The Construction Industry Council (CIC) comprises 35 Member organisations with interests across the built environment and the following submission has been made following extensive consultation and represents a consensus of the views of the professional bodies in membership of the Construction Industry Council (CIC). The submission builds upon input from the CIC Liability Panel and the Construction Leadership Council's Professional Indemnity Insurance (PII) Group, which is hosted by the CIC.

The submission does not include any assessment of the 38 pages of Government amendments to the Building Safety Bill, which were issued on 15 February 2022. We have not had time to consider the considerable impact of these amendments, which have been made late in the parliamentary process. It is our initial view that they will have a dramatic effect on the construction industry and may lead to unintended consequences in terms of insurers potentially leaving the construction professional indemnity insurance market and businesses – especially SMEs, which the industry relies heavily upon - no longer being able to operate in the housing development and wider building market. This will have a deleterious impact on the capability to remediate unsafe buildings, build new housing (including affordable housing) and potentially militate against levelling-up policy intentions. **Considerable scrutiny needs to be given to these amendments to ensure that they do not lead to such unintended consequences.**

Background data

In Q1 2021 the CLC PII Group carried out a survey of industry and the anonymised raw data was provided to DLUHC. This is a summary of the survey response:

- Over 1,000 businesses responded, mostly SMEs.
- Most were buying £10,000,000 cover or less and almost 50% had been declined insurance by three insurers or more.
- Premiums had increased nearly 4-fold at last renewal, having doubled the year before.
- The average rate applied to income to calculate premium was 4% but one in five were paying more than 5%.
- Three quarters were carrying a claim excess imposed upon them by their insurers. It has been noted that excesses have also increased.
- Although most respondents said that less than 5% of their work related to high rise residential buildings, almost one in 3 were unable to buy the cover they wanted or needed.

- Over 60% had some form of restriction on cover relating to cladding or fire safety, with one third of the total respondents having a total exclusion in place for cladding claims and 1 in 5 of total respondents having a total exclusion in place for fire safety claims.
- Over a quarter of respondents said they had lost jobs as a result of inadequate PII and 1 in 3 could not do remedial work if they wanted to, with almost a quarter of respondents having changed the nature of their work due to inadequate PII. This is also critical as many of the professional bodies mandate PII for their members and the firms who employ them, so this would make it difficult for them to remain members without PII.

  A follow up survey is expected to be circulated in Q2 of 2022.

The following is a response to the questions posed by the Select Committee in relation to the Secretary of State's reset:

What is your assessment of the Government's announcements on 10 January 2022 regarding building safety?

1) Not all buildings may be unsafe, but more work needs to be done to establish the appropriate data that will identity buildings where there is a fundamental risk to life safety.
2) We agree that leaseholders should not have to pay to remediate buildings that are unsafe.
3) We welcome the removal of the consolidated advice note.
4) We agree that those clearly responsible for profiteering at the expense of fire safety should be removed from government schemes that provide them with work or that provide grants, subsidies or loans to their customers.
5) We agree that the government should press ahead with the Building Safety Fund but that it should be subject to change.
6) We welcome the funding for more fire alarms and changes to allow shared owners to sub-let and/or sell.
7) We note that the announcements refer to the Grenfell Tower tragedy, and the need to 'fix the cladding crisis'. We also note that the supportive measures put forward by the government (such as the Building Safety Fund, and the new dedicated team) relate to these issues. However, we also note that the proposed changes to legislation **affect a far wider range of construction than the scope referred to in the announcements** (and in earlier Government statements). This mis-match between policy statements is a cause of great concern, as **it will have wider and possible unintended effects** that will result in failure to achieve the aims that the changes are intended to address (see our response on 'potential impacts' below).

Do the announcements go far enough, and what, if anything, is missing?

8) We agree with the Secretary of State's view that unfortunately some within the construction industry appear to have prioritised profit over safety and too many contractors have been forced by clients, public and private, for many years to agree to fees that can lead to cutting corners which has compromised fire safety and other aspects of building quality.
9) There are many clients that want to do the right thing and will invest in better culture and leadership and pay due regard to fire safety throughout the lifetime of a building.
10) However, we fear that some clients will continue to place cost above value and therefore compromise issues of quality and safety. Government must lead by example in paying a fair price for its construction projects, and not accept the lowest cost available. We welcome the guidance given in the **Construction Playbook** and feel that the promotion of accessible design stage guidance should be encouraged.
11) The new regime, as currently proposed, may deter many project participants from fully engaging, particularly with the new roles and duties being implemented by the Building Safety Bill. There needs to be an acknowledgement from Government that consultants, contractors and sub-contractors are entitled to be paid commensurate fees for the services required to adequately perform those roles and duties, especially the higher-risk Principal Designer, Principal Contractor and Building Safety Manager roles.
12) Without the support of a robust building regulations and testing regime, consultants, contractors and sub-contractors cannot specify products with certainty and meet the requirements of the fund or the Building Safety Bill. There is a need for a product testing regime that supports both the required dangerous cladding remediation works and the new regulatory regime proposed by the Building Safety Bill. Currently, adherence to the Approved Documents does not demonstrate that a design is compliant with the building regulations. Additionally, there is evidence that fire certification is being withdrawn for fire-safety products (e.g. cavity barriers) as the validity of the tests used are now being questioned.
13) While we cannot yet form a rounded view on the effectiveness of the recently introduced PAS 9980:2022 methodology, and its impact on the proportionality of fire risk appraisal of external walls etc., it is imperative that those completing the assessments are able to apply risk-analysis principles and state where the level of risk identified is acceptable. Early feedback appears to indicate that further guidance is needed.
14) It will be necessary for state intervention to ensure the provision of PII to suitably competent and experienced engineers and others taking on liability for fire safety relating to the necessary remedial works being undertaken via the building safety fund if commercial market insurers continue to insist on excluding cover for fire safety.
15) If government does not intervene, we are concerned that work for the building safety fund will either (a) grind to a halt because no-one has fire safety cover or (b) only the largest businesses with buying power/self-insurance will be able to carry out the work, putting good SME practices at a disadvantage. **We are at a point where perfectly competent people are being excluded from providing services due to the risk aversion of the insurance sector.**

What are the potential impacts of the announcements? In the case of negative impacts, how can they be addressed?

16) The extension of the limitation period under the Defective Premises Act (DPA) and the changes to section 38 of the Building Act 1984 (s38) are well-intentioned but in danger of hurting the wrong parties or being unenforceable through the courts. These extensions and changes will have an effect that is far wider in scope than that needed to address the essential issue of fire safety of high risk buildings.

17) The changes to the DPA will:

a. Apply to all dwellings, not only those that are high risk and/or high rise;

b. Apply to all types of defects that render a dwelling 'unfit for habitation', not just those relating to fire safety (or safety generally). It could for example apply to issues with mould, ventilation, damp, etc;

c. Introduce an extended strict liability against which firms involved in such work will be unable to obtain adequate professional indemnity insurance (PII). PII only protects against negligence based liability (failure to exercise the normal standards of skill and care) not against strict liability (failure to achieve a result, often termed 'fit for purpose' liability); and

d. A retrospective strict liability of 30 years for such defects goes well beyond the changes needed to deal with the problem of unsafe cladding and the 30 year limitation period does not align with contractual obligations and could lead to an unfair reallocation of risk through the supply chain to those least likely to influence the extent of their contractual obligations; it will affect ability to purchase PII; and ultimately pay claims under the DPA. Documents required to make and defend claims may have been destroyed as part of a reasonable document destruction/GDPR policy.

18) The changes to Section 38 of the Building Act 1984 (s38) will:

a. Apply to all buildings, not just dwellings or those that are high risk and/or high rise;

b. Apply to all types of defects, not just those relating to fire safety (or safety generally) or habitability. It could for example apply to very minor breaches; and

c. Introduce an entirely new and extensive area of strict liability in relation to all aspects of the Building Regulations, against which firms involved in such work will be unable to obtain adequate PII

19) A new 15 year liability for such defects goes well beyond the changes needed to deal with the problem of unsafe cladding. Feedback from some professional institutions suggests that the proposed retrospective 30 year limitation period under the DPA would be unworkable.

20) Initial discussions with insurers indicate that the insurance sector will undertake its own analysis of the risks and potential costs and assess them against their fiduciary duty to their shareholders as required by company law. They may walk away from construction. The consequences of the massive increase in level and extent of liability will do the following (in relation **to all construction work,** not just cladding etc, for reasons stated above):

a. Render insurance cover impossible to obtain except possibly for a limited number of very large firms;

b. Disproportionally affect and penalise SME's;

c. Reduce the number of firms available to undertake work (as smaller firms can no longer operate);

d. This will in turn impact on the 'Levelling up' policy, in appearing to support key players largely located in the South East, and doing nothing to enable smaller firms in other areas to participate in the large amount of construction that is urgently needed; and

e. Drive up construction costs across all sectors of the construction industry, including housing, schools, hospitals, and other public sector construction programmes, as well as in the private sector.

21) Many developers use Special Purpose Vehicles (SPVs) for building projects and if these have been dissolved by the time leaseholders bring a claim they will not exist to pay though they may be responsible.

22) These proposals are likely to encourage the increased use of SPVs for construction, motivated to avoid future claims. They could also lead to companies relocating outside the UK (for example to the Republic of Ireland), and therefore outside the jurisdiction of the courts and tax system.

23) There should be express provision in the DPA that manufacturers are duty holders under the DPA or are otherwise caught by the remedies under the DPA.

24) The Acts impose strict liabilities and therefore defendants cannot use as a defence that they acted with "reasonable skill and care". With joint and several liability in place some contractors/consultants (and their insurers if they have cover) will end up paying not because they were negligent but because they were involved on a project and no-one else is able to contribute.

25) It is unknown but anticipated that DPA/s38 claims brought as a result of the extension of the DPA will be related primarily to cladding/fire safety. That appears to be the intention behind the change. However, because the retrospective change to the limitation period is not limited to cladding/fire safety related issues, this will create further uncertainty for Contractors/Consultants and their insurers, which will push insurance premiums up or lead to insurance being unavailable.

26) Those contractors and consultants with a wide-ranging exclusion relating to fire safety claims in their PII will not have insurance to meet a civil claim arising out of such action and the leaseholders will not be recompensed.

27) The proposals will result in insurance policies with wider ranging exclusions, higher excesses, and higher premiums.

28) Insurers that <u>are</u> providing cover that would respond will have their exposure to claims multiplied overnight, not having charged a premium commensurate to the increased exposure (complicated by the fear of being "last man standing" under joint and several liability) and they will have to increase premiums significantly.

29) The proposed new legislation will impose huge responsibilities on a small number of parties, specifically those taking on the Building Regulations sign-off obligations of the Principal Designer and Principal Contractor. The legislation should enshrine obligations on all parties to construction projects to provide supporting sign-offs to the Principal Designer and Principal Contractor, where reasonable, to promote collective responsibility for the safety of projects, and for manufacturers to be required to adhere to the new Code for Construction Product Information.

<u>How might the announcements affect the wider objectives of the Department for Levelling Up, Housing and Communities, including the building of affordable housing?</u>

30) Increasing liabilities of contractors/consultants retrospectively will make the insurance risk unattractive to commercial market insurers and will push premiums and claim excess levels up

such that the insurance is prohibitively expensive, if available at all, disproportionately affecting SMEs, which will in turn impact on the Levelling Up initiative.

31) It will also increase construction costs across all sectors, impacting not only on the cost of the necessary remedial work, but also on costs associated with all other construction programmes (for example, challenging the ability for developers to build affordable housing). The proposed changes to legislation, particularly the introduction of s38, affect all types of construction.
32) Our short term concern is that the amended wording of the Building Safety Bill (and associated regulations) will make the liabilities imposed uninsurable.
33) This is because contractors/consultants are asked to "ensure" that things are done/achieved under the current drafting.
34) Most PII policies provide cover for civil liabilities and for contractual liabilities "so far as they are no more onerous than the liabilities imposed by law in the absence of a contract".
35) In the absence of contractual liabilities to "ensure" something, contractors/consultants must only, by law, demonstrate "reasonable skill and care" in their activities.
36) If a claim is brought against them for failing to ensure something it is likely that their PII insurers will be able to decline to pay that claim on the basis that the liabilities are more onerous than they would have been in the absence of the contract.
37) To summarise, use of the word "ensure" renders the activities potentially uninsurable.

What would you like to see in the funding arrangement to be agreed with industry?

38) Firms are required to have a limit of cover for their PII equal to the value of the project up to a maximum of £10,000,000 but this is not widely available.
39) It is our understanding that only the largest firms are able to buy a policy that will cover claims related to fire safety and even medium to large-sized firms are unlikely to be able to buy more than £5,000,000 in the aggregate per policy year.
40) This means that only the very largest firms are able to sign up to be involved in remedial work under the Building Safety Fund and SMEs with good competency, skills and experience are prohibited from doing this work.
41) This is supported by data provided to DLUHC by the CLC PII Group survey carried out in February/March 2021 and summarised at the head of this submission, (survey soon to be repeated).
42) There are some excellent building safety initiatives that should receive government support such as the Building a Safer Future Charter and the Building Safety Alliance.
43) On a broader macro level, we believe that there should be a review – as seen in Australia - of the legal concept of joint and several liability or there should be regulation or legislation that makes net contribution/fair shares clauses mandatory in appointments between clients and contractors/consultants, with government/local authority frameworks leading by example.

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