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Evidence from: Social Housing Law Association ("SHLA") Wales

Drafted by Sarah Salmon, barrister at Cornerstone Barristers and Caroline Stubbs, Director of Legal and Governance, Pobl Group (with input from Devonshires Solicitors) on behalf of the SHLA Wales Committee and SHLA Wales members

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Senedd Cymru | Welsh Parliament

Y Pwyllgor Llywodraeth Leol a Thai | Local Government and Housing Committee

Bil Diogelwch Adeiladau (Cymru) | Building Safety (Wales) Bill

You do not need to answer every question, only those on which you wish to share information or have a view.

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1. What are your views on the general principles of the Bill, and whether there is a need for legislation to deliver the stated policy intention?

The Building Safety (Wales) Bill ("the Bill") is part of the Welsh Government's response to the Grenfell Tower fire in June 2017. It addresses issues identified in the Hackitt Review, the Grenfell Tower Inquiry and by the Welsh Government's Building Safety Expert Group.

The Grenfell Tower fire highlighted the vital need to prioritise safety at every stage of a building's lifecycle. Effective management is essential to identify and minimise new and emerging risks wherever reasonably possible. The Bill ensures that safety remains a central focus during the occupation phase of a building, ultimately safeguarding residents.

SHLA Wales is supportive of the Bill and agrees with Community Housing Cymru ("CHC") and the social housing sector in general that the reforms it proposes are both necessary and overdue to improve resident safety, accountability on behalf of responsible persons and public confidence in the social housing sector.

SHLA Wales does, however, have several specific concerns in respect of the Bill which we have outlined below.

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2. What are your views on the provisions set out in Part 1 of the Bill – Safety of buildings containing two or more residential units (sections 1 -66 and Schedule 1)? In particular, are the provisions workable and will they deliver the stated policy intention?

General comment

SHLA Wales notes that a lot of the detail is left to future regulations and guidance. Whilst this features in the regime in England following the Building Safety Act 2022 ("BSA 2022"), the number of regulations issued was chaotic and Wales in not operating under the same urgent setting.

The resourcing and training for social housing providers in Wales that will be required to prepare for the Bill to become law will be significant. It is suggested, and hoped by the social housing sector, that there will be the necessary lead in time and that includes knowing what will be required under any regulations and guidance. Lessons need to be learnt from the Renting Homes (Wales) Act 2016 where there was a flurry of activity in a relatively short space of time, including immediately before the 2016 Act came into force.

Three categories of building

This is a key difference between the English and Welsh regime. 'Regulated building' means any building that contains at least 2 residential units and is wholly, or mainly, in Wales (with limited excluded buildings). Residential units include dwellings, HMOs and any other unit of living accommodation. There are three categories of 'regulated building':

1. Category 1 – at least 18 metres in height or at least 7 storeys
2. Category 2 – between 11 and 18 metres in height and between 5 to 7 storeys
3. Category 3 – is less than 11 metres in height and fewer than 5 storeys

There are differing levels of duties that apply to the categories of buildings, but all are caught by the new regime.

SHLA Wales is broadly supportive of the Bill's proposal that regulated buildings be divided into 3 categories. We accept that the intention behind this is to ensure the safety of all multi-occupied buildings in Wales and to establish accountability for the safety of those buildings.

We are conscious, however, that in England, where a different approach has been taken and the Building Safety Act 2022 ("BSA 2022") prescribed only buildings of 18+ metres in height as 'higher risk', the introduction of a building safety regime has presented significant challenges in terms of pressure on the Building Safety Regulator's resources as well as pressure on social housing providers.

In Wales, where it is proposed that the building safety regime will apply to three categories of building, it seems likely that those same pressures will face local authorities in their capacity as the building safety authority and, potentially, be greater due to the application of the regime to three categories of building. We are concerned about the extent of new requirements and duties that would be placed on social housing providers which will inevitably involve pressures on its workforce and the need to source those with specialist skills to deliver the requirements of the Bill.

Given the size of Wales, it is inevitable that there will be competition to secure the services of those specialists and pressures on those specialists to deliver. At a time when social housing providers are experiencing financial pressures associated with a number of other duties and requirements, SHLA Wales suggests that delivery of these requirements and duties will be difficult without additional funding. Without this, costs may be passed onto residents, which should be avoided at a time when many are feeling the impact of the 'cost of living crisis'.

Principal Accountable Person and Accountable Person

The Bill provides that an Accountable Person ("AP") is a person who holds the legal estate in possession of the common parts of the building (or any part of them) or has a relevant repairing obligation over those parts. The Principal Accountable Person ("PAP") is the AP (if there is only one) or the person that holds the legal estate in possession in the external structure of the building or has the relevant repairing obligation over it (including foundations, external walls and roof).

The requirement applies to all 'regulated buildings', not just those over 18 metres or 7 storeys.

Unlike the English regime, an AP can include those who have obligations under contract, or any degree of control. Those categories of persons are excluded in the English regime.

Overall, SHLA Wales agrees with the establishment of the roles of PAP and AP for the purposes of creating clear responsibilities and accountability. The number of buildings in scope, however, adds to the complexity of determining PAPs and APs and there are several concerns which we take in turn.

First, consider amending 10(2) to allow for an application by one PAP where more than one person meets the definition.

Under the Bill, where there is more than one person who meets the definition of PAP, the building safety authority will have a power to make a determination as to who is the PAP for the building. As currently drafted, clause 10(2) sets out if there is more than one person who could be a PAP then any application for a determination may only be made jointly. We are unclear why the Bill does not make provision for any potential PAP to make an application on a singular basis. The whole thrust of the policy regime is that there should be one PAP so as to ensure one clear duty holder providing certainty to the building safety authority and/or any other interested parties. Assuming this provision is to save costs of applying to the residential property tribunal ("the tribunal") under clause 11, we see no reason why an application could not be made by one potential PAP for a determination as to who the PAP should be.

Secondly, not learning from the decisions and the applications made to the First-tier Tribunal (Property Chamber) in England.

What if there is consent as to who should be the PAP?

In relation the regime in England, Judge Sheftel has queried (in the case of Ovington Court, 197-205 Brompton Road, London, SW3 1LB (LON/00AW/BSG/2024/0001)) whether an application to the tribunal is actually required where there is an agreement. The comments are, however, not authoritative as he has made them in passing without making a decision as to whether or not the position is correct. He said at [15]:

"…it is said that no provision is made for the parties to agree between themselves who is the principal accountable person for a higher risk building without reference to the tribunal. I express no finding on this, save to note that where a party …has already been registered as the principal accountable person and there is no dispute that they should be principal accountable person, it is not obviously apparent that a determination by the tribunal is also required. Nevertheless, the tribunal will of course proceed to determine the present application, as an interested person is entitled to seek the tribunal's determination under section 75(1)(b) of the 2022 Act … and there may be advantages to the parties in having certainty and/or being bound by their agreement, both of which a determination will provide".

As matters stand, many PAPs are making applications to the First-tier Tribunal even where the parties consent. The Bill could solve this issue by making it clear

whether or not an application needs to be made where the two or more potential PAPs agree on the position of which one of them is the PAP.

Another issue that has recently arisen in the First-tier Tribunal is whether or not a person can make an application where there is doubt over the PAP but the person making the application does not meet the test: see Globe View House, 27 Pocock Street, London, SE1 0FU (LON/00BE/BSG/2025/0600). In that case, it was Clarion Housing Group's position that it should not be an AP as it did not fall within the relevant definition in section 72(1) of the BSA 2022: it was said that Clarion neither holds a legal estate in possession in any part of the common parts, nor that it is under a relevant repairing obligation in relation to any parts of the common parts of Globe View House.

Under section 75(1) of the BSA 2022, an application to determine who is an AP for a building and/or the part of the building for which any AP for the building is responsible, may be brought by an interested person. 'Interested person' is defined in section 75(3) as: (a) the Regulator; (b) a person who holds a legal estate in any part of the common parts (or who claims to hold such an estate), or (c) a person who is under a relevant repairing obligation in relation to any part of the common parts (or who claims to be under such an obligation).

Judge Sheftal at [17] said the following as to whether or not a person who does not meet the definition could make an application for a determination by the First-tier Tribunal (emphasis added):

"The difficulty in the present case, is that Clarion contends that it neither holds a legal estate in any part of the common parts, nor is under a relevant repairing obligation in relation to any part of the common parts. In other words, due to a quirk in the legislation, it might be suggested that a party who has been registered as an accountable person but who does not believe itself to be one, does not fall within the list of persons who may bring and application under section 75 of the BSA. Of course, if Clarion were to fail in its submissions, this would necessitate a finding that it is under a relevant repairing obligation in relation to any part of the common parts and so would bring it within section 75(3)(c). In any event, … there was no dispute that the RTM Company also sought a determination as to the substantive issue in the application and so the RTM company could, in essence, be treated as an applicant under rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 insofar as necessary. Certainly, there is no question that the RTM Company falls within the definition of an 'Interested Person' in section 75(3). Accordingly, both parties agreed that the application fell within the tribunal's jurisdiction and should proceed".

SHLA Wales' view is that the Bill could account for this quirk by adding in a further definition of 'interested person' under clause 11.

Thirdly, the position of the building safety authority.

What is the situation where the local authority holding the role of building safety authority is an AP and/or PAP?

Where there is one or more person who meets the definition of a PAP and one of those is the local authority, the building safety authority will be in a position of decision-making against itself. Clear provision should be made to deal with this situation and it appears to us this could be added to clause 11 *i.e.* in circumstances where the local authority meets the definition of a PAP and is the authority who is also the building safety authority, any application to determine who is the PAP must be made to the tribunal.

Fourthly, the potential scope of the AP role. As drafted, the Bill provides that anyone with responsibility for maintaining all or part of the common parts may be an AP. Further, an AP can include those who have obligations under contract, or any degree of control. This suggests that, for instance, a contractor instructed by the landlord or management company of a building to undertake works to the common parts may be an AP for what might be a matter of hours whilst undertaking those works. This cannot have been intention of Welsh Government when drafting clause 8(2)(b) of the Bill.

There needs to be good regulatory understanding of who the duty-holders are and what duties they have, and it is suggested that amendments are made to clarify the position especially of any duty-holders by way of agency.

Enforcement powers

In relation to the powers of enforcement provided for in Part 1 of the Bill, we note that these apply to an AP but that there is no equivalent power in the Bill for residents or other interested parties to take enforcement action. The explanatory note to the BSA 2022, Annex A is a useful summary of applicability to Wales, and it can be seen:

- section 121 (associated person) – does not apply;
- section 123 (Remediation Orders) – does not apply; and,
- section 124 (Remediation Contribution Orders) – does not apply; but
- section 130 (Building Liability Orders) – does apply

We find the lack of such enforcement avenues to be a concerning omission and invite the Welsh Ministers to look at this again as the tools have been well used in England to take action (including when there has been inaction on the person with responsibility to remediate).

Moreover, SHLA Wales has concerns about the practicalities of entry (or the access provisions) at clause 53 and the contravention provisions at clause 55. These provisions can only be enforced by the tribunal. It is our understanding that the tribunal in Wales has no power to enforce its own orders. As such, once an order for entry or contravention order is made, if it is not complied with the matter will need to be transferred to the county court for enforcement. We are not sure, when these are provisions to tackle urgent issues, why such applications cannot be made to the county court in the first instance. The ability to deal with matters urgently is lost when you must apply to the tribunal but on breach have to transfer the case to the county court.

Withholding rent

We have particular concern regarding clause 65 of the Bill which purports that residents will be able to withhold rent and other charges in the event they do not receive certain documents. Although SHLA Wales is supportive of the Bill's intention to strengthen accountability, we expect this provision to receive opposition from the sector. Lessons learned from the Renting Homes (Wales) Act 2016 with regard to withholding of rent and ECRs has taught us that clear regulation and guidance is required as to how this provision will operate in practice to avoid the uncertainty which led to test cases before the Divisional Court under the 2016 Act.

Adult

Under the BSA 2022, adult is defined as those who are 16 years old or above. In Wales, the definition is those over 18 years old (see clause 111). SHLA Wales assumes the reason for this is due to the extension of the number of buildings to which the Bill applies which will, of course, cause an increased administrative burden on those with any relevant duties which will include the social housing sector. Whilst the social housing sector is keen not to be overloaded from an administrative point of view, SHLA Wales highlights the lacuna where residential units are occupied by those who are 16 or 17 who, for example, will not be given a copy of

any resident engagement strategy and will not be under the same duties as others in relation to fire safety risk.

Resident engagement strategy

It is an onerous obligation to provide a strategy "as soon as possible". SHLA Wales would invite the Welsh Ministers to consider this phrase further.

3. What are your views on the provisions set out in Part 2 of the Bill – Fire safety in certain houses in multiple occupation (sections 67 – 80)? In particular, are the provisions workable and will they deliver the stated policy intention?

SHLA Wales is supportive of the inclusion of HMOs within the scope of the Bill, given the risks associated, particularly with regard to fire safety, with these buildings.

As with Part 1 of the Act, we note that enforcement action (*e.g.* an application for an access order) may be taken by a duty holder in relation to a relevant HMO but there is no reciprocal right for an occupier of a residential HMO to take enforcement action against a duty holder who is not complying with its duties pursuant to the Bill. SHLA Wales believes this to be a concerning omission.

SHLA Wales also makes the same observations it has under question 2 as to the enforceability of any such orders that are made by the tribunal in circumstances of breach.

4. What are your views on the provisions set out in Part 3 of the Bill – Enforcement and investigatory powers (sections 81 – 97 and Schedule 2)? In particular, are the provisions workable and will they deliver the stated policy intention?

SHLA Wales is broadly supportive of the provisions set out in Part 3 of the Bill and believes that they will deliver the stated policy intention. However, we are conscious that much of the detail remains to be published in the form of Regulations and repeat the general concern set out under question 1 above.

There is also an issue as to how the building safety authority will be able to carry out the enforcement actions, including serving notices, on itself if it is a relevant duty-holder against whom enforcement action needs to be taken. The problem

does not appear to be dealt with within the Bill and, if that is right, is an omission which should be dealt with.

5. What are your views on the provisions set out in Part 4 of the Bill – Supplementary and general (sections 98 – 114 and Schedules 3-4)? In particular, are the provisions workable and will they deliver the stated policy intention?

As set out at the beginning of this response, SHLA Wales has general concerns regarding the volume of regulations and guidance which this Bill proposes will be published. We appreciate that Welsh Ministers must reserve the power to publish such guidance and regulations in certain circumstances including to give full effect to the primary legislation in question.

We believe, however, there is risk in reserving such a degree of detail to regulations and guidance. The courts interpret the law first by reference to the primary legislation and then secondary legislation. Guidance is not all that helpful especially if it is non-statutory guidance and/or in conflict with the legislation and/or confusing. This can lead to difficulties in the understanding and interpretation of the primary legislation not only when it is put to the test in court but also for those who need to apply the legislation. Again, lessons need to be learnt from the Renting Homes (Wales) Act 2016. The ECR case demonstrated what can happen when the guidance is not in accordance with the provisions of the legislation.

It would therefore be the preference of the social housing sector in Wales for more of the detail which is proposed to be reserved to regulations and guidance to be included within the body of the primary legislation. If secondary legislation is to be used, as above, it needs to be available with a good lead in time.

SHLA Wales also has reservations about the potential effectiveness of local authorities as building safety regulators. Some of those reservations are set out above. More generally, unlike in England, where there is a single building safety regulator, the approach proposed by the Bill in Wales will lead to multiple local authorities taking on the duties of building safety regulator. This will, in our view, inevitably lead to a position where different local authorities are able to resource and carry out these functions to different degrees, leading to inconsistencies across the country.

6. What are the potential barriers to the implementation of the Bill's provisions and how does the Bill take account of them?

The Bill reserves powers to Welsh Government to publish secondary legislation and guidance. SHLA Wales has concerns about the volume of detail to be published in that format. As referenced above, we strongly believe that as much detail as possible should be included in the primary legislation. The primary legislation will be the key reference point for social housing providers, duty holders and the courts. Reserving important detail to secondary legislation or guidance could not only lead to uncertainty and the inability to plan, pending its publication, but could potentially lead to stakeholders being unclear as to where to find information or, in the case of guidance, it not having legal effect.

There is also concern about the significant time and resources (both human and financial) that the social housing sector will need to apply in implementing the proposed regime. This may include resources associated with the creation of building safety case reports, maintaining the 'golden thread' of information and potentially the creation of new digital systems (or updating of existing ones) to take account of new processes.

7. How appropriate are the powers in the Bill for Welsh Ministers to make subordinate legislation, as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)?

As above.

8. Are there any unintended consequences likely to arise from the Bill?

SHLA Wales believes that we have addressed these in response to the questions above.

9. What are your views on the Welsh Government's assessment of the financial implications of the Bill, as set out in Part 2 of the Explanatory Memorandum?

SHLA Wales believes the financial implications of the Bill as set out in Part 2 of the Explanatory Memorandum do not fully account for the potential costs associated with the Bill for social housing providers. Although SHLA Wales is supportive of the principles behind the Bill and the benefits it seeks to bring in terms of improved building safety and accountability, it will require social housing providers to potentially have to fund the creation of/improvements to digital systems ,

workforce training and recruitment or engagement of specialists, which may come at a premium as demand rises. As most social housing providers operate on a not-for-profit basis, in a highly regulated sector that already makes significant demands of it, these costs will place added pressure on them. We would support a more robust financial assessment to establish the true impact the Bill is likely to have on social housing providers from a financial perspective, both in the short and long term.

10. Are there any other issues you would like to raise about the Bill and the Explanatory Memorandum or any related matters?

It is SHLA Wales' view that it is crucial for the Bill to be placed in alignment with other legislative and regulatory requirements connected with property condition and building safety. For instance, the Fire Safety Order, the Renting Homes (Wales) Act, the Welsh Housing Quality Standard (WHQS) 2023 and the Housing Health and Safety Rating System. There is also potential for overlap with the ongoing consultation on strengthening leaseholder protections over charges and service charges. Failure to align has the potential to create duplication, conflict or gaps. In our view, it is crucial to address this to ensure social housing providers have absolute clarity on the extent of their duties and so that they can best provide residents with a safe home.