



## Apartment Owners' Network

Representing Homeowners in Managed Estates

# Submission to Independent Working Group on Defective Homes for a MUD Defects Remediation Scheme

**Joint submission by the Apartment Owners' Network and  
the Construction Defects Alliance**

**29 March 2022**



**CONSTRUCTION DEFECTS**  
ALLIANCE

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## Executive Summary

The following are a summary of the key points made in this submission:

- The mission statement proposed in the 2018 all-party, Joint Oireachtas Committee *Safe as Houses?* report should be at the core of the Working Group's recommendations to Government. Namely that ordinary homeowners should not be left with liability for the costs of remediating defects in their own homes.
- This must include owners who have already paid for the remediation of their homes or are currently paying for such remediation – in other words retrospection must be provided for in the Working Group's recommendations.
- Responsibility for financing remediation works should be placed where it properly belongs – with the construction industry (because the defects resulted from shoddy building work) as well as the State (because it failed to ensure that its own Building Regulations were adhered to).
- A levy on the output of the construction industry should be introduced in Finance Bill 2022 (there are precedents for such levies as we see in the insurance and banking sectors).
- The Working Group's recommendations must ensure that all owners of defective homes are treated in an equitable manner – whether they are landlords, owner-occupiers or social landlords; whether they own a home affected by fire/water ingress defects or mica and pyrite. In this context, any remediation scheme recommended by the Working Group should cover 100% of owners' remediation costs – as the Pyrite and Mica Schemes do – and also cover, technical, accommodation and storage costs.
- Owners' Management Companies (OMCs) must be at the heart of any remediation scheme given their legal responsibility for the areas most affected by defects and given that they are the only bodies that can practically deliver the required remediation works.
- This also means that remediation funding should be routed through OMCs.
- AON and CDA believe that the best method for funding future remediation works would be grants to OMCs. Interest-free loans to OMCs would only be acceptable provided owners can recover 100% of their costs through the tax system.
- AON and CDA accept that the best mechanism for delivering 100% cost recovery to most MUD owners who have paid or are paying remediation levies is through tax credits. The process of introducing such tax credits should commence in Finance Bill 2022.
- However, grants will be required for MUD owners who are not in the tax net and social landlords such as housing associations and local authorities.
- Given its extensive history in managing defects remediation schemes, The Housing Agency should be tasked – and resourced accordingly – with managing whatever remediation scheme is proposed by the Working Group.

## 1. Introduction

This submission is jointly made by the Apartment Owners' Network and the Construction Defects Alliance to the Independent Working Group on Defective Homes and it sets out our agreed view as to how the widespread problem of defects in apartments and duplexes needs to be tackled.

## 2. AON and CDA

The Apartment Owners' Network (AON) is a volunteer-led, independent, non-party political organisation that represents the interests and views of owners (owner occupiers and investors) and Owners' Management Companies ("OMCs") of homes in managed estates throughout Ireland.

AON's objectives are:

- To achieve the proper regulation of OMCs;
- To seek reform of the law governing the operation of OMCs;
- To promote best practices among OMCs and the conduct of their directors;
- To educate, inform and communicate with its members in relation to matters of relevance and importance to the multi-unit development sector and such other companies whose operations affect, directly or indirectly, the purchase, sale or ownership of residential units in multi-unit developments or of OMCs;
- To influence public policy for the betterment of multi-unit development living;
- To influence for the better the general public's perception and understanding of multi-unit development living;
- To engage with other parties with common interests in the multi-unit development sector.

The Construction Defects Alliance is an informal grouping – which has the support of the Apartment Owners' Network (AON) – currently involving hundreds of apartment owners and OMCs from over 150 different locations around the country which are affected by construction defects. The Alliance also has active involvement from some of the professionals who are working with the owners and OMCs concerned.

The Alliance has its origins in the Beacon South Quarter Lobby Group which has been campaigning for the last number of years for action for homeowners affected by defects. Through that Lobby Group's campaigning work other individual owners and OMCs approached it and got involved in the campaign. Ultimately, as the numbers began to grow, the Construction Defects Alliance was set up in autumn 2019.

The Alliance has one very simple aim – the implementation of the Oireachtas Housing Committee's *Safe As Houses?* report, which was published in January 2018.

### 3. Working Group's Terms of Reference

The Programme for Government (PFG) commits the Government to examining *“the issue of defective housing...having regard to the recommendations of the Joint Oireachtas Committee on Housing report, ‘Safe as Houses?’”*.

This commitment provided the basis for Term of Reference (TOR) 1 for the Independent Working Group to Examine Defects in Housing which requires the Working Group to:

*Examine defects in housing having regard to the recommendations of the Joint Oireachtas Committee on Housing report ‘Safe as Houses?’ in respect of “addressing the legacy of bad building and poor regulation.”*

The purpose of this submission is to translate the recommendations of *Safe as Houses?* relevant to TOR 1 into practical financial proposals and a tangible remediation scheme model.

### 4. *Safe as Houses?* Report Recommendations

The *Safe as Houses?* report recommendations referred to in the PFG and the Working Group's TOR 1 are set out in Chapter 4.4 of the report as follows:

- i. *Government should establish a redress scheme to assist homeowners with latent defects*
- ii. *The mission statement of the redress scheme should be: “Ordinary owners who purchased in good faith should not be liable for the costs of remediation caused by the incompetence, negligence or deliberate non-compliance of others”*
- iii. *The redress scheme should provide an information and advice service for those affected by non-compliance and regulatory failure*
- iv. *The redress scheme should examine a number of possible funding mechanisms for assisting owners affected by pre-2014 non-compliance including:*
  - *An industry levy funded levy matched by Government funding*
  - *Allowing owners to write off the costs of remedial works against their tax liabilities*
  - *An interest free loan scheme to assist homeowners fund the cost of remedial works*
- v. *The redress scheme should be accompanied by a programme of fire risk assessments based on a methodology designed to assess boom time developments deemed potentially at risk of containing latent defects.*

The recommendations in *Safe as Houses?* provide some of the key underpinnings for the proposals set out in this submission namely that:

- Ordinary homeowners are not left with liability for the costs of remediation – including owners who have already paid for the remediation of their homes or are currently paying for such remediation. In other words, there has to be a provision for retrospection;
- The proposed remediation scheme should be financed through a fund supported by the (construction) industry and the Government or through interest-free loans combined with the writing off of levies against tax or a combination of these two routes.

## 5. Parity between Homeowners

The Minister for Housing, Darragh O'Brien TD, set out some important principles in relation to equity for homeowners whose homes are affected by defects when he announced the details of the revised mica scheme in late 2021:

- *“This newly enhanced scheme ensures absolute parity of treatment for the northwest coast and the east coast and in some instances goes further.”*
- *“I have consistently said the State has a moral obligation to assist affected homeowners and that is what we are doing through this enhanced scheme.”*

The principles set out by the Minister should equally apply to the owners of homes in MUDs affected by fire safety and serious structural defects. However, the reality is that some homeowners are already being made liable for the full costs of remediation whereas others are not.

As the paper on *Building Defects Remediation Costs and Tax Liability* – prepared by the Department of Finance for the Financial Issues Sub-Group of the Working Group – points out:

*“(Commercial) Owners of rental properties are entitled to claim deductions and reliefs from gross rents for various expenses relating to their rental property. These expenses include any rent payable in respect of the premises, general repairs and maintenance (capital expenditure excluded), insurance and management fees, rates, service charges, accountancy fees and certain mortgage protection policies.”*

This position was corroborated by the Minister for Finance, Paschal Donohoe TD, in his answer to a Parliamentary Question (PQ) from Deputy Ged Nash on 28 September last when he said:

*Section 97 Taxes Consolidation Act 1997 (TCA) sets out the deductions allowable in computing rental income chargeable to income tax or corporation tax under Case V of Schedule D. Income chargeable under Case V is computed on the gross amount of rent receivable less allowable expenses incurred in earning that rent, as specified in section 97(2). These expenses include, inter alia, the cost of maintenance, repairs, insurance, and management of the premises borne by the person chargeable and which constitute an expense of the agreement under which the rent/receipts were received, but excluding any capital expenditure.*

*Revenue's Tax and Duty manual 04-08-01 provides detailed guidance on the tax treatment of rental income. Service charges and levies that are imposed by management companies are deductible against the landlord's rental profits.*

In practical terms, commercial landlords – who according to a 2019 report for The Housing Agency and Clúid Housing (Mooney, Paul. 2019. *Owners' Management Companies: Sustainable Apartment Living for Ireland*. Dublin: The Housing Agency and Clúid Housing) account for 60% of apartment owners in Ireland – have been able to claim tax relief for the remediation levies they have paid or are paying whereas owner-occupiers and social landlords – local authorities and housing associations – have not been able to avail of such a facility (as social landlords don't pay either income tax or corporation tax).

Another issue that needs to be taken into consideration in terms of ensuring parity between homeowners is to ensure that some homeowners don't receive a double benefit from any possible remediation scheme. In that context, it's important to note another point made by the Minister for Finance in his 28 September answer to a PQ from Ged Nash TD:

*I am advised by Revenue that it does not have a figure for the cost of deductions claimed by landlords for service charges or levies related to the remediation of defects, as it does not request such detailed information on tax returns.*

So given that the State doesn't know which landlords have claimed for reliefs for past or current levies, this reality will have to be factored in to how any possible remediation scheme treats homeowners who have paid or are paying remediation levies.

In summary then – from a parity perspective – given the *Safe as Houses?* report recommendation that '*ordinary homeowners...should not be liable for the costs of remediation*', it is untenable in the light of that recommendation that owner-occupiers and social landlords would solely be held fully liable for such costs in the context of tackling defects. Equally, it is important – in order to ensure parity between homeowners – that no owner should receive a double benefit from any proposed remediation scheme, namely a tax relief and a grant.

The proposals set out in this submission seek to take these important considerations in relation to parity for homeowners on board.

## **6. Key Role of OMCs**

A central issue in the development of an effective remediation scheme for apartment and duplex developments is the key role of Owners' Management Companies (OMCs) in multi-unit developments (MUDs)

An OMC is established for three reasons:

1. To manage and maintain common areas in a multi-unit development

2. To be the legal owner of the common areas on behalf of the owners of the units
3. To be the legal owner of the beneficial or reversionary interest of each unit. This means that the OMC owns a share in each unit.

According to the MUD Act 2011, common areas are defined as:

- The external walls, foundations and roofs and internal load-bearing walls
- The entrance halls, landings, lifts, lift shafts, staircases and passages
- The access roads, footpaths, kerbs, paved, planted and landscaped areas, and boundary walls
- Architectural and water features
- All ducts and conduits, other than those within and serving only one unit in the development
- Cisterns, tanks, sewers, drains, pipes, wires, central heating boilers, other than those within and serving only one unit in the development
- Other areas that are from time to time provided for common use.

In practice, most of the defects issues that arise within MUDs occur within the common areas referred to above and other common areas such as:

- Cavities between ceilings and floors;
- Cavities within the party walls between apartments;
- The external area around an apartment's front door.

These areas are the legal responsibility of OMCs and therefore it is OMCs – not individual owners – that have the legal responsibility to deal with the vast majority of defects.

In addition, under Section 13 of the MUD Act:

*...the owners' management company shall have a right to carry out repairs or maintenance on a part of a relevant multi-unit development which is not in their ownership or control where such repairs are reasonably necessary to ensure the safe and effective occupation or the peaceful enjoyment of occupation of any unit or units in the development...*

It is clear then, on the basis of the responsibilities and rights set out in the MUD Act, that remediation works – and funding for same – should be routed through OMCs rather than individual owners.

## **7. Holding Construction Industry to Account**

As pointed out earlier in this submission, the *Safe as Houses?* report recommends that the remediation scheme for MUD defects should be part-funded by an industry levy. AON and CDA agree with that proposition and we go further in saying that it would be contrary to any concept of natural justice and simply unconscionable if owners were asked to contribute to remediation costs while the construction sector continues to get off scot-free.

Returning to the idea of a levy on the construction industry, the Pyrite Panel in its June 2012 report recommended that (P. 116, <https://www.pyriteboard.ie/Pyrite/media/Pyrite/Updated/Report-of-Pyrite-Panel-June-2012.pdf>): *'...the Government should take the necessary steps to ensure that those who have responsibility for the pyrite problem should bear the costs of remediation'*.

In this context, the Pyrite Panel proposed that the following groups should be the ones to pay for the remediation of homes affected by pyritic heave:

- Construction sector – including builders and developers;
- Insurance industry;
- Banking sector and mortgage providers.

The approaches of *Safe as Houses?* and the Pyrite Panel in proposing that the construction and other relevant sectors – like banking and insurance – should pay for the remediation of construction defects was mirrored in Minister Darragh O'Brien's statement on 30 November 2021, when he announced the details of the revised Defective Concrete Block Scheme.

In the *Notes to Editors* at the end of that statement (<https://www.gov.ie/en/press-release/e365e-minister-obrien-announces-enhancements-to-the-defective-concrete-block-scheme/>) the Minister said: *'the potential for an industry levy to financially contribute to the Scheme will be investigated'*.

A document issued by the Department of Housing, Local Government and Heritage, *Your Questions Answered: Defective Concrete Block Scheme*, also on 30 November 2021 went further on the matter of an industry levy when it stated on Page 11: *'A levy on the construction industry will be put in place and introduced in Finance Bill 2022'*.

It's worth noting that the UK Government has explicitly asked the UK construction sector to contribute financially to the costs of remediating fire safety defects in apartment buildings there. While discussions are ongoing on the exact amount that the sector will contribute financially, the UK's Secretary of State for Levelling Up, Housing and Communities, Michael Gove has threatened to introduce a tax on the sector if it doesn't contribute enough.

Meanwhile, Stewart Baseley, Executive Chair of the Home Builders' Federation on 21 January 2021 last stated: *'we absolutely agree that leaseholders should not have to pay to remediate buildings.'* Mr Baseley, pointed out that his members had already spent or committed almost £1 billion to remediating affected buildings.

So reverting to the situation in Ireland, AON and CDA are proposing that a levy should be introduced by the Government in the 2022 Finance Bill on the construction industry (building contractors, developers, construction professionals, sub-contractors, quarries and product manufacturers) to reflect their responsibility for defective MUDs.

While the detail of how such a levy might work would be a matter for Government, it's worth pointing out that a 1% levy on the output of the construction sector in 2022 would

recoup a €320 million contribution to the costs of remediating defects (this is based on AECOM Ireland Annual Review 2022 published in January 2022 <https://communications.aecom.com/ireland-annual-review-2022>).

There is also considerable precedent for the imposition of such levies where the State has had to intervene to make good failures by the private sector. For example, the current Insurance Levy was introduced to help the State recoup the costs of bailing out Quinn Insurance and the Bank Levy – which has netted €1.2 billion up to the end of 2021 – was put in place to help the State recover some of the costs of the outlay on recapitalising the bank after the crash of the financial sector.

## **8. Mirroring Pyrite and Revised Mica Remediation Schemes**

Another key factor in shaping the proposals in this submission has been the successful operation of the pyrite remediation scheme – as operated by the Pyrite Resolution Board – which has assisted thousands of homeowners affected by pyritic heave to remediate their homes. Indeed, the pyrite remediation scheme has been such an operational success that the revised Defective Concrete Block Scheme largely replicates it.

Given the clear recognition by the State of the beneficial outcomes from the Pyrite Resolution Board’s approach, this paper seeks to mimic that approach too.

Amongst the key features of both remediation schemes are:

- 100% grant for remediation costs for owner-occupiers, social landlords and one property for landlords (up to a maximum of €420,000 per home for mica as of November 2021);
- Technical/advisory and accommodation/storage costs are covered in addition to these grants;
- Key role for the Housing Agency in providing technical support and guidance.

AON and CDA are proposing that these features of the pyrite and mica schemes should largely be replicated in the remediation scheme for MUD defects.

## **9. Key Foundations for MUD Defects Remediation Scheme**

To sum up – before getting into the meat of our proposals – this submission seeks to:

- Ensure that ordinary homeowners are not left with liability for the costs of remediation as recommended by the *Safe as Houses?* report – including owners who have already paid for the remediation of their homes or are currently paying for such remediation;
- Place responsibility for financing remediation works where it should properly lie – with the construction industry as well as the State;
- Put in place a scheme where all owners of defective homes are treated in an equitable manner – whether they are landlords, owner-occupiers or social landlords; whether they own a home affected by fire/water ingress defects or mica and pyrite;

- Ensure that OMCs are at the heart of any remediation scheme given their legal responsibility for the areas most affected by defects and that they are the only bodies that can practically deliver the required remediation works;
- Provide options on the use of the financial mechanisms set out in *Safe as Houses?* including a redress fund financed by the construction and other sectors as well as the State, tax measures and interest-free loans;
- Build on the successful operating model used in the pyrite remediation scheme, parts of which have now been adopted in the revised mica scheme.

## **10. Proposed MUD Defects Remediation Scheme Options**

### **10.1 Where remediation works have not commenced**

The first part of the proposed MUD Defects Remediation Scheme (MDRS) addresses developments where remediation works have not yet commenced and where levies have not yet been paid.

Two options are put forward:

- Grants scheme (funded by a levy on construction on the construction industry as well as an Exchequer contribution);
- Interest-free loans combined with tax credits and grants for those outside the tax net.

#### **10.1.1 Option 1, Grants Scheme**

##### Stage 1: Application and Validation

- OMC has an investigation carried out by a suitably qualified professional — building surveyor for example.
- OMC submits surveyor's report as part of an application to the MDRS
- MDRS assesses the application for compliance with eligibility criteria (MUD built during period 1991-2013, etc).
- MDRS contacts OMC to conduct an assessment to see if development has experienced the requisite level of defects.
- Decision made to refer to Stage 2 or refuse application.
- If application is refused, OMC can appeal.

##### Stage 2: Assessment, Verification and Recommendation

- Through the assessment process, the MDRS will establish that the defects in the development are attributable to the original construction process.
- Tests will be carried out by the MDRS to assess the scale, nature and severity of the defects.
- Based on these processes, the MDRS will decide whether to include the development in the remediation scheme or not (if the development is excluded, that decision can be appealed).

- If included in the scheme, the OMC may recoup the costs of the original investigative works.

### Stage 3: Remedial Works Plan

- From an approved list of qualified professionals, the MDRS will appoint a professional to prepare a remedial works plan for the remediation of the development in conjunction with the OMC and its professional advisors.

### Stage 4: Tendering and Tender Analysis

- Once the remedial works plan has been completed, the tender for the remedial works will be issued to a panel of contractors approved by the DRB.
- At this stage, the MDRS will send the OMC a contract in relation to the remediation works.

### Stage 5: Decision to Contract

- Once the tenders have been received, the MDRS – in conjunction with the OMC – makes a decision on awarding the contract once it fits within the MDRS's programme and budget.

### Stage 6: Financing the Works

- Once the MDRS decides to award the contract, it sanctions a grant payment to be made to the OMC to finance the works.
- The payment will be made in tranches in line with the works programme set out by the contractor/OMC and approved by the DRB.

### Stage 7: MUD Remediation

- The contractor will remediate the defective elements of the multi-unit development in accordance with the contract and the approved standard.
- The DRB will supervise execution of the remediation works.
- Once the remediation works are completed, apartment owners will receive a certificate to confirm remediation and compliance with the approved standard (Building Regulations will need to be amended to provide a 'reasonable standard' that will allow people live safely and to trade their homes).
- Apartment owners can then submit their claims for accommodation and storage to the MDRS – and once the claim satisfies the MDRS's conditions, they will be approved for payment.

### Stage 8: Retention Period

- There is a retention period of 11 months from the date of the Certificate of Remediation.

- If, within this period, any defects arise as a result of the remediation works, the OMC should notify the MDRS in writing.
- The MDRS's engineer will then assess these defects and the DRB will ensure that the contractor repairs any defects considered to be caused by the remediation process.

#### Stage 9: Application Closure

- An application will be considered closed after the retention period has ended or once the defects caused by the remediation works are repaired.

### **9.1.2 Option 2, Interest-Free Loans combined with Tax Credits and Grants for those outside the tax net**

#### **Stage 1: Application and Validation**

- OMC has an investigation carried out by a suitably qualified professional — building surveyor for example
- OMC submits surveyor's report as part of an application to the MDRS
- MDRS assesses the application for compliance with eligibility criteria (MUD built during period 1991-2013, etc)
- MDRS contacts OMC to conduct an assessment to see if development has experienced the requisite level of defects
- Decision made to refer to Stage 2 or refuse application.
- If application is refused, OMC can appeal.

#### **Stage 2: Assessment, Verification and Recommendation**

- Through the assessment process, the MDRS will establish that the defects in the development are attributable to the construction process.
- Tests will be carried out by the MDRS to assess the scale, nature and severity of the defects.
- Based on these processes, the MDRS will decide whether to include the development in the remediation scheme or not (if the development is excluded, that decision can be appealed).
- If included in the scheme, the OMC may recoup the costs of the original investigative works.

#### **Stage 3: Remedial Works Plan**

- From an approved list of qualified professionals, the MDRS will appoint a professional to prepare a remedial works plan for the remediation of the development in conjunction with the OMC and its professional advisors.

#### **Stage 4: Tendering and Tender Analysis**

- Once the remedial works plan has been completed, the tender for the remedial works will be issued to a panel of contractors approved by the MDRS.
- At this stage, the MDRS will send the OMC a contract in relation to the remediation works.

#### **Stage 5: Decision to Contract**

- Once the tenders have been received, the MDRS – in conjunction with the OMC – makes a decision on awarding the contract once it fits within the MDRS's programme and budget.

#### **Stage 6: Financing the Works**

- Once the MDRS decides to award the contract, it sanctions a low-interest long-term loan facility — 20 years in duration — to the OMC to finance the works.
- The loan will be paid by in tranches in line with the works programme set out by the contractor/OMC and approved by the MDRS.

#### **Stage 7: MUD Remediation**

- The contractor will remediate the defective elements of the multi-unit development in accordance with the contract and the approved standard.
- The MDRS will supervise execution of the remediation works.
- Once the remediation works are completed, apartment owners will receive a certificate to confirm remediation and compliance with the approved standard.
- Apartment owners can then submit their claims for accommodation and storage to the MDRS — and once the claim satisfies the MDRS's conditions, they will be approved for payment by the MDRS.

#### **Stage 8: Repaying Loans and Reclaiming Remediation Costs**

- OMCs will levy their members to cover the cost of their loan repayments.
- In turn:
  - Landlords can continue to submit evidence of their levy payments as a reckonable business expense in their tax returns.
  - Owner-occupiers who are within the tax net can claim a tax credit for 100% of their levy payments by providing proof of payment in the preceding year.
  - Owner-occupiers have the option of accessing interest-free loans to help cash-flow their levy payments.
  - Those owner-occupiers who are outside the tax net can claim a grant to cover 100% of their costs similar in nature to the Housing Adaptation Grant or the Home Improvement Grant.
  - Social landlords can claim grants from the Department of Housing to cover their past and present levy payments.

### **Stage 9: Retention Period**

- There is a retention period of 11 months from the date of the Certificate of Remediation.
- If, within this period, any defects arise as a result of the remediation works, the OMC should notify the MDRS in writing.
- The MDRS's engineer will then assess these defects and the MDRS will ensure that the contractor repairs any defects considered to be caused by the remediation process.

### **Stage 10: Application Closure**

- An application will be considered closed after the retention period has ended or once the defects caused by the remediation works are repaired.

### ***9.2 Retrospectively Claiming Remediation Costs***

This part of the proposed remediation scheme is aimed at owners in MUDs where remediation works have been completed or have commenced (namely where remediation levies have been paid by owners, even if only partially, to their OMCs).

The purpose here is to enable all homeowners to have a mechanism for reclaiming levies paid and to avail of interest-free loans – if required – to help cashflow their levy payments to their OMC.

The proposed mechanisms should include:

- Landlords can continue to submit evidence of their levy payments as an allowable business expense against income or corporation tax in their tax returns.
- Owner-occupiers who are within the tax net can claim a tax credit for 100% of their levy payments by providing proof of payment in the preceding years.
- These owner-occupiers have the option of accessing State-guaranteed interest-free loans to help cash-flow their levy payments.
- Those owner-occupiers who are outside the tax net can claim a grant to cover 100% of their costs similar in nature to the Housing Adaptation Grant or the Home Improvement Grant
- Social landlords can claim grants from the Department of Housing to cover 100% of their past and present levy payments.

Ends.