether the funding would be made available for works already in progress<sup>26</sup> – this was addressed in a letter sent by the Secretary of State to housing associations and published in *Inside Housing*:

We are therefore providing this funding so that they can continue to provide these essential services while also making your buildings safe. I can confirm that grant funding will be available for the remediation of ACM cladding systems which have failed large-scale tests on residential social housing buildings over 18m owned by local authorities and housing associations.

This will not be means tested, and will be available regardless of whether work has been started, completed or not yet started, so that building owners do not have to worry about the cost of work displacing other activities.

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<sup>21</sup> Ministry of Housing, Communities and Local Government (MHCLG), [Press Release](#), 16 May 2018

<sup>22</sup> *Inside Housing*, "Government will use grant to fund cladding replacement," 16 May 2018 [subscription required]

<sup>23</sup> Ministry of Housing, Communities and Local Government (MHCLG), [Press Release](#), 16 May 2018

<sup>24</sup> [MHCLG Press Release, 17 October 2018](#)

<sup>25</sup> *Ibid.*

<sup>26</sup> *Inside Housing*, "Government will use grant to fund cladding replacement," 16 May 2018 [subscription required]



Because we are providing this funding to social sector landlords, we want them to go further in taking a low risk approach to fire safety. We will therefore be asking them to replace the unsafe cladding on their buildings with non-combustible materials which meet A1 and A2 standards in order to be eligible for the funding.

We will then fund reasonable costs associated with the removal and replacement of cladding, such as access, scaffolding, materials and labour. We will also continue to offer local authorities financial flexibilities for other essential work.<sup>27</sup>

### 3. Privately owned blocks

As noted above, at 31 March 2019 there were 226 privately owned residential blocks, including hotels and student accommodation, with ACM cladding.

Flats in the affected residential blocks will be owned on a long leasehold basis. As with long leaseholders in blocks owned by social landlords, long leaseholders *could* be liable to pay a contribution towards the cost of the remedial works depending on the wording of their lease agreements. The Government funded Leasehold Advisory Service posted the following response to the question of who pays for fire safety measures, such as changing cladding on blocks of flats, on its website:

It depends on the terms of the lease between the building owner (the freeholder) and the leaseholders.

#### **Sweeping-up clauses**

Even if the lease doesn't say anything about passing on fire safety costs to leaseholders, the freeholder might still be able to.

Freeholders might use something called a '[sweeping-up clause](#)'. This could allow freeholders to get leaseholders to pay for a range of unexpected costs.

These costs could include:

- money spent for the 'benefit of the building'
- money spent to enable 'good estate management'<sup>28</sup>

The Association of Residential Managing Agents (ARMA) warned that leaseholders could face fire safety bills "in the tens of thousands". ARMA proposed that the Government should provide interest-free loans to leaseholders to cover the cost of the work to avoid safety being compromised by delays in removing ACM cladding.<sup>29</sup>

During the aforementioned Westminster Hall debate on 21 December 2017, the Shadow Secretary of State for Housing also suggested the establishment of a Government-backed loans scheme for private landlords:

They could consider, for instance, a Government-backed loans scheme for private landlords who genuinely struggle to cover the costs themselves. The Government could also consider a similar condition that might help to address the concerns the Minister has heard from some of my hon. Friends about the position of leaseholders in private high-rise blocks. In any case, I ask the Minister to reflect carefully on the points that have emerged in the debate, linked to the work required after Grenfell Tower, and early in the new year to make a clear statement on what the Government will do to try to deal with the concerns for leaseholders with both private landlords and social landlords.<sup>30</sup>

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<sup>27</sup> *Inside Housing*, "[Landlords can use cladding funding to pay for completed works](#)", government says," 29 May 2018 [subscription required]

<sup>28</sup> [Who pays for fire safety work such as changing the cladding on blocks of flats?](#) 2017

<sup>29</sup> *Inside Housing*, "[Leaseholders across the country could face fire safety bills in the tens of thousands](#)", 18 January 2018

<sup>30</sup> [HC Deb 21 December 2017 c490WH](#)

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During the debate on 6 March 2018, Robert Neill made the point that interest-free loans would still place a burden on leaseholders:

I understand that interest-free loans have been suggested, but a lot of these people are already suffering, so how will they repay the capital? I am glad that additional funding has been made available to the Leasehold Advisory Service, but again, that does not address the underlying situation. A failure of regulation is a failure of governance, whoever was in government at the time, so ultimately the Government need to stand behind those affected, rather than expecting the costs to be picked up by individuals who did nothing and had no control over what happened.<sup>31</sup>

One block that attracted media attention is Citiscape in Croydon which is managed by Firstport on behalf of Proxima Properties. The estimated cost of removing and replacing the cladding on this block is reported to be between £1.8 and £2 million. Reports said that this could result in leaseholders facing average bills of £21,000 depending on the size of their flats. Firstport referred the question of the recoverability of the cost from leaseholders to a First-Tier Tribunal (Property Chamber). On 13 March 2018, the Tribunal ruled that the cost *is* recoverable from the block's leaseholders.<sup>32</sup> However, on 19 April 2018, Barratt Developments, the original developers of the block, told leaseholders that they would cover future and backdated costs relating to employing a fire warden and the removal and replacement of unsafe cladding from this building.<sup>33</sup>

Subsequently, some other companies committed to covering the cost of the work. Kit Malthouse, the Housing Minister, referred to these firms in response to a PQ in October 2018:

Ministers have been very clear that in the private sector it is the responsibility of the building owner, or responsible person, to fund the measures necessary to ensure the safety of residents and must do all they can to protect leaseholders from additional costs. **We are encouraged by those in the sector, such as Barratt Developments, Mace, Legal & General and Taylor Wimpey, who are doing the right thing and taking responsibility, and we expect others to follow their lead.**<sup>34</sup>

Peabody has committed not to pass on the cost of remediation to leaseholders in four of its privately owned blocks.<sup>35</sup>

*Inside Housing* reported that the property management company in charge of New Capital Quay in Greenwich, a block which has similar cladding to that of Grenfell Tower, had launched a legal challenge against the National House-Building Council (NHBC) on the basis that the cladding complied with the building regulations in force at the time of construction and was signed off by the NHBC in their building control role.<sup>36</sup> In July 2018, *Construction News* reported that the NHBC had accepted the claim following an investigation. The estimated cost is between £25 and £40 million.<sup>37</sup> In November 2018, the CEO of NHBC, Steve Wood, confirmed to *Inside Housing* that claims on a "defined number" of developments had been accepted.<sup>38</sup>

The question of who might be responsible for the cost of remedial works is further complicated where defects are identified with the installation of cladding. For example,

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<sup>31</sup> [HC Deb 6 March 2018 c80WH](#)

<sup>32</sup> *Inside Housing*, "[Leaseholders lose appeal over cladding removal costs](#)," 14 March 2018

<sup>33</sup> MHCLG, [Press Release](#), 20 April 2018

<sup>34</sup> [PQ 174629, 9 October 2018](#)

<sup>35</sup> *Inside Housing*, "[Peabody will not pass on cladding removal costs to leaseholders](#)," 7 August 2018

<sup>36</sup> *Inside Housing*, "[NHBC faces liability claims for dangerous cladding on tower blocks](#)", 29 January 2018

<sup>37</sup> *Construction News*, "[NHBC to pay for Grenfell-style cladding removal](#)," 10 July 2018

<sup>38</sup> *Inside Housing*, "[NHBC to cover costs on more developments with Grenfell-style cladding](#)," 6 November 2018



*Inside Housing* reported on a block in Salford where surveys revealed inadequate fire breaks in cladding panels, which could give rise to a liability under the leaseholders' warranties.<sup>39</sup>

Leaseholders are also being asked to meet the cost of 'waking watch' fire marshals. These marshals have been installed in affected blocks to provide additional fire safety protection pending the removal and replacement of ACM cladding. Costs for this service are reported to be around £4,000 per week. A First-Tier Tribunal decision concerning the recoverability of these costs from long leaseholders was issued on 24 January 2018. The Tribunal in this case found that the costs were recoverable based on the wording in the lease agreements.<sup>40</sup> Giles Peaker of the specialist housing law website, *Nearly Legal*, commented:

The wording of similar clauses will be stress tested in a manner that these usually uncontroversial and untested clauses have not seen before.<sup>41</sup>

More information on the case and its implications can be found on [the Leasehold Advisory Service's website](#).<sup>42</sup>

### 3.1 The Government response

In June 2018, the Government appointed a Ministerial taskforce to oversee a programme of remediation in the private sector. The Government called on freeholders to cover the cost of the necessary works and provided additional funding for the Leasehold Advisory Service:

The Secretary of State has made clear that building owners should do all they can to protect leaseholders from costs relating to interim measures and cladding remediation – either funding it themselves or looking at alternative routes such as insurance claims, warranties or legal action.

It is important that leaseholders are able to access specialist advice to understand their rights. The Secretary of State announced on 4 December that the department is providing additional funding to the Leasehold Advisory Service (LEASE), an arm's length-body which provides free initial legal advice to leaseholders, to advise on fire safety issues.

The department is keeping the situation under review.<sup>43</sup>

In October 2018, the Housing Minister advised:

The Secretary of State has recently written to all private sector building owners who are currently committed to passing costs to leaseholders, and to those who are yet to make clear their plans to remediate their buildings, or their intention to pass on costs.

These letters set the expectation that there is a moral imperative for private sector landlords to do the right thing and remove unsafe cladding quickly and not leave leaseholders to cover the cost. We have made clear that we have ruled out no options own solutions.<sup>44</sup>

The suggestion that freeholders should meet the cost was described as 'unrealistic' by some. For example, the following observations were made on the [Nearly Legal housing law website](#):

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<sup>39</sup> *Inside Housing*, "[Fire safety: the leaseholder issue](#)", 2 March 2018

<sup>40</sup> [E & J Ground Rents No. 11 LLP various leaseholders of Fresh Apartments, Salford](#)

<sup>41</sup> [Fire Safety - Who pays?](#) 4 February 2018

<sup>42</sup> [The use of wardens and recovery of costs from leaseholders](#), January 2018

<sup>43</sup> [High Rise Flats: Written Question: 126695](#), 8 February 2018

<sup>44</sup> [PO 174629, 9 October 2018](#)

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- The current owners of some blocks may not have been responsible for commissioning the 'flawed' work – on this basis they may be reluctant to fund the necessary works.
- Some private landlords may not be able to fund the works. For example, a lessee-owned freehold vehicle (e.g. a nominee purchaser post-enfranchisement) may struggle to raise the finance given that the capital value of the building is primarily in the long leases.
- Traditional private landlords hold a freehold reversion in order to generate an income stream and not to fund substantial works "where the benefit is, on any view, at least shared with the leaseholders."<sup>45</sup>

During the Westminster Hall debate on 6 March 2018, Robert Neill referred to the fiduciary duty owed by directors of commercial companies to their shareholders and the fact that this could represent a 'conflict' for those considering who should meet the cost of fire safety works.<sup>46</sup> Several Members speaking in the debate mentioned the moral duty on freeholders the Minister had referred to, pointing out that "a moral duty is not legally enforceable."<sup>47</sup> Responding to the debate, the then Minister, Dominic Raab, said:

In the private sector, of course, the allocation of responsibility depends on the terms of the leasehold arrangements, as qualified by general law. The determination of the legal position will obviously need to be settled ultimately by a court. Proceedings are under way in the constituency of the hon. Member for Croydon North, as I am sure he knows. I took the point that my hon. Friend the Member for Hendon (Dr Offord) made: that it cannot be right for a Minister to pre-empt or prejudge the legal determination of a relationship, where it is not only spelled out in the leasehold arrangement, but qualified by general law.

In some cases, the costs fall, in practice, to landlords or building owners; it may be clearer in some leases than in others. Where the costs do not fall to landlords or building owners as a matter of strict law, we continue to urge those with responsibility to follow the lead of the social sector. We urge those private companies to do the right thing, and not to attempt to pass the costs on to residents. They can meet some of those costs—hon. Members asked about this—through alternative routes such as insurance claims, warranties or legal action. It is rightly for them to pursue those avenues. They have the financial means, the relationship—legal or otherwise—and the wherewithal to do so. The Secretary of State and I have been clear about that in direct conversations, including with those who own the property in the constituency of the hon. Member for Croydon North. Where building owners are seeking to pass on remediation costs to leaseholders, it is important that leaseholders are able to get specialist advice. The Government have provided free legal advice and support through a range of measures, including the Leasehold Advisory Service, or LEASE—a free and tailored service.<sup>48</sup>

The Government reportedly threatened further enforcement action against companies passing on the cost of the works; fines and bars from accessing other Government schemes were also possible courses of action.<sup>49</sup> An article in *The Times* suggested that this approach could face legal challenge as it would "cast doubt over the legitimacy of legal contracts" in the UK.<sup>50</sup> The Housing, Communities and Local Government Select Committee conducted an inquiry into building Regulations and fire safety which reported in July 2018. The Committee remarked that "during our public evidence session with the

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<sup>45</sup> [An air of unreality](#), 4 December 2017

<sup>46</sup> [HC Deb 6 March 2018 c80WH](#)

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, cc102-3WH

<sup>49</sup> *Guardian*, "[Landlords told to remove Grenfell-style cladding or face action](#)", 10 September 2018

<sup>50</sup> *The Times*, "[Dispute over plan to make landlords fund recladding](#)", 20 October 2018

then Minister of State for Housing, it was not clear what additional options were available to the Government to intervene".<sup>51</sup> The Committee concluded:

More than a year has passed since the Grenfell Tower fire and it is unacceptable that so many private buildings continue to have unsafe cladding. This is a difficult and complex legal situation and, while the Government says it will rule out no options, it is unclear what more they can do to compel private building owners to act or whether they should be liable for this work in the context of the ambiguity of the current guidance for external surfaces. These delays are unfair on leaseholders and cannot continue.

Furthermore, it is clear that the ownership and responsibility of privately owned buildings is often complex. For example, some of these blocks do not have a single 'building owner', rather an owner of the modest freehold ground rent and the constituent long-leaseholders, the latter often being the only parties with a contractual obligation to carry out remedial works. *We therefore recommend that the Government conduct an urgent review into responsibility and liability of such buildings to ensure the necessary work can be carried out for the safety of residents, which is paramount. The Government should then produce further subsequent guidance for building owners.*

While it is encouraging that an insurance company has recently accepted a claim to pay for remedial work on a private sector development in Greenwich, nevertheless, more needs to be done now to ensure that unsafe cladding is removed urgently. *To avoid any further delay, we propose that the Government introduces a low-interest loan scheme for private sector building owners, to ensure that remedial work is carried out as quickly as possible and that costs need not immediately be passed on to leaseholders.*

As we indicated earlier, we believe it would be unfair for private sector building owners or long leaseholders to be made liable for the costs of remedial work if the building fully complied with the building regulations at the time of construction or if the work was signed-off by Local Authority Building Control. In such circumstances, the cost of remedial work should fall to the Government.<sup>52</sup>

The Government response was published in September 2018, on the specific points raised above, the Government said:

- In the private sector more and more firms are doing the right thing and replacing cladding themselves without the costs falling to leaseholders. The Government will consider what further steps may be appropriate as part of the detailed analysis of the consultation responses and the wider reforms proposed by the Independent Review.
- The Government has been clear that building owners are legally responsible for ensuring residents' safety. They must undertake remediation action where potentially dangerous ACM cladding has been used and we have said that they should do all they can to protect leaseholders from incurring costs, either funding it themselves or looking at alternative routes such as insurance claims, warranties or legal action.

We are not persuaded that a review into responsibility for buildings is necessary; and would be concerned about the further delay that it could introduce into the process. We have written to the relevant building owners to remind them of their responsibilities and to highlight that, where building owners do not take action, local authorities have extensive enforcement powers to ensure that required remediation is undertaken. We welcome Mace's decision to cover the full costs of recladding two blocks at its Greenwich Square Project in south-east London. We also welcome the decision of developers such as Barratt Developments, Legal & General, Taylor Wimpey

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<sup>51</sup> HCLG Committee, [HC 555](#), 18 July 2018, para 82

<sup>52</sup> *Ibid.*, paras 84-87

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and Peabody to pay for work to remove cladding. We call on others to follow their example.

We have met leaseholders to understand their concerns, and industry to discuss the barriers to remediation and to work on solutions for individual building owners who cannot resolve building remediation themselves. We do not rule out any options if industry, individual building owners or developers do not come forward with their own solutions. Our new minister-chaired taskforce will be charged with ensuring that remediation plans are put in place swiftly across all private sector buildings with ACM cladding systems.<sup>53</sup>

On 24 January 2019, Kit Malthouse responded to a PQ on leaseholder charges:

We understand that leaseholders in Heysmoor Heights have been protected from a substantial proportion of the overall remediation costs due to a warranty claim being accepted. However, we continue to set our strong expectation that leaseholders should be protected from all remediation costs. We have written to, and continue to engage with, individual building owners to reiterate this expectation.<sup>54</sup>

In response to an [adjournment debate](#) on the removal of ACM cladding from private blocks led by Rushanara Ali on 29 April 2019, Kit Malthouse acknowledged that remediation work on these blocks had made slow progress:

In the social sector we are making good progress. In the private sector, progress is slower; I absolutely admit that. We need to do something to speed that up, and we hope to increase the pace quite soon. Discussions are ongoing.<sup>55</sup>

**On 9 May 2019, the Secretary of State, James Brokenshire, announced that the Government will “fully fund the replacement of unsafe aluminium composite material (ACM) cladding on high-rise private residential properties where building owners have failed to do so.”<sup>56</sup>** The estimated sum of the available funding is £200 million. The press release contains the following information:

The government has already fully funded this work in social housing developments. However, private developers and freeholders have been too slow to act and leaseholders have been threatened with significant, often unaffordable, costs resulting in delays.

The latest figures show that 166 private buildings are yet to start works on removing and replacing ACM cladding, compared to 23 in the social sector.

Building owners will have 3 months to access the new fund. We will look carefully at those who fail to remediate and consider what further action can be taken.

Building owners and developers who have already fully funded the remediation of buildings are Pemberstone, Aberdeen Asset Management, Barratt Developments, Fraser Properties, Legal & General, Mace and Peabody.

[...]

For the purposes of this press release, high-rise buildings are defined as those above 18 metres in height.

[...]

As a condition of funding, we will require the building owner to take reasonable steps to recover the costs from those responsible for the presence of the unsafe cladding.<sup>57</sup>

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<sup>53</sup> [Cm 9706](#). September 2018, paras 13 and 34-36

<sup>54</sup> [Written question – 210545, 24 January 2019](#)

<sup>55</sup> [HC Deb 29 April 2019 c97](#)

<sup>56</sup> MHCLG, [Government to fund and speed up vital cladding replacement](#), 9 May 2019

<sup>57</sup> Ibid.

In a [statement to the House of Commons](#), James Brokenshire enlarged on the expectation that building owners should pursue claims to recover the cost of the works and said that the funding would be conditional on the work being completed within a set period:

The fund does not absolve industry from taking responsibility for the failures that led to the ACM being wrongly put on buildings. As a condition of funding, we will stipulate that building owners must pursue warranty and insurance claims and any appropriate action against those responsible for putting unsafe cladding on the buildings, with moneys to be repaid to the Government.

We will write to all potential fund applicants by the end of next week to start engaging them in preparation for formal applications. We will also make funding conditional on the building owner or responsible person agreeing a contract to start remediation works within a set period. We will provide further details on the application process; I urge those who intend to apply to start developing ACM remediation proposals and costings so that applications can be made and processed promptly.<sup>58</sup>

In response to questions from the Shadow Housing Secretary, John Healey, he said that the £200 million is not new money:

We intend to manage funding for the policy through our existing significant programme budgets. To put that in context, if the full amount were used, it would represent something like 3% of this year's financial programming. We will keep the House updated through the supplementary estimate. The size of the new fund is informed by the public sector fund's utilisation and drawdown, by the financial support that has been provided by some of the developers and builders, and by the insurance that has been activated for a number of the buildings.<sup>59</sup>

Members questioned whether the level of funding will be sufficient:

As I have said, the £200 million represents an estimate of the cost, based on the existing experience of remediation—some of the work that has already been done—and taking account of instances in which developers, or insurance, are already in place. It is there to provide capital support.<sup>60</sup>

The Secretary of State clarified what the funding will cover:

The fund is intended to provide capital support for the removal of ACM cladding systems, including insulation, as well as the removal and disposal of existing cladding, replacement materials and labour. As part of the process of writing to building owners and of the subsequent work, we will specify that in greater detail to give reassurance.<sup>61</sup>

Immediate reaction within the sector has been positive. However, the UK Cladding Action Group and Manchester Cladiators have reportedly referred to the “abandonment” of residents in buildings with dangerous non-ACM systems such as high-pressure laminate cladding.<sup>62</sup> There is concern that Government funding will not cover the cost of additional fire-safety measures:

While this will be a relief for thousands trapped in buildings with ACM cladding we must not forget the many, many leaseholders and social housing tenants living in blocks with other forms of unsafe cladding and internal fire safety defects who will be excluded from this help. We must also not forget the life-changing sums of money for

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<sup>58</sup> [HC Deb 9 May 2019 c687](#)

<sup>59</sup> [HC Deb 9 May 2019 c690](#)

<sup>60</sup> [HC Deb 9 May 2019 c692](#)

<sup>61</sup> [HC Deb 9 May 2019 c691](#)

<sup>62</sup> *Inside Housing*, “Leaseholders warn against ‘cladding lottery’ after government announces fund”, 9 May 2019

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interim fire safety measures that leaseholders are paying, that has been excluded from this announcement.<sup>63</sup>

*Inside Housing* Magazine's [End Our Cladding Scandal campaign](#) is calling for:

- Government provides a fund to cover the cost of cladding removal and remedial works on private blocks
- A firm timescale is set out of no more than two years for the work to be carried out
- Residents are reimbursed for the interim fire safety costs incurred, and funding is to be provided for necessary internal fire safety measures identified by a competent fire risk assessor

Following the announcement on 9 May 2019, the campaign published an open letter to the Government saying:

We need the government to set up a fund to pay for all unsafe residential homes to be made safe, both inside and out and including non-ACM systems. This must not be provided as loans, which would simply saddle leaseholders with debt. We need this fund to be tied to a commitment to complete the work within two years. We need those who have spent their life savings on interim measures to be recompensed. And we need all of this to be announced by June 14 this year – the second anniversary of Grenfell.<sup>64</sup>

### 3.2 Local authority enforcement powers

In the wake of the Grenfell Tower fire, it became apparent that the Housing, Health and Rating System (HHSRS) [Operating Guidance](#) did not specifically cover assessment of cladding, and predominantly focused on assessing the risk of hazards within *individual dwellings*, rather than assessing the common parts of the building, including the exterior of building.

In November 2018, MHCLG published an [addendum](#) to the Operating Guidance to provide guidance on the assessment of high-rise residential buildings with unsafe cladding:

It supplements the Hazard Profile for Fire as given in the HHSRS Operating Guidance (see Profile 24, pages 150 to 155) and should be read and used in conjunction with that Operating Guidance. While the addendum deals specifically with high-rise residential buildings (those 18 metres high and over) with such cladding, some aspects will be relevant for other issues relating to the exterior of a building, or to other residential buildings containing flats or apartments.<sup>65</sup>

The Government has said that financial support may be available to authorities seeking to use enforcement action and carry out remedial work to tackle private blocks with unsafe cladding. In February, *Inside Housing* reported that Tower Hamlets Council was considering the use of enforcement action to tackle a block with 87 units at Victoria Wharf Bethnal Green.<sup>66</sup> Ultimately, a local authority in this position would seek to recover their costs so enforcement action would not necessarily relieve leaseholders of a requirement to meet the cost of the works under the terms of their lease agreement. However, as noted above, the Government has committed to fund the replacement of ACM cladding on privately owned blocks. The press release makes it clear that building

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<sup>63</sup> Ibid.

<sup>64</sup> *Inside Housing*, "New cladding fund will come out of existing MHCLG budgets, Brokenshire confirms", 9 May 2019

<sup>65</sup> HC 1744, [HHSRS Operating Guidance Addendum](#), November 2018

<sup>66</sup> *Inside Housing*, "East London borough to make first use of cladding enforcement powers," 19 February 2019



owners will be expected to take reasonable steps to recover the costs “from those responsible for the presence of the unsafe cladding”.<sup>67</sup>

## 4. Devolved administrations

### 4.1 Wales

On 22 May 2018, the Housing and Regeneration Minister, Rebecca Evans, [announced](#) £3 million in capital funding to enable Newport City Homes to replace cladding on three tower blocks with ACM cladding in the city.

The National Assembly for Wales Equality, Local Government and Communities Committee conducted an inquiry into fire safety in privately owned high rise blocks in Wales which [reported](#) in November 2018. The Committee considered uncertainty over who would pay for remedial works on these blocks and recommended:

**Recommendation 13.** We recommend that the Welsh Government liaises with the UK Government to identify any common approaches that can be taken in relation to addressing concerns about the cost of remedial work and leaseholders being held liable.<sup>68</sup>

The Welsh Government [responded to the report in December 2018](#) – on liability for payment for the works the Government said:

In respect of your comments on liability for remediation costs, I am pleased to report that the completed and planned removal and replacement of Aluminium Composite Material cladding in Wales has been, and is being, funded by developers or building owners, rather than by individual leaseholders.<sup>69</sup>

### 4.2 Scotland

Different building regulations operate in Scotland. The Scottish Government’s factsheet on ACM cladding in Scotland states:

**Are we sure the cladding systems in social housing high rise tower blocks in Scotland are not the same as that used in Grenfell Tower?**

Yes, all 32 Scottish local authorities reported that no local authority or social high rise domestic properties in Scotland have been extensively clad in ACM.

**What about the cladding systems in private high rise domestic tower blocks in Scotland – are these also being checked?**

Yes, all local authorities completed checks on private sector properties. 31 local authorities have reported to that no privately owned high rise domestic properties have ACM in their cladding system. Glasgow City Council has confirmed a private high rise development in Glasgow has extensive ACM cladding. Interim mitigation measures are in place and the cladding is scheduled to be replaced.<sup>70</sup>

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<sup>67</sup> MHCLG, [Government to fund and speed up vital cladding replacement](#), 9 May 2019

<sup>68</sup> National Assembly for Wales Equality, Local Government and Communities Committee, [Fire safety in high-rise buildings \(private sector\)](#), November 2018

<sup>69</sup> Welsh Government, [Review of Fire Safety in High Rise buildings](#), 21 December 2018

<sup>70</sup> Scottish Government Factsheet [ACM cladding in Scotland: questions and answers](#) [accessed on 14 July 2019]

### 4.3 Northern Ireland

An Independent Reference Group which looked at [Fire Safety in Housing Executive Tower Blocks](#) (January 2018) found that none had ACM cladding similar to that used on Grenfell Tower.<sup>71</sup>

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<sup>71</sup> Independent Reference Group, [Fire Safety in Housing Executive Tower Blocks](#), January 2018, p5

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