trowers & hamlins

BUILDING SAFETY ACT

Essential guide

Contents

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Introduction

The Building Safety Act (the Act) received Royal Assent on 28 April 2022, following a three-year public consultation and legislative process. The Act implements most (but not all) of Dame Judith Hackitt's recommendations in her 2018 review of the building industry, Building a Safer Future, in response to the Grenfell Tower fire in 2017. The Act imports a new centrally-regulated regime to govern the design, construction, and maintenance of the built environment, and represents the most radical change to the building industry in fifty years.

The Act itself was published on 13 May 2022, following a number of drafts of the Bill as it went through the parliamentary process. Public discussion about the Act was overshadowed in the final months of the parliamentary process by last-minute Government and House of Lords amendments to make developers pay for remediation works to existing buildings and to limit landlords' ability to recharge tenants for building remediation costs. The role of the Building Safety Manager, which was to have been a central part of the new regulatory regime for higher-risk buildings in the Bill, has been removed from the final Act. These amendments have not been subject to public consultation, and many industry players are still catching up with the implications of the changes to what is already an extremely technical and complex piece of legislation.

Since the first version of the Bill was published, a number of draft pieces of secondary legislation have also been published alongside it. Whilst most of these currently remain in draft form, we expect them to be brought into effect in the coming months, along with further regulations yet to be made under the Act. Whilst this Guide explains the key provisions of the draft sets of regulations, it should be noted that the Government may make further changes to these in their final form.

Implementation of the bulk of the new regime is anticipated within 12-18 months from the date of Royal Assent (i.e. by April – October 2023) with some obligations coming into force before then. For example, the provisions dealing with the remediation of certain defects (which were the most heavily publicised part of the Act) came into force two months from the date of Royal Assent (i.e. 28 June 2022). This is an ambitious timetable, and much work is already underway to upskill across the built environment industry to meet the new requirements.

Trowers & Hamlins is committed to helping our clients implement the new building safety regime and we have been working alongside clients across the public and private sectors from the outset of the proposals, helping to deliver meaningful change.

As part of this work, we produced an Essential Guide whilst the Bill was making its way through Parliament, which provided an overview of the key elements of the proposed legal changes. Now that the Act has been published, we have updated this Essential Guide to reflect the final regime. Whilst the Essential Guide covers the Act and the rest of the regime as it currently stands, we still await further secondary legislation, guidance and the explanatory notes to the Act to flesh the regime out further. However, we hope that this will help the sector get to grips with the new regime as we move to implement the changes.

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Overview of the Act

The Building Safety Regulator

Part 2 of the Act establishes a new national Building Safety Regulator, which will sit in the Health and Safety Executive and report to the Secretary of State for Levelling Up, Housing and Communities. The Regulator will oversee the safety and performance systems of all buildings in England, and will advise Ministers on changes to building regulations, identifying emerging risks in the built environment, and establishing and maintaining registers of building control bodies and approved building inspectors. The Regulator will also assist in encouraging the improvement of competence in the built environment industry and improvements in building standards.

The Regulator is also responsible for implementing and managing a new and more stringent regulatory regime for "higher-risk buildings" (defined in Part 3 of the Act) and will become the building control authority for all such buildings. The Regulator will oversee the inspection of higher-risk buildings during their design and construction, and has express powers to authorise remedial works, stop non-compliant projects, impose special measures for failing projects, and order the replacement of key officers. It will also be responsible for registering higher-risk buildings and assessing safety cases for those buildings during their occupation. While developing the new regime, the Regulator will establish and consult with three advisory committees on buildings, building industry competence, and resident representation.

Higher-risk buildings

Part 3 of the Act, together with the draft Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations (currently being consulted on by the Government), define higher-risk buildings as buildings in England that are at least 18 metres in height or with at least 7 storeys and containing two or more dwellings. This definition is expected to include houses, flats, serviced apartments, supported accommodation, and student accommodation facilities.

The draft Regulations clarify that height measurement will be from ground level to the top floor surface of the top storey of the building, excluding any storey which is a roof-top machinery or plant area or which consists exclusively of machinery or plant rooms. When determining the number of storeys, any storey below ground level will be ignored, and any mezzanine floor is considered to be a storey if its internal floor area is at least 50% of the internal floor area of the largest storey in the building which is not below ground level.

Hospitals and care homes that meet the height requirements will be classified as higher-risk building for their design, construction and refurbishment stages but will not be subject to the in-occupation obligations under the Act. Secure residential institutions (e.g. prisons), temporary leisure establishments (e.g. hotels) and military premises will be excluded from the scope of higher-risk buildings for now.

The Secretary of State has general powers to amend the definition of "higher-risk buildings" and prescribe activities for buildings, after undertaking a cost-benefit analysis and/or seeking advice from the Regulator; the types of in-scope buildings are expected to expand over time.

Building work and competency

The Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations, which currently remain in draft form, impose legal requirements on clients to ensure that any works covered by the Building Regulations are properly monitored and that any appointees are compliant. Appointees are also required to ensure that their work complies with the Building Regulations and that they are competent, and must not start work until they are satisfied that the client is aware of its own duties.

The Regulations also impose a general competency requirement on any person carrying out any building or design work that they have the skills, knowledge, experience and behaviours necessary, and the organisational capability where the appointee is a company, to carry out their work. Clients must also take all reasonable steps to ensure that anyone appointed to carry out building or design work meets these competence requirements. Appointees are under a duty to inform the client in the event that they no longer satisfy a competency requirement.

Part 5 of the Act amends the Architects Act 1997 to allow the Architects Registration Board to monitor the competence of architects in line with the new regime.

Dutyholders and Gateway regime

Part 3 of the Act sets out a proposed regime of dutyholders for the design, construction and refurbishment of higher-risk buildings, in similar roles to the CDM Regulations. Dutyholders will have legal obligations in respect of their duties in relation to higher-risk buildings, and those who fail to meet key building safety obligations will be guilty of criminal offences. Where a dutyholder is a corporate entity, individuals within that organisation may also be prosecuted where the breach was committed with their consent, connivance or as a result of their neglect.

Part 3 of the Act anticipates a three-stage Gateway regime for the design, construction and major refurbishment of all higher-risk buildings, covering the planning applications through to the practical completion/final certification of the building. Further details of the requirements for each Gateway are set out in the draft Building (Higher-Risk Buildings) (England) Regulations [2022].

In-occupation obligations

Part 4 of the Act establishes the role of the Accountable Person who will be legally responsible for the safety of higher-risk buildings. Accountable Persons may be individuals or corporate entities, and will hold either a legal estate in possession of the common parts of the building or a relevant repairing obligation in respect of the common parts. Accountable Persons have ongoing obligations to assess and prevent fire safety risks, update prescribed building safety information (known as “the golden thread”), register higher-risk buildings and apply for a Building Assessment Certificate before the higher-risk building can be occupied.

For buildings with more than one Accountable Person, a Principal Accountable Person will be identified, who will carry the obligations set out in Part 4, coordinate building safety practices in the building and liaise with the other Accountable Persons.

The requirement to have a Building Safety Manager (which was included in the Bill) has been removed from the final Act. Earlier drafts of the Bill had introduced a statutory duty on the Accountable Person to appoint a Building Safety Manager for each higher-risk building. The purpose of the role was to support the Accountable Person in adhering to safety standards and complying with the legislation. However, the cost-benefit analysis adopted by the House of Lords resulted in its removal amid concerns about the costs of the role to leaseholders.

Changes to landlord and tenant law

Part 4 of the Act amends the Landlord and Tenant Act 1985, allowing landlords to recover costs for a specified list of "building safety measures", covering most of the Part 4 in-occupation obligations. Previous versions of the Bill had introduced a new "Building Safety Charge", but this was removed and replaced with a simplified list of measures, the cost of which landlords can recover from tenants as a service charge. The Act also sets out a list of "excluded costs" for higher-risk buildings that may not be recharged to leaseholders, covering primarily costs incurred where the landlord has been at fault (e.g. costs incurred as result of a penalty imposed by the Regulator).

The Act imposes implied terms into long leases of dwellings within higher-risk buildings, requiring landlords who are Accountable Persons to comply with their building safety duties, to cooperate with relevant persons carrying out building safety duties, including providing information to the Accountable Person to assist with building safety compliance and to comply with any Special Measures Order. Tenants are required not to act in a way that creates a significant building safety risk, or that would interfere with a relevant safety item (e.g. by damaging it, removing it or interfering with its intended function). Where residents fail to comply with their responsibilities, the Accountable Person may issue a contravention notice requesting that the resident complies within a reasonable time and may also go to court to enforce a contravention notice.

Tenants are also required to provide access to dwellings for relevant building safety purposes, provided this is at reasonable times and with 48 hours' prior notice. If a tenant denies the landlord entry, the right of access will be enforceable upon application to the County Court.

Where a landlord who is the Accountable Person of a higher-risk building fails to provide certain prescribed building safety information to its residents, tenants will not be required to pay the rent, service charges or administration charges otherwise due for any period before the information is provided.

Remediation of defects in "relevant buildings"

Part 5 of the Act creates a number of new statutory remedies to require landlords and associated persons to undertake and pay for remediation works for defects in "relevant buildings". These provisions were introduced by the Government during the final stages of the Bill's passage through Parliament and were therefore not subject to public consultation.

The Government has also introduced restrictions on service charges for remedying defects under "qualifying leases". Section 122 and Schedule 8 of the Act set out a number of financial caps and exclusions on service charge payments for defects in relevant buildings. The aim of these amendments is to provide additional protection for leaseholders in relation to both cladding and non-cladding remediation works.

The Secretary of State has been given powers to establish building industry schemes, which can include securing that persons in the building industry remedy defects in buildings or contribute to costs associated with remedying defects in buildings.

The Secretary of State may also make regulations to prohibit "prescribed persons" from carrying out development of land in England, which may apply despite planning permission already having been granted.

Claims and building industry reforms

The Act amends the Defective Premises Act 1972. The limitation period for claims under section 1 of the Defective Premises Act 1972 (which relates to work in providing a dwelling) arising prior to the commencement of this section will be extended to 30 years. The Act also introduces a new section 2A of the Defective Premises Act 1972 which imposes a duty on those who take on any work on a building that contains a dwelling to ensure that the work does not render the dwelling unfit for habitation. Claims under section 1 and the new section 2A of the Defective Premises Act 1972 arising after the commencement of this section will have a limitation period of 15 years.

Provisions of the Act which are to be brought into effect require developers to provide purchasers of "new build" homes with a "new build" home warranty, under which the developer agrees to remedy defects in the home within a specified period. The warranty must also provide for and give the purchaser or other prescribed persons the benefit of an insurance policy with a minimum of 15 years' coverage.

The Act requires the Secretary of State to establish a scheme for all developers to allow complaints to be made to a newly-established New Homes Ombudsman. The Secretary of State will also establish a new national regulator for construction products marketed in the UK, which will sit within the Office for Product Safety and Standards.

Social housing residents will be able to escalate complaints directly to the Housing Ombudsman Service once they have completed their landlord's complaints process.

Amendments to Fire Safety Order

The Act incorporates amendments to the Regulatory Reform (Fire Safety) Order 2005, requiring "Responsible Persons" within the meaning of that Order to ensure that anyone assisting them is competent within the meaning of the Act, to provide residents in higher-risk buildings with information about relevant fire safety matters and keep a register of all such matters and to cooperate with Accountable Persons. Further amendments to the Fire Safety Order have been introduced through the Fire Safety Act 2021 to clarify that the Order applies to the structure and external walls of any multi-occupied residential building, which includes the cladding, windows, doors and any balconies, as well as the individual flat entrance doors that separate the domestic properties from the common parts of the building.

Structure of the Act

There are 171 sections in the Act divided into 6 Parts (each sub-divided into different "Chapters") and 11 Schedules. The Parts are as follows:

- Part 1 – Overview of the Act;
- Part 2 – Establishes the Building Safety Regulator and its functions in relation to buildings in England;
- Part 3 – Amendments to the Building Act 1984, including definition of "higher-risk buildings", the Dutyholder regime, general competence requirements and the regulation of building control approvers and building inspectors;
- Part 4 – Sets out in-occupation obligations and the roles of the Accountable Person and the Principal Accountable Person, and sets out details of offences and appeals; sets out amendments to the Landlord and Tenant Act 1985, and obligations on landlords and tenants in respect of building safety; and also provides for the appointment of Special Measures Managers;
- Part 5 – Further amendments to improve safety, including provisions related to remediation works and Building Industry Schemes; provisions to enable the Secretary of State to prevent certain persons from carrying out developments;

the introduction of Building Liability Orders; the establishment of a New Homes Ombudsman Scheme; the establishment of "new build" home warranties; the establishment of a new national regulator for construction products; reforms to the Fire Safety Order 2005; amendments to the Architects Act 1997; and amendments to complaints to the Housing Ombudsman;

- Part 6 – Miscellaneous provisions relating to the liability of corporate bodies, reviews of the regulatory regime, Crown applications, and commencement and transitional provisions.

References in this Guide to "sections" refer to the relevant section of the Act.

Commencement and timings

Section 170 provides that the following provisions will come into force on the date on which the Act is passed into law:

- The Regulator will be established within the Health and Safety Executive (section 2(1));
- Provisions establishing public proposals and consultations for the implementation of the new regime (section 7);
- Provisions allowing the Secretary of State to authorise the Regulator to charge fees or recover charges in connection with the performance of relevant functions under the Act (section 28);
- The ability for the Secretary of State to make regulations concerning "building safety risks" and the classification of higher-risk buildings as defined (sections 61-70); and
- The right for the Secretary of State to authorise the Regulator to make regulations pursuant to the Act.

Two months after the Act was passed into law (i.e. 28 June 2022), the following provisions came into force:

- Provisions requiring the remediation of certain defects, including amendments to service charges, the introduction of Remediation Orders and Remediation Contribution Orders, and provisions dealing with meeting the remediation costs of insolvent landlords (sections 116 to 125 and Schedule 8);
- Amendments to the Defective Premises Act 1972 to introduce a new s.2A which imposes a duty on those who take on any work on a building that contains a dwelling to ensure that the work does not render the dwelling unfit for habitation (section 134);
- Amendments to the Limitation Act 1980 to extend limitation periods for claims under the Defective Premises Act 1972 and section 38 of the Building Act 1984 (section 135);
- Rules about the regulation of and liability relating to construction products (section 146 and Schedule 11 and sections 147 to 155); and
- Amendments to the Architects Act 1997 (sections 157-159).

There are specific provisions for implementation in Wales set out in section 170.

The Act states that the other provisions of the Act will come into force on such day as the Secretary of State may by regulations appoint. The first of such commencement regulations (The Building Safety Act 2022 (Commencement No. 1, Transitional and Saving Provisions) Regulations 2022) has been brought into force and sets out when some further sections of the Act will come into force.

Under these commencement Regulations, the provisions relating to orders for information in connection with Building Liability Orders (section 132) came into force on the 28 May 2022. These are for the purpose of making regulations only.

The following further provisions of the Act came into force on the 28 June 2022:

- Section 2(2) and Schedule 1, which include a number of amendments to the Health and Safety at Work Act 1974 relating to the Health and Safety Executive becoming the Regulator;
- Section 3, which concerns the Regulator's objectives and principles;
- Sections 17 and 18, which relate to the Regulator's strategic plan;
- Section 31, which gives the Secretary of State the ability to define 'higher-risk buildings' for the purposes of the Building Act 1984 (we have already seen the proposed definition set out in the draft Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations);
- Section 41, which disapplies procedural provisions of the European Union (Withdrawal) Act 2018 in relation to changes to building regulations;
- Section 55 and parts of Schedule 5, which contain minor and consequential amendments to the Building Safety Act 1984;
- Section 57, which inserts a new section 105B into the Building Act 1984 to allow, in England, the Secretary of State to make regulations to enable fees and charges to be levied by both the Regulator and local authorities in connection with the exercise of their respective functions under the Building Act 1984 and regulations made under it;
- Sections 130 to 132, which provide for Building Liability Orders, new orders which can be made by the High Court in relation to the liability of a body corporate in respect of a specified building under any of the Defective Premises Act 1972 or section 38 of the Building Act 1984 or as a result of any building safety risk.

Section 48 relating to the removal of insurance requirements for approved inspectors from the Building Act 1984 will come into force on 28 July 2022 and section 160 of the Act (removal of the "democratic filter" in relation to social housing residents' complaints) will come into force on 1 October 2022.

We await further detail of when the other sections of the Act will come into force. The Government's Transition Plan (published with the Bill in July 2021) anticipated that the bulk of the new obligations will be implemented within 12-18 months from the date of Royal Assent (i.e. by April – October 2023).

Buildings covered by the Act

There are two categories of buildings recognised by the Act and secondary legislation – "buildings" and "higher-risk buildings", with the latter being defined separately in Part 3 of the Act relating to design and construction, and Part 4 of the Act relating to their occupation:

"Higher-risk buildings"

Higher-risk buildings are defined by section 31 of the Act as a building in England that is at least 18 metres in height or has at least 7 storeys and is of a description specified in regulations made by the Secretary of State.

The draft Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations clarify that the height of a building is to be measured from ground level to the top floor surface of the top storey of the building, ignoring any storey which is a roof-top machinery or plant area or which consists exclusively of machinery or plant rooms. The Government is currently consulting on these draft Regulations and the consultation closes on 21 July 2022.

The draft Higher-Risk Building Regulations provide that higher-risk buildings for construction and design purposes will also include the following buildings (provided that they also meet the height requirements set out above):

- a building (defined as including any structure or erection, and any part of a building, as so defined, but not plant or machinery comprised in a building) which contains at least two residential units;
- a care home (defined as a care home within the meaning of the Care Standards Act 2000); and
- a hospital (defined as a building which is a hospital within the meaning of the National Health Service Act 2006 and which has at least one bed intended for use by a person admitted to the premises for an overnight stay).

Part 4, section 65 of the Act provides a different definition of higher-risk buildings for the in-occupation phase, which explicitly excludes care homes and hospitals as it is primarily focussed on domestic rather than commercial residential accommodation which is already covered by the Fire Safety Order; however, the draft Higher-Risk Building Regulations attempt to align the two definitions by providing that the following buildings are not higher-risk buildings for either the design and construction phase, nor the in-occupation phase if they comprise entirely of:

- a secure residential institution, which means an institution used for the provision of secure residential accommodation, including as a prison, young offenders' institution, detention centre, secure training centre, custody centre, short-term holding centre, secure hospital or secure local authority accommodation;
- a temporary leisure establishment, which means a hotel or similar establishment which offers overnight accommodation for the purpose of leisure; and
- military premises, which means any: military barracks; building occupied solely for the purposes of the armed forces; or building occupied solely for the purposes of any visiting force or an international headquarters or defence organisation designated for the purposes of the International Headquarters and Defence Organisations Act 1964.

Note that the Secretary of State has general powers under section 31 of the Building Safety Act to amend the definition of "higher-risk buildings" and prescribe activities for buildings, after undertaking a cost-benefit analysis and/or seeking advice from the Regulator.

Obligations in respect of higher-risk buildings

All higher-risk buildings will be subject to Part 3 of the Act, which amends the Building Act 1984 and imposes new obligations in respect of the design, construction, and major refurbishment of those buildings.

Higher-risk buildings excluding hospitals and care homes (as defined above) will be subject to Part 4 of the Act, which imposes obligations in respect of the registration and occupation of those buildings.

Higher-risk buildings will also be subject to the obligations in the draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations, explained below.

"Buildings"

Section 30 of the Act also defines "buildings" as "any permanent or temporary building in England except a building of a prescribed description" (i.e. prescribed by regulations made by the Secretary of State, such as higher-risk buildings).

Buildings that are not higher-risk buildings, or otherwise prescribed by the Secretary of State will not be subject to the provisions for higher-risk buildings set out in Parts 3 and 4 of the Act. However, certain provisions of the Act will apply to all buildings, including:

- Regulator oversight of the building safety and performance system that applies to all buildings (Part 2 generally, especially sections 3, 5, 6 and 8);
- Amendments to the Building Act in relation to the functions of building control authorities, obtaining keeping and giving information and documents (sections 32-33);
- Dutyholder obligations in respect of prescribed works (section 34);
- Obligations in respect of competency (section 35);
- Requirements to comply with any compliance notice or stop notice issued by the Regulator (section 38);
- Requirements to comply with the decisions of registered building inspectors and building control approvers (whose powers are set out in Part 2A);
- Penalties for breaches of the Building Regulations (section 39 and 40);
- The new "developer levy" which the Secretary of State can implement through regulations on applicants for building control approval- the regulations can apply the levy in respect of all new residential development of all sizes (previously the Bill restricted the levy to only higher-risk buildings) (section 58);
- Any requirements specified by the New Homes Ombudsman (who will be established pursuant to section 136);
- Requirements to comply with regulations on construction products set out by the new regulator (who will be established pursuant to section 146); and
- Requirements to comply with amendments to the Regulatory Reform (Fire Safety) Order 2005, where relevant to that building (section 156).

Work on any building covered by the Building Regulations will also be subject to the provisions of the draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations, as explained further below.

The provisions on the remediation of certain defects under Part 5 will apply to self-contained buildings or parts of buildings that contain at least 2 dwellings and are at least 11 metres high or have at least 5 storeys. These are defined as "relevant buildings".

The Building Safety Regulator

Part 2 of the Act establishes the role of the Building Safety Regulator, which will sit within the Health & Safety Executive and report to the Secretary of State for Levelling Up, Housing and Communities. The Regulator already existed in shadow form before the Act came into force, with Peter Baker appointed as the Chief Inspector of Buildings, and it is responsible for developing and implementing the new regulatory regime.

The Regulator is the lynchpin of the new laws, and as such, its approach to and execution of its functions and powers will determine how successful the new regime is.

Functions of the Regulator

The Regulator has three primary functions which it must exercise with a view to securing the safety of people in or about buildings in relation to risks arising from buildings; and improving the standard of buildings (section 3(1)). All regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent, and targeted only at cases in which action is needed (section 3(2)).

The three functions are as follows:

Duty to facilitate safety: higher-risk buildings (section 4)

The Regulator must provide such assistance and encouragement as it considers appropriate with a view to facilitating the safety of people in or about higher-risk buildings and regards any building safety risks, with a particular requirement to securing the safety of disabled people. The Regulator will also establish and implement the new regulatory system for the design and construction of higher-risk buildings (set out in Part 3).

To this end, the Regulator will become the building control authority for all such buildings, removing the right for clients and developers to choose a building control authority for those buildings. It will also oversee the performance of other building control bodies (local authorities and registered building control approvers (previously called Approved Inspectors)), involving collecting performance data and having the power to impose sanctions for poor performance.

Keeping the safety and standards of buildings under review (section 5)

The Regulator will be required to keep under review the safety of people in or about all buildings in relation to building risks for those buildings. It will also be required to review existing and emerging building standards and safety risks, including advising on changes to regulations, changes to the scope of the building safety regime and commissioning advice on the standard of buildings.

Facilitating improvement in the competence of the building industry and building inspectors (section 6)

The Regulator has two key workstreams:

- Assisting and encouraging improvement in the competence of the built environment industry through several functions, including establishing and setting the strategic direction of the proposed industry-led competence committee, carrying out research and analysis and publishing non-statutory advice and guidance.

- Establishing a unified building control profession with competence requirements for registration of a building control professional that will be common across both public sector (local authority) building control and the private sector.

The Regulator must make arrangements for a person to establish and operate a voluntary occurrence reporting system, to facilitate the voluntary giving of building safety information to the person operating the system. The current proposal is for this function to be fulfilled by expansion of the existing scheme for Confidential Reporting on Structural Safety to take account of fire safety as well as structural safety, and be renamed Collaborative Reporting for Safer Structures (CROSS).

The Regulator can also ask a "relevant authority" (a local authority or fire and rescue authority) for assistance to carry out its functions.

Advisory Committees

As part of its implementation of the new regulatory regime, the Regulator is charged with establishing and consulting with three advisory committees:

- Building Advisory Committee (section 9) – This implements one of the Hackitt Review's recommendations that Government should create a new structure to validate and assure guidance, oversee the performance of the built environment sector and provide expert advice. This Committee will give advice and information to the Regulator about matters connected with the Regulator's building functions (except relating to the competence of persons in the building industry and registered building inspectors). This Committee will replace the Building Regulations Advisory Committee for England, which will be abolished.
- Committee on Industry Competence (section 10) – This implements an observation in the Hackitt Review that the current landscape for ensuring competence is fragmented, inconsistent and complex. The sector needs to work together to develop proposals for a system for competence oversight. This industry-led Committee will be concerned with monitoring and improving competence of persons in the built environment industry.
- Residents' Panel (section 11) – This Committee will consist of residents of higher-risk buildings and other relevant persons and is intended to ensure that residents are contributing to key policy changes related to their homes. The Regulator must take all reasonable steps to ensure the panel includes representation from disabled residents.

Regulator's duties: plans and reports

The Regulator must produce a number of plans and reports to demonstrate how it intends to implement the new regulatory regime:

- A Strategic Plan setting out how it proposes to carry out its building functions in the period to which the plan relates, to be approved by the Secretary of State (sections 17-18);
- A report about the information provided under the mandatory reporting requirements, to be prepared and published as soon as reasonably practicable after the end of each financial year (section 19);
- An annual statement about its engagement with residents (section 20);
- A further statement on its engagement with residents, owners and their representative bodies and the Residents' Panel, made pursuant to the Health & Safety at Work Act 1974 (section 20); and

- A cost-benefit analysis of making regular inspections of, and testing and reporting on, the condition of electrical installations in buildings; as well as considering what further provision can be made (by way of legislation or guidance) in relation to stairs and ramps, emergency egress for disabled residents and automatic water fire suppression systems (with a view to improving safety and carrying out a cost-benefit analysis) (section 21).

Enforcement

The Regulator is empowered to set up a multi-disciplinary team of authorised officers to exercise powers to carry out relevant building functions on its behalf (section 22).

It will be a criminal offence to obstruct an authorised officer of the Regulator or to impersonate an authorised officer (section 23), triable in the Magistrates' Court only. The offence of obstruction will carry a fine of Level 3 on the standard scale (currently £1,000 – in line with obstructing a police officer under the Police Act 1996). The offence of impersonation will carry an unlimited fine (mirroring the offence of impersonating a police officer under the Police Act).

It will also be a criminal offence to provide false or misleading information to the Regulator (section 24), triable in the Magistrates' or Crown Courts. If tried by Magistrates, the offence will carry a maximum penalty of 12 months' imprisonment and/or a fine. If tried in the Crown Court, the maximum penalty is an unlimited fine and/or two years' imprisonment

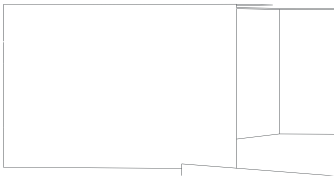
Review of Regulator's decisions

The Regulator will be required to undertake a formal review of any prescribed decisions (section 25-26). This will not apply to any issuing of compliance notices, notices about contravention of the Building Act 1984, disciplinary orders for misconduct of building inspectors or building control approvers or notices for contravention of operational standards rules (which will be subject to an external appeal process).

The Explanatory Notes published with the initial version of the Bill detail that if the person requiring the review is not content with the decision reached by the Regulator's review, they may appeal this decision to the First-Tier Tribunal, within a prescribed period after the conclusion of the review. This mirrors the review regime used by the Regulator of Social Housing, the Health & Safety Executive, the Civil Aviation Authority and the Food Standards Agency.

Cooperation and information sharing

Section 27 and Schedule 3 of the Act impose duties on the Regulator and other persons (e.g. other regulators and enforcement bodies operating in the same regulatory landscape and with functions relevant to building standards and safety, such as local authorities and fire and rescue authorities) to cooperate with each other. These provisions also confer powers on these bodies to share information with the Regulator and other persons, subject to any confidentiality obligations or other restrictions on the disclosure of information.



Fees and charges

Section 28 allows the Regulator to charge fees and recover charges from those it regulates in relation to its functions under Parts 2 and 4 of the Act. This implements one of the recommendations of the Hackitt Review, that the Regulator should be funded through a full cost-recovery approach. The Secretary of State is intended to implement this section via new statutory regulations. The draft Building Safety (Fees) Regulations 2022 have been published in this regard, which cover most of the Regulator's anticipated functions under the Act. All fees covering the design and construction of a project must be paid by the client Dutyholder, whereas all fees covering in-occupation functions are to be paid by the Principal Accountable Person.

Disabled residents

The Act places express requirements on the Building Safety Regulator to facilitate and secure the safety of disabled people in or about higher-risk buildings in relation to building safety risks (section 4). The Regulator must also ensure representation of disabled people and disabled interest groups on its residents' consultative panel (section 11) and must publish a statement each year about its engagement with disabled residents of higher-risk buildings (section 20).

Amendments to the Building Act 1984

Part 3 of the Act provides for amendments to the Building Act 1984, to implement the new regulatory framework for the design, construction and major refurbishment to buildings covered by the Act, including more stringent obligations for higher-risk buildings. The key provisions include:

Definition of higher-risk buildings

The Act provides a basic definition of higher-risk buildings (as discussed above). The Secretary of State is empowered to amend the definition of higher-risk buildings after consultation with the Regulator and such other persons as it thinks appropriate (section 31).

Building control authority for higher-risk buildings

Section 32 provides that the Regulator will be the building control authority for higher-risk buildings, removing developers' ability to choose their own building control authority. As the building control authority, the Regulator will be responsible for supervising and inspecting building work in respect of all higher-risk buildings, and for any work that leads to a building becoming a higher-risk building.

Section 33 allows for the establishment of an applications process for building control approval, including: the giving of notices and certificates, consultation arrangements, notification requirements to the building control authority, and the appeals process for any decisions made during the building control process. Section 36 provides that any approval will automatically lapse where work is not commenced within 3 years of the date of the building control approval.

Dutyholders

Section 34 provides for the Building Regulations to prescribe dutyholders with defined duties in respect of work on buildings covered by the Building Regulations, including higher-risk buildings. Full descriptions of the dutyholder roles and responsibilities will be set out in secondary legislation, though the draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations have set out some requirements, as described below.

Competence

Section 35 provides for the Building Regulations to set out competence requirements for persons working on all buildings covered by the Building Regulations, including higher-risk buildings.

The draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations have set out basic competency duties for persons working on building or design works covered by the Building Regulations, including the roles of Principal Designer and Principal Contractor (see below).

Further guidance on competence requirements for dutyholders for higher-risk buildings are expected in secondary legislation. The British Standards Institution is also preparing detailed competence requirements for the roles of Principal Designer and the Principal Contractor for the design and construction phase.

Compliance Notices and Stop Notices

Section 38 empowers the Regulator as the relevant building control authority to issue notices during the design and construction phase of higher-risk buildings, comprising:

- Compliance Notices, requiring issues of non-compliance to be rectified by a set date; and
- Stop Notices, requiring work to be halted until serious non-compliance is addressed.

A person who without reasonable excuse contravenes a Compliance Notice or a Stop Notice is guilty of a criminal offence, triable in the Magistrates Court or Crown Court. If tried in the Magistrates' Court, the penalty is imprisonment for a term not exceeding 12 months and/or a fine, and if tried in the Crown Court, for a term not exceeding two years and/or a fine. In addition, a further fine may be imposed for each day on which the default continues after the initial conviction.

Breaches of the Building Regulations

Section 39 of the Act provides that any breach of the Building Regulations will be a criminal offence, triable in the Magistrates' Court or Crown Court. If tried in the Magistrates' Court, the penalty is imprisonment for a term not exceeding 12 months and/or a fine, and if tried in the Crown Court, for a term not exceeding two years and/or a fine. In addition, a further fine may be imposed for each day on which the default continues after the initial conviction.

Section 40 provides that where an offence under the Building Act by a corporate entity is committed:

- with the consent or connivance of any director, manager, secretary or other similar officer of the corporate entity, or by any person purporting to act in any such capacity; or
- is attributable to any neglect on the part of any such person, then the person as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly. Equivalent provisions exist for partners of legal partnerships and governing members of unincorporated bodies.

In addition, section 39 of the Act extends the period after work has completed from 12 months to 10 years during which the building control authority can require non-compliant work to be pulled down or altered (known as a Section 36 notice under the Building Safety Act 1984).

When section 38 of the Building Act 1984 is brought into force, as is intended, it will have the effect of creating civil liability for breach of building regulations.

Building Control Approvals and Building Inspectors

Section 42 requires the Regulator to establish and maintain a register of building inspectors (for public sector works) and building control approvers (for private sector works) and produce codes of conduct and operational standards rules for each professional body.

The Regulator must investigate claims of professional misconduct and, if proven, make a disciplinary order, including the suspension of an individual's registration. The Regulator may also issue improvement notices and contravention notices to any inspector or approver for failure to meet operational standards.

A registered building inspector or building control approver commits an offence if without reasonable excuse it carries out an activity that is outside the scope of their

registration or while their registration is suspended. It will also be an offence for any person to impersonate a registered building inspector or building control approver, punishable on summary conviction by a fine.

The Regulator is empowered to recommend to the Secretary of State that the functions of the building inspector are transferred to another local authority or the registered building control approver's registration is cancelled (as appropriate).

Section 44 amends the Building Safety Act 1984 so that a building control authority may carry out a restricted activity in relation to any work only through a registered building inspector, acting on the authority's behalf, whose registration has effect in relation to work of that description. Before each exercise of a restricted function in relation to any work, a building control authority must obtain and consider the advice of a registered building inspector whose registration has effect in relation to work of that description. The draft Building (Restricted Activities and Functions) (England) Regulations [2022] set this out in further detail and clarify that "restricted activities" relate to all building control and other approval decisions for higher-risk buildings.

Procedures for higher-risk building works

Sections 46 – 52 set out a new process for inspections and issuing notices under the Building Regulations for higher-risk buildings, or where any works become higher-risk building work.

Section 53 requires the Regulator to establish and maintain an electronic facility for allowing exchange of information and documents to building control authorities. The Regulator must also keep a register of specified relevant information provided to building control authorities and ensure that specified parts of the register are available for inspection by members of the public.

Appeals

Section 56 and Schedule 6 make amendments to provisions about appeals under the Building Act, providing for certain appeals to be made to the Regulator rather than the Secretary of State; appeals relating to buildings in England to be made to the First-Tier Tribunal instead of a Magistrates' Court; and rights of appeal against decisions of local authorities.

Fees, charges and building industry levy

Section 57 empowers the Regulator to issue regulations authorising any relevant authority to charge fees and recover charges for, or in connection with the performance of any of its functions under the Building Act.

Section 58 allows the Secretary of State to issue regulations imposing a levy on applicants for building control approval in respect of all new residential development of all sizes (previous versions of the Bill only referred to higher-risk buildings). The levy is to be paid to the Secretary of State for the purpose of meeting any building safety expenditure. The Government consulted on the scope of the levy during 2021 (including potential exemptions) and has made it clear that the purpose of the levy is to ensure the building industry shares the costs of the historical remediation of defective buildings.

Competence and other requirement for building and design work

Dutyholders

The Act allows for the Building Act 1984 to be amended to create a new dutyholder regime. Dutyholders are persons or organisations involved with higher-risk buildings who will be legally responsible for their work and the appointment of others. Dutyholder roles may be fulfilled either by an individual or a legal entity, and some dutyholders may hold more than one role in a project.

Full details about dutyholders and their roles will be set out in secondary legislation. In the meantime, the Explanatory Notes published with the initial version of the Bill and Impact Assessment published with the draft Bill in 2020 outlined the proposed regime to be established by the Regulator.

Five key dutyholder roles are expected to be created, based on equivalent roles in the Construction (Design and Management) Regulations 2015:

Client: Any person or organisation for whom a construction project is carried out.

Principal Designer: Appointed by the Client when there is more than one contractor working on the project, and responsible for planning, managing, monitoring and coordinating the pre-construction phase when most design is carried out.

Principal Contractor: Appointed by the Client, and responsible for planning, managing monitoring and coordinating the construction phase.

Designer: Anyone carrying on a trade, business or undertaking that prepares or modifies a design or instructs any person under their control to do so.

Contractor: Anyone managing or controlling construction work (including building, altering, maintaining or demolishing a building or structure) and also anyone who directly employs or engages a construction worker.

Each dutyholder is expected to have specific duties in respect of higher-risk buildings, to be set out in secondary legislation, and summarised in the Impact Assessment. All dutyholders will be expected to ensure that the people they have appointed are competent; have systems in place to plan and manage the work to ensure compliance with the Building Regulations; comply with specific regulatory requirements of the higher-risk buildings regime (e.g. Gateway requirements and mandatory occurrence reporting); and co-operate and share information with other relevant dutyholders.

It is at present unclear how the new dutyholder duties for higher-risk buildings will affect or overlap with the duties on dutyholders set out in the “Competence Regulations” discussed below.

The draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations (the “Competence Regulations”), are the first piece of secondary legislation to define relevant competence requirements for the building industry, pursuant to section 35 of the Building Safety Act.

The Competence Regulations set out a general duty of "competence" in relation to "building work" and "design work" carried out in England pursuant to the Building Regulations 2010. The scope of this new legislation is therefore very wide, as it will cover most work undertaken by the Building Regulations, rather than just applying to higher-risk buildings.

There are also more specific duties on those carrying out the roles of "client", "principal designer", "principal contractor", "designer" and "contractor" in respect of building and design works within the scope of the Competence Regulations. It is important to note that these duties will be in addition to the requirements of the Construction (Design and Management) Regulations 2015. However, the Competency Regulations state that these two sets of obligations may be carried out by the same persons. For example, a person or organisation appointed as the "principal designer" under the CDM Regulations may also carry out the "principal designer" duties under the Competence Regulations, assuming the entity has the appropriate skills for both the CDM Regulations role and that under the Building Safety Act.

"Building work" and "design work"

"Building work" has the same meaning as in the Building Regulations, though the following categories of works are excluded:

- works undertaken by individuals intending to carry out work on their own homes that are listed in Schedule 4 of the Building Regulations; and
- exempt buildings and works listed in Schedule 2 of the Building Regulations (buildings controlled under other legislation, buildings not frequented by people, greenhouses and agricultural buildings, temporary buildings, ancillary buildings, small detached buildings and extensions.

"Design work" means the design of any building works. "Design" is defined as including "drawings, design details, specifications and bills of quantities (including specification of articles or substances) relating to a building, and calculations prepared for the purpose of a design."

General competence duty

The Competence Regulations set out a general duty of "competence" in relation to building work or design work, meaning that a person has the skills, knowledge, experience and behaviours necessary, or where the person is not an individual, the organisational capability, to carry out:

- any building work in accordance with all "relevant requirements" of the Building Regulations; and/or
- any design work so that, if built, the building work to which the design relates would be in accordance with all "relevant requirements" of the Building Regulations.

"All relevant requirements" means, to the extent relevant to the building work or design work in question, the requirements of regulations 4, 6, 7, 8, 22, 23, 25B, 26, 26A, 28, 36, 41(2)(a), 42(2)(a) and 43(2) of, and Schedule 1 to, the Building Regulations.

Duties on all employers

Anyone appointing another party to carry out building work or design work for projects covered by the Competence Regulations must take all reasonable steps to satisfy themselves that the appointee:

- fulfils the general competence requirements in the Competence Regulations; and

- can fulfil a general duty to plan, manage and monitor any building work or design work (and any workers under their control) so as to be in compliance with all relevant requirements of the Building Regulations.

General obligations on appointees

The Competence Regulations require that anyone appointed to carry out any building work or design work within the scope of the Competence Regulations must:

- fulfil the general competence requirements to carry out that work;
- not accept an appointment where it does not meet the general competence requirements at the time of appointment;
- fulfil the specific competence requirements of their defined roles (i.e. of principal designer, principal contractor, designer and/or contractor); and
- notify the relevant person where it no longer meets a competency requirement at any point during the project.

In the event that anyone working on building work or design work ceases to satisfy the competence requirements in relation to the work, the "relevant person" to be notified will be as follows:

- A principal designer or principal contractor must notify the client;
- A designer must notify the person who appointed them and the principal designer (or the client where there is no principal designer);
- A contractor must notify the person who appointed them and the principal contractor (or the client where there is no principal contractor); and
- Anyone else must notify the person who asked them to do the work.

Specific duties in respect of building works and design works

Where anyone is undertaking building works pursuant to the Competence Regulations, they must:

- take all reasonable steps to ensure that any building work carried out by them and any workers under their control is planned, managed and monitored; and
- co-operate with the client, the principal designer, the principal contractor and other designers and contractors to the extent necessary to ensure that the work is compliant with all relevant requirements of the Building Regulations.

Where anyone is undertaking design works pursuant to the Competence Regulations, they must:

- take all reasonable steps to ensure that any design work carried out by them (and any workers under their control) is planned, managed and monitored; and
- co-operate with the client, the principal designer, the principal contractor and other designers and contractors to the extent necessary

to ensure that, if built, the building work to which the design relates would be compliant with all relevant requirements of the Building Regulations.

Specific duties on clients

A client is any person for whom a project is carried out. The duties of a client under the Competence Regulations comprise:

- making "suitable arrangements" for planning, managing and monitoring a project (including the allocation of sufficient time and other resources) so as to ensure compliance with all "relevant requirements" under the Building Regulations. "Suitable arrangements" require that:

  - any design work is carried out so that, if built, the work to which the design relates would be compliant with the relevant requirements of Building Regulations;
  - any building work is carried out in accordance with the Building Regulations;
  - Designers and contractors are able to cooperate with each other to ensure compliance with the Building Regulations; and
  - Periodic reviews of the building work and design work are included in the project to identify whether it is higher-risk building work;

- ensuring that any arrangements are maintained and reviewed throughout the project;
- providing building information as soon as is practicable to every designer and contractor on the project; "Building information" is defined as information in the client's possession or which is reasonably obtainable by or on behalf of the client, which is relevant to the building work and design work, including information about the work, the planning and management of the project, and issues relating to compliance with the relevant requirements of the Building Regulations and how they were addressed;
- cooperating with any other person working on or in relation to a project to the extent necessary to enable them to fulfil their duty or function;
- making suitable arrangements to ensure information is provided to designers and contractors working on the project to make them aware that it includes higher-risk building work and the nature of that work;
- checking that anyone they appoint meets the general competence requirements; and
- specific obligations in respect of appointing principal designers and principal contractors (see below).

Duties when appointing principal designers and principal contractors

Where there is more than one contractor on a higher-risk building project or any other building project covered by the Competence Regulations, the client must appoint:

- a principal designer with control over the design work; and
- a principal contractor with control over the building work.

Where there is only one contractor or designer working on the project, they will be the principal contractor or principal designer (respectively) for the project. Where there is more than one designer on the project, the designers must agree in writing who is to fulfil the duties of a principal designer.

Where a client has already appointed a principal designer and principal contractor under the CDM Regulations for the project, the client may certify in writing that those parties will also be appointed as the principal designer and principal contractor for the Competence Regulations.

The client must keep a record in writing of the steps it took to appoint and confirm the competence of any principal designer or principal contractor, as well as the steps taken to ensure that those appointed continue to meet their responsibility throughout the project.

Where a project involves higher-risk building work, the appointments must be made before an application for building control approval is made to the Regulator. For all other building projects, the appointments must be made before the construction phase begins.

Where a principal designer or principal contractor appointment ends before the end of the project, the client must appoint a replacement as soon as reasonably practicable. Where the client fails to appoint a principal designer or principal contractor, the client must fulfil these roles until an appointment is made.

Duties on contractors

Anyone appointed as a contractor must undertake the following duties:

- Provide each worker under their control with appropriate supervision, instructions and information so as to ensure that the building work is in compliance with all relevant requirements of the Building Regulations; and
- Not start building work unless satisfied that the client is aware of the duties owed by the client under all relevant requirements of the Building Regulations.

Duties on principal designers

Anyone appointed as a principal designer must undertake the following duties:

- Plan, manage and monitor the design work during the design phase;
- Co-ordinate matters relating to the design work to ensure that, if built, the building work to which the design relates would be compliant with all relevant requirements of the Building Regulations;
- Take all reasonable steps to ensure:
    - designers and any other person involved in relation to design work cooperate with the client, the principal designer, the principal contractor and each other;
    - the design work of all designers is coordinated so that, if built, the building work to which the designs relate would be compliant with all relevant requirements of the Building Regulations; and
    - designers and any other person involved in relation to design work comply with their duties;
- Liaise with the principal contractor and share with them any information relevant to:
    - the planning, management and monitoring of the building work; and
    - the coordination of building work and design work for ensuring compliance with all relevant requirements of the Building Regulations.
- Have regard to any comments provided by the principal contractor in relation to compliance with all relevant requirements of the Building Regulations;
- Assist the client if requested to do so in providing information to other designers and contractors;
- Give the client a document no later than 28 days after the end of its appointment explaining the arrangements it put in place to fulfil its obligations as principal designer;
- Review the arrangements put in place by any previous principal designer to fulfil its obligations under the Competence Regulations to ensure that if built, the building work to which the design relates would be compliant with all relevant requirements of the Building Regulations; and
- Where the principal designer is not a person, it must designate an individual under its control who has the task of managing its functions as principal designer and ensure that said individual is competent to undertake this role.

Duties on principal contractors

Anyone appointed as a principal contractor must undertake the following duties:

- Plan, manage and monitor the building work during the construction phase;
- Coordinate matters relating to the building work to ensure that the building work is compliant with all relevant requirements of the Building Regulations;
- Take all reasonable steps to ensure:
    - contractors and any other person involved in relation to building work cooperate with the client, the principal designer, the principal contractor and each other;
    - the building work of all contractors is coordinated so that the work is compliant with all relevant requirements of the Building Regulations; and
    - contractors and any other person involved in relation to building work comply with all relevant requirements of the Building Regulations;
- Liaise with the principal designer and share with them any information relevant to:
    - the planning, management and monitoring of the design work;
    - the coordination of building work and design work for ensuring compliance with all relevant requirements of the Building Regulations;
- Have regard to any comments provided by the principal designer in relation to compliance with all relevant requirements of the Building Regulations;
- Assist the client if requested to do so in providing information to other designers and contractors;
- Give the client a document no later than 28 days after the end of its appointment explaining the arrangements it put in place to fulfil its obligations as principal contractor; and
- Review the arrangements put in place by any previous principal contractor to ensure that the building work is compliant with all relevant requirements of the Building Regulations.

Where the principal contractor is not a person, it must designate an individual under its control who has the task of managing its functions as principal contractor and ensure that said individual is competent to undertake this role.

Duties on designers

Anyone appointed as a designer must undertake the following duties:

- Ensure that, if built, the building work to which the design relates would be compliant with all relevant requirements of the Building Regulations;
- Take all reasonable steps to provide sufficient information about the design, construction and maintenance of the building to assist the client, other designers and contractors to comply with all relevant requirements of the Building Regulations;
- Consider any other design work undertaken by others which directly relates to the building work and report to the principal designer any concerns as to compliance with all relevant requirements of the Building Regulations; and
- A designer must not start design work unless satisfied that the client is aware of the duties owed by the client under all relevant requirements of the Building Regulations for the building work to which the design relates.

Gateways regime for higher-risk buildings

Gateways are mandatory safety checks that will be required as part of the design and construction of all new higher-risk buildings, and the major refurbishment (i.e. requiring planning consent) of existing higher-risk buildings. The regime will provide a series of "hard stops", whereby the next stage of the project will not be able to proceed until the relevant Gateway is achieved.

Gateway 1

Gateway 1 came into force on 1 August 2021. Gateway 1 now forms part of the existing planning application process, courtesy of the Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2021. Applicants proposing new-build developments or major refurbishment of higher-risk buildings will be required to satisfy Gateway 1 by submitting a Fire Statement to the planning authority as part of their application, demonstrating that fire safety issues have been considered (e.g. the layout of the building, access to water supplies and for fire safety vehicles to the site).

The Health and Safety Executive will become a new statutory consultee for all planning applications involving higher-risk buildings and will provide specialist fire safety input to assist planning authorities in assessing applications.

Pre-commencement stage (between Gateways 1 and 2):

The Impact Assessment anticipated that the Regulator will meet with the client and relevant dutyholders involved in a higher-risk building project and provide advice ahead of their submitting a Gateway 2 application. The Regulator will be expected to set up a multi-disciplinary team to assist with assessing the Gateway 2 application, including local building control and the Fire & Rescue Service.

Gateways 2 and 3

The draft Building (Higher-Risk Buildings) (England) Regulations [2022] (the "draft HRB Regulations") provide more detail about the building control approval stages for the design, construction and major refurbishment of higher-risk buildings formerly referred to as "Gateway 2" and "Gateway 3".

The draft HRB Regulations apply to anyone undertaking "HRB work", which is defined as:

- the construction of a higher-risk building; or
- work to an existing building that causes it to become a higher-risk building; or
- such work, if any, which is necessary to ensure a building that undergoes a material change of use to become a higher-risk building complies with the applicable requirements listed in Regulation 6 of the Building Regulations 2010.

Gateway 2

Gateway 2 occurs prior to construction work beginning on a higher-risk building, and replaces the current "deposit of full plans" stage in the Building Regulations. The client, assisted by other dutyholders, will be required to apply to the Regulator (who will be the building safety authority for all higher-risk buildings) via a building control application containing their full design intention for the building.

Gateway 2 is referred to as "building control approval", which must be applied for and approved before any HRB work commences. This provides a "hard stop" whereby construction cannot begin until the Regulator is satisfied that the design meets the functional requirements of the Building Regulations and does not contain any unrealistic safety management expectations.

The draft HRB Regulations require that a building control approval application must be made in writing, signed by the applicant, and must include:

- the name, address, telephone number and (if available) an email address of the client;
- the name, address, telephone number and (if available) an email address of the principal contractor (or sole contractor) and the principal designer (or sole or lead designer);
- a statement that the application is made under the HRB Regulations;
- where the HRB work consists of work to an existing building, a description of the existing building including:
    - details of the current use, including the current use of each storey;
    - the height measured from the mean level of the ground adjoining the outside of the external walls of the building to the level of half the vertical height of the roof of the building, or to the top of the walls or of the parapet, if any, whichever is the higher;
    - the height as determined in accordance with the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2022];
    - the number of storeys as determined in accordance with regulation 6 of the Higher- Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2022];
- a description of the proposed HRB work, including:
    - details of the intended use of the higher-risk building, including the intended use of each storey;
    - the height of the higher-risk building as determined in accordance with regulation 5 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2022];
    - the number of storeys in the higher-risk building as determined in accordance with regulation 6 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2022];
    - the provision to be made for the drainage of the higher-risk building;
    - where paragraph H4 of Schedule 1 to the Building Regulations 2010 imposes a requirement, the precautions to be taken in the building over a drain, sewer or disposal main to comply with the requirements of that paragraph; and
    - the steps to be taken to comply with any local enactment that applies;
- where the applicant proposes that the higher-risk building is built in stages, a statement ("staged work statement") setting out a detailed description of the proposed stages of the work (including an estimate of the time when each stage of the work will commence).

The draft HRB Regulations require that a building control approval application must be accompanied by:

- a plan to a scale of not less than 1:1250 showing:
    - the size and position of the building and its relationship to adjoining boundaries;

  - the boundaries of the curtilage of the building, and the size, position and use of every other building or proposed building within the curtilage;
  - the width and position of any street on or within the boundaries of the curtilage of the building;
  - such other plans as necessary to show that the HRB work would comply with all applicable requirements of the Building Regulations (there are some specific requirements for applicants which have provided a staged work statement);

- a competence declaration (which is a statement signed by the client or on behalf of the client that it has taken all reasonable steps to ensure that the principal contractor and designer meet the competence requirements under the Dutyholder Regulations in relation to the HRB work);
- a construction control plan;
- a design and build approach document;
- a fire and emergency file;
- where the applicant proposes occupation of part of the building before completion of the HRB work, a partial completion strategy;
- a statement describing the arrangements the client will put in place to maintain the golden thread information;
- a copy of the key building information for the proposed higher-risk building (see the definition of key building information below); and
- a planning statement.

The draft HRB Regulations set out when the Regulator will be able to refuse an application (and that it must give reasons for doing so). The Regulator can either accept or reject the application or make any approval conditional on remedial actions or amendments to any of the key documents. The draft HRB Regulations require the Regulator to consult various bodies in certain circumstances before determining an application (such as "enforcing authorities" as defined in article 25 of the Regulatory Reform (Fire Safety) Order 2005).

Under the draft HRB Regulations, the Regulator must notify the applicant of the outcome of the building control approval application within 12 weeks (note that this could change in the final regulations).

The Regulator may require a client to notify it when a specified stage or point of the HRB work has been reached or not to cover up specified work for a specified period.

Where building control approval for HRB work is granted, at least two working days before the day the HRB work commences, the client, or someone on behalf of the client, must give a notice to the Regulator setting out their intention to commence the work.

Between Gateway 2 and Gateway 3

Following Gateway 2 approval, strict change control procedures apply. Under the draft HRB Regulations, in some instances (where there is a "notifiable change"), the Regulator will need to be notified in advance of the change being made and it is anticipated that the change must not be carried out for 14 days beginning on the day the change was notified to the Regulator (note these timescales may change in the final regulations). In others (where there is a "major change"), an application to the Regulator will need to be made first. The Government has not yet defined which changes will be "notifiable changes" and "major changes".

The draft HRB Regulations set out how a change control application must be made and require the Regulator to consult various bodies in certain circumstances. For "major changes" which require the Regulator's consent, it is anticipated that the Regulator must determine these within four weeks of the application (noting this timescale may change in the final HRB Regulations).

The Regulator will be able to issue a Compliance Notice or Stop Notice in respect of any non-compliance during this period.

Gateway 3

Gateway 3 takes place at the completion/final certificate stage, when building work on a higher-risk building is completed, and prior to the occupation of the building. Gateway 3 is referred to as "completion certificate approval", which must be applied for after completion of the works and must be approved before the building can be legally occupied. Completion certificates will be issued if a Gateway 3 application is approved. Applicants may also apply for partial completion certificates for a building.

Gateway 3 provides another hard stop whereby the building will not be able to be registered or occupied until the completion certificate is issued. However, dutyholders will be able to apply for partial occupation of the building in certain circumstances.

The draft HRB Regulations require that a completion certificate application must be made in writing, signed by the applicant, and must include:

- the name, address, telephone number and (if available) an email address of the client;
- the name, address, telephone number and (if available) an email address of the principal contractor (or sole contractor) and the principal designer (or sole or lead designer);
- a statement that the application is made under the HRB Regulations;
- a description of the HRB work, as built, including—
    - the location of the higher-risk building created by the HRB work;
    - details of the intended use of the higher-risk building, including the intended use of each storey;
    - the height of the building as determined in accordance with regulation 5 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2022];
    - the number of storeys in the higher-risk building as determined in accordance with regulation 6 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2022];
    - the provision made for the drainage of the higher-risk building;
    - where paragraph H4 of Schedule 1 to the Building Regulations 2010 imposes a requirement, the precautions taken in building over a drain, sewer or disposal main to comply with the requirements of that paragraph; and
    - the steps taken to comply with any local enactment that applies;
- a statement, signed by the client or someone on behalf of the client, confirming that to the best of the client's knowledge the higher-risk building, as built, complies with all applicable requirements of the Building Regulations;
- a statement, signed by both the client (or someone on behalf of the client) and the relevant person, confirming that a copy of the golden thread information and the key building information was provided to the relevant person in accordance with the HRB Regulations and the relevant person has received them.

A completion certificate application must be accompanied by:

- a plan to a scale of not less than 1:1250 showing:
  - the size and position of the higher-risk building, as built, and its relationship to adjoining boundaries;
  - the boundaries of the curtilage of the building, and the size, position and use of every other building within the curtilage;
  - the width and position of any street on or within the boundaries of the curtilage of the building;
- such other plans that are necessary to show that the HRB work complied with all applicable requirements of the building regulations;
- the following agreed documents:
  - the construction control plan;
  - the design and build approach document;
  - a fire and emergency file;
  - a compliance declaration (if such a declaration was not already provided to the Regulator, in relation to that part of the work) signed by:
    - each principal contractor (or sole contractor) for the HRB work, and
    - each principal designer (or sole or lead designer) for the HRB work,
  - where a principal contractor (or sole contractor) or a principal designer (or sole or lead designer) is unable to make a compliance declaration, the completion certificate application must be accompanied by a statement explaining why a compliance declaration for that person has not been provided.
  - a list of all the written reports submitted to the regulator in accordance with the mandatory occurrence reporting requirements;
  - a copy of the key building information for the higher-risk building, as built.

In the draft HRB Regulations, "compliance declaration" is defined as a document, signed by the principal contractor (or sole contractor) and the principal designer (or sole or lead designer) to which the declaration relates, that includes:

- the name, address, telephone number and (if available) an email address of the principal contractor (or sole contractor) and the principal designer (or sole or lead designer);
- the dates of their appointment; and
- a statement confirming:
  - in the case of a principal contractor (or sole contractor), that they took all reasonable steps to fulfil their duties as a principal contractor under the Dutyholder Regulations;
  - in the case of a principal designer (or sole or lead designer), that they took all reasonable steps to fulfil their duties as a principal designer under the Dutyholder Regulations.

There are slightly different application requirements for partial completion certificates set out in the draft HRB Regulations.

As with Gateway 2, the draft HRB Regulations require the Regulator to consult various bodies in certain circumstances before determining an application. Before determining a completion certificate application, the Regulator must also arrange an inspection of the completed HRB work for the purpose of assessing whether the work complies with all applicable requirements of the Building Regulations.

The draft HRB Regulations set out when the Regulator will be able to refuse an application. The Regulator can either accept or reject the application. It is anticipated that the Regulator must approve or reject applications within 12 weeks of the completion certificate application, or such longer period as agreed between the Regulator and the applicant.

When Gateway 3 comes into effect, it will have a significant effect on normal practice and timescales for signing off completion of works.

The golden thread and key building information

The Act allows the Regulator to specify that key information forming the "golden thread" for higher-risk buildings must be presented in a certain format.

The draft HRB Regulations define for the first time the "golden thread" (an electronic portal containing all information submitted as part of building control, change control and completion certificate applications as well as any mandatory occurrence reports). Golden thread information must be kept electronically, but the Government has yet to provide further details on an appropriate standard or format. The Impact Assessment published with the draft Bill suggested that parties using BIM level 1 would not incur significant additional cost in implementing the "golden thread" requirements.

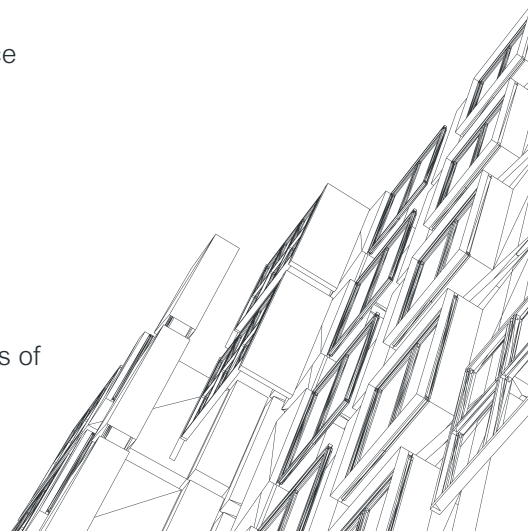
The draft HRB Regulations require the client to ensure there are (in relation to HRB work):

- arrangements for an electronic facility to be created and maintained by the client (or someone on their behalf) for the purpose of holding the golden thread information;
- procedures for persons involved with the HRB work to maintain any golden thread information in electronic facility;

The draft HRB Regulations require that certain documents (including any updated documents agreed by the Regulator) are uploaded onto the electronic facility within specified timescales.

The draft HRB Regulations also require that "key building information" about higher-risk buildings is submitted by the client to the Regulator via an online portal. The purpose of the key building information is to allow the Regulator to keep a register of higher-risk buildings. Up-to-date key building information must be kept electronically but, as with the golden thread information, the standard or format is still to be confirmed. Key building information is defined in the draft HRB Regulations as:

- before the completion of the HRB work:
    - name of the building;
    - postal address, or map reference where not yet a postal address;
    - the name, address, telephone number and (if available) an email address of the client;
    - proposed height of the completed building as determined in accordance with regulation 5 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations [2022];
    - proposed number of storeys above ground level;
    - proposed number of storeys below ground level;
    - proposed uses of any below ground storeys;
    - proposed number of dwellings in the building;
    - proposed building use(s);
    - if the proposed use of the building is residential and another use, details of the proposed other use of the building;



  - if the proposed use of the building is residential only, which is the proposed main building tenure;
  - number of staircases serving all storeys of the building;
  - number of sprinkler heads in the building;
  - date(s) planning permission was granted for the building;
  - proposed façade system(s) for the building, including details of the materials and the insulation;
  - proposed percentage coverage of each façade system on the building;
  - details of whether the façade of the building will use a large panel system;
  - details of the proportion of the building's outer surface to be windows;
  - details of any proposed wall attachments, including their type and materials;
  - details of the proposed roof sheeting, including materials;
  - details of the proportion of cover provided by each roof sheeting;
  - details of the largest proposed fire compartment in square metres;
  - details of proposed energy supply to the building;
  - details of the proposed building frame material(s);
  - details of the ground on which the building is built;
  - details of any proposed external facilities, including car parks;
  - proposed number of fire doors in the building;
  - details of the proposed evacuation strategy for the building;

- on completion of the HRB work, the information listed above and additionally:
  - name, address, telephone number and (if available) an email address of the Principal Accountable Person (if known at this date);
  - date of completion of the work;
  - date building control approval was granted;
  - date any further building control approval was granted;
  - fire door number, manufacturer and model (for each fire door);
  - details of the fire and smoke control provisions and equipment are in the buildings.

Both golden thread and key building information must be provided to the "relevant person" (which will usually be the Principal Accountable Person) before the completion certificate application is made.

Appeal of Gateway decisions

All decisions of the Regulator or any building inspector or building control approval will be able to be reviewed and appealed. Details of the review process are set out in the draft HRB Regulations.

In-occupation obligations

Part 4 of the Act relates to the in-occupation phase of higher-risk buildings. It introduces new roles of the Accountable Person and the Principal Accountable Person, each with duties in respect of the care and maintenance of higher-risk buildings and residents of those buildings.

Part 4 also amends the Landlord and Tenant Act 1985 to amend the service charge regime, and imports a number of new rights and obligations on landlords and tenants in tenancy agreements covered by that Act, which will be dealt with in the next section.

Building safety risk

The obligations around occupation of higher-risk buildings are chiefly concerned with managing "building safety risk" within those buildings. Section 62 of the Act defines "building safety risk" as a risk to the safety of people in or about a building arising from any of the following occurring as regards the building:

- the spread of fire (this has been amended from previous drafts of the Bill, which simply referred to "fire");
- structural failure;
- any other matter prescribed by the Secretary of State.

When prescribing matters in accordance with this definition, the Secretary of State must consult with the Regulator and any other persons the Secretary of State considers appropriate.

Section 63 empowers the Regulator to make recommendations to the Secretary of State to prescribe matters in relation to higher-risk buildings, but only if it considers that the matter would have the potential to cause a major incident in such a building. "Major incident" means an incident resulting in "a significant number of deaths" or "serious injury to a significant number of people".

There are further duties on Accountable Persons in respect of the identification and management of building safety risks in higher-risk buildings, explained further below.

"Occupied" higher-risk buildings

Section 71 of the Act provides that a higher-risk building is "occupied" if there are residents of more than one residential unit in the building.

Earlier versions of the Bill defined a "resident" as being a person who lawfully resides in a residential unit, but this definition has been removed. This potentially extends the scope of the Act to cover responsibility for all those living in higher-risk buildings, regardless of their tenancy status in that building.

Accountable Person

Section 72 of the Act establishes the role of Accountable Person in relation to a higher-risk building. The Accountable Person will be:

- a person who holds a legal estate in possession in any part of the "common parts". For the purposes of this definition, "common parts" means in relation to a building:
    - the structure and exterior of the building, except so far as included in a demise of a single dwelling or premises to be occupied for the purposes of a business; or

  - any part of the building provided for the use, benefit and enjoyment of the residents or more than one residential unit (whether alone or with other persons); or

- a person who does not hold a legal estate in any part of the building but who is under a relevant repairing obligation in relation to any part of the common parts. For the purposes of this definition, a person is under a "relevant repairing obligation" in relation to anything if they are required under a lease or by virtue of an enactment to repair or maintain that thing. This is intended to cover management companies that do not own the land but are a named party to the lease, and have maintenance obligations. However, on the current definition of "relevant repairing obligation", managing agents with repairing obligations and statutory H&S compliance obligations under a contract (such as an agency agreement) but without a possessory interest in the property, cannot be the Accountable Person, even though they would be the Responsible Person under the Regulatory Reform (Fire Safety) Order 2005.

The Government has promised further guidance on the identification of Accountable Persons for complex tenancy structures, and further explanation of their responsibilities.

Principal Accountable Person

Section 73 of the Act introduces the new role of the Principal Accountable Person, who will be responsible for meeting the statutory obligations for occupied higher-risk buildings. This new role has been created to ensure that a single person has overall responsibility where there are multiple Accountable Persons.

In a building with a single Accountable Person, that person will also fulfil the role of the Principal Accountable Person.

Where there is more than one Accountable Person in a higher-risk building, the Principal Accountable Person will be the Accountable Person who holds the legal estate in possession in the relevant parts of the structure and exterior of the building or has a relevant repairing obligation in relation to the structure and exterior of the building.

Tribunal determination of Accountable Persons and Principal Accountable Persons

Section 75 of the Act establishes a process for the First-Tier Tribunal to determine the identity of any Accountable Person or Principal Accountable Person. The Explanatory Notes published with the initial version of the Bill suggest that this process might be used, for example, if no one is clearly identified as the Principal Accountable Person, or if a person refuses to acknowledge that they are the Principal Accountable Person. An application can be made to the Tribunal by an "interested party", defined as being either the Regulator, or a person who holds (or who claims to hold) a legal estate in any part of the common parts or a person who is (or who claims to be) under a relevant repairing obligation in relation to any part of the common parts.

Requirement to register a higher-risk building

Section 76 of the Act introduces the requirement for a "completion certificate" in relation to the construction of a higher-risk building, the creation of additional units in a higher-risk building and works to a building which cause it to become a higher-risk building. The completion certificate must be issued before the residential units are occupied. If a relevant residential unit is occupied before a completion certificate relating to a relevant part of the building is issued, the relevant Accountable Person

commits an offence, punishable by imprisonment or a fine (or both). On summary conviction, the maximum term will be 6 months (increasing to 12 months upon the commencement of Schedule 22 of the Sentencing Act 2020) and on conviction on indictment the maximum term for imprisonment is two years.

An important initial duty of a Principal Accountable Person is to register a higher-risk building with the Regulator (section 77). For new higher-risk buildings, this registration will be required before the building can be occupied.

Section 77 of the Act provides that Principal Accountable Persons who fail to register a higher-risk building before its occupation commit an offence, punishable by imprisonment or a fine (or both). On summary conviction, the maximum term will be six months, but increasing to 12 months in future as explained above, and on conviction on indictment the maximum term for imprisonment is two years.

The Explanatory Notes published with the initial version of the Bill confirm that existing higher-risk buildings will also need to be registered, following an extended timeline to be set out by the Regulator in secondary legislation.

Registration

Section 78 provides that the Regulator may register a higher-risk building following an application from the Principal Accountable Person and must publish the register in the way it considers appropriate.

The Regulator may remove a building from the register if it appears that the building is not occupied or is not a higher-risk building.

Section 104 allows decisions of the Regulator under these provisions to be appealed.

Building Assessment Certificates

Section 79 requires the Principal Accountable Person to apply for a Building Assessment Certificate when required to do so by the Regulator. The Principal Accountable Person is required to apply for the Building Assessment Certificate within 28 days of the date on which the direction from the Regulator is given.

The Impact Assessment published with the draft Bill confirms that existing higher-risk buildings will likely be required to apply for Building Assessment Certificates. It is estimated that it will take the Regulator five years to carry out certification assessments for all existing higher-risk buildings (as currently defined), carried out in phases. The Regulator is likely to prioritise certain categories of buildings, based on their likely complexity and level of hazards.

A Principal Accountable Person who fails to apply for a Building Assessment Certificate within the specified timescales without a reasonable excuse commits an offence punishable by imprisonment or a fine (or both). On summary conviction, the maximum term for imprisonment is the maximum summary term for either-way offences (currently six months increasing to 12 months as explained above) and on conviction on indictment, the maximum term for imprisonment is two years. In either case, the Principal Accountable Person will also be liable for a further fine for each day on which the default continues after the initial conviction.

Information required for Building Assessment Certificate applications

Section 80 provides that applications for Building Assessment Certificates must be accompanied by:

- a copy of the most recent Safety Case report for the building unless a copy of that report has been provided in accordance with section 86(2);

- prescribed information about the Mandatory Occurrence Reporting System operated by the Principal Accountable Person;
- prescribed information demonstrating compliance by each Accountable Person with their duties under section 89 (provision of information to regulator, residents etc.); and
- a copy of the Residents' Engagement Strategy.

The Impact Assessment published with the draft Bill sets out more detail about the type of information that the Government intends to require to be submitted as part of the application, including:

- core details identifying the building (name, address, height and age for existing buildings);
- details of the Accountable Person(s) (names and addresses, and address for service of notices);
- confirmation that key obligations have been met (including the requirements of Gateway 3 where it is a newly-constructed building).

Approval of Building Assessment Certificates

Section 81 provides that the Regulator must only issue a Building Assessment Certificate if it is satisfied that the Principal Accountable Person has not contravened any "relevant duties", which are:

- sections 83 and 84 (duty to assess and manage building safety risks);
- section 85 (provision of Safety Case report);
- section 87(5) (provision of Mandatory Occurrence Reporting System);
- section 89 (provision of information to the Regulator, residents etc.); and
- section 91 (provision of Residents' Engagement Strategy).

The Impact Assessment published with the draft Bill also confirmed that the Regulator will have the power to inspect buildings before issuing a Building Assessment Certificate.

Where the Regulator is not satisfied that all relevant duties have been complied with, it must refuse the application and notify the Principal Accountable Person.

Where the Regulator considers that a contravention can be remedied promptly, it may give a notice to the Principal Accountable Person containing a brief description of the contravention and specify a period for it to be remedied. Where the contravention is remedied within the prescribed period, the Regulator may issue the Building Assurance Certificate instead of refusing the application.

Duty to display Building Assessment Certificate

Section 82 requires the Principal Accountable Person to display the Building Assessment Certificate in a "conspicuous position" in the building, along with a notice in a prescribed form containing information about the Accountable Persons for the building, and any relevant Compliance Notice.

Building Assessment Certificates will need to be reapplied for periodically. The Impact Assessment issued with the draft Bill estimates that this will be required every five years.

Assessment and management of building safety risks

Section 83 provides that all Accountable Persons must assess building safety risks as soon as reasonably practicable after "the relevant time" in respect of the part of a higher-risk building for which they are responsible. "The relevant time" is defined either as the time when the building becomes occupied or the later point at which that person becomes an Accountable Person for that building. This is an obligation on all Accountable Persons, so where a building has more than one Accountable Person it is not just the Principal Accountable Person who is required to assess building safety risk.

Further assessments must also be carried out:

- at regular intervals;
- at any time that an Accountable Person has reason to suspect that the current assessment is no longer valid; and
- at the direction of the Regulator within a specified period.

All assessments must be suitable and sufficient for the purposes of enabling the Accountable Person to comply with their duties under Section 84 (management of building safety risks).

Section 104 allows decisions of the Regulator under Section 83(2) to be appealed.

Section 84 requires Accountable Persons to take all reasonable steps for the following purposes:

- to prevent a building safety risk materialising in respect of the parts of a higher-risk building for which they are responsible (i.e. a risk to the safety of people in or about the building arising from the spread of fire, structural failure or any other prescribed matter); and
- reduce the severity of the incident resulting from such a risk materialising.

In doing so, they must act in accordance with "prescribed principles". The draft The Higher-Risk Buildings (Prescribed Principles for Management of Building Safety Risks) Regulations [2022] set out these "prescribed principles", which are to:

- avoid building safety risks;
- evaluate building safety risks that cannot be avoided, including identifying the proportionate measures required to reduce, address and mitigate the building safety risks;
- combat building safety risks at source by introducing proportionate measures to reduce, address and mitigate that risk at the earliest opportunity;
- ensure suitable and proportionate systems are in place for the effective inspection, testing and maintenance of the efficacy of measures taken;
- give collective protective measures priority over individual protective measures;
- adapt to technical progress;
- where reasonable to do so, replace the dangerous with the non-dangerous or less dangerous;
- where reasonable to do so, consider the impacts on residents within the higher-risk building and carry out engagement with those residents, and
- give appropriate instructions and information to employees and persons working on or in the higher-risk building.

Safety Case Reports

Section 85 requires the Principal Accountable Person to produce a Safety Case Report for an occupied higher-risk building for which it is responsible, as soon as

reasonably practicable after "the relevant time" (defined as above). The Report must contain any assessment of building safety risks made by any Accountable Person under Section 83 and a brief description of any steps taken to prevent those risks.

The Safety Case Report will normally be presented to the Regulator as part of the Building Assessment Certificate application. The Principal Accountable Person must also revise the Safety Case Report if they consider it necessary or appropriate to do so, following any assessment made by an Accountable Person pursuant to Section 83, or the taking of further steps pursuant to Section 84.

The Secretary of State is authorised to make further provision about the content and form of Safety Case Reports. The Impact Assessment issued with the draft Bill explains that Safety Case Reports must explain how the building safety risks in a building are effectively managed on an ongoing basis and should reference the supporting evidence contained within the "golden thread" of key building safety information. It is expected that a key part of the Safety Case Report will be an overview of the safety management system, explaining the policies, procedures and processes in place to deliver systemic risk management for the building.

Section 86 requires the Principal Accountable Person to give notice to the Regulator after preparing or revising a Safety Case Report, and to provide a copy to the Regulator on request.

Mandatory reporting requirements

Section 87 requires the Principal Accountable Person to establish and operate a mandatory occurrence reporting system, which is a system for the giving of information to Accountable Persons for the building to enable them to give prescribed information to the Regulator. The mandatory occurrence reporting system will normally be presented to the Regulator as part of the Building Assessment Certificate application.

Any contravention of this requirement without reasonable excuse is an offence and liable on summary conviction to a fine.

The draft Building (Higher-Risk Buildings) (England) Regulations [2022] also set out details of the mandatory occurrence reporting system for higher-risk building work. During design and construction, the main duty to put in place a mandatory occurrence reporting system will be placed on the principal designer and the principal contractor. Where there is a safety occurrence during the construction phase, a principal Dutyholder must follow a prescribed reporting procedure to inform the Regulator on becoming aware of the occurrence.

Information requirements

Section 88 requires Accountable Persons to keep "prescribed information" in accordance with "prescribed standards" (also known as "the golden thread" of information) in relation to a building safety risk in respect of the part of a building which an Accountable Person is responsible.

The Secretary of State is authorised to prescribe the content and format of any prescribed information, some detail of which is set out in the draft Building (Higher-Risk Buildings) (England) Regulations [2022], as set out above.

Section 89 allows the Secretary of State to make a provision requiring an Accountable Person to give prescribed information to the Regulator, another Accountable Person for the building, and residents/owners or other prescribed persons. In disclosing information under this provision, an Accountable Person does not breach any obligations of confidence owed by the Accountable Person in respect of that data, or any other restrictions on its disclosure, subject to the Accountable Person's continued compliance with any data protection legislation.

Any contravention of these requirements without reasonable excuse is an offence and liable on summary conviction to a fine.

Section 90 requires an outgoing Accountable Person to give prescribed information to any new or replacement Accountable Person in respect of all or any part of a building for which they are responsible. Failure to do so is an offence and punishable by imprisonment or a fine (or both).

Residents' Engagement Strategy

Section 91 requires the Principal Accountable Person to produce a Residents' Engagement Strategy (in consultation with certain prescribed persons in certain circumstances) for any higher-risk building for which it is responsible, as soon as reasonably practicable after "the relevant time" (as defined above). The Principal Accountable Person must act in accordance with the Strategy. The Strategy will normally be presented to the Regulator as part of the Building Assessment Certificate application.

The Strategy must promote the participation of relevant persons (residents) in the making of any "building safety decisions" made by any Accountable Person about the management of the building, or in connection with the performance of a duty of an Accountable Person, and must also include information about:

- the information to be provided to relevant persons about decisions relating to the management of the building;
- the aspects of those decisions that an Accountable Person will consult relevant persons about;
- the arrangements for obtaining and taking account of the views of relevant persons; and
- how the appropriateness of an Accountable Person's methods for promoting participation will be measured and kept under review.

As soon as reasonably practicable after the Strategy is prepared or revised, each Accountable Person for the building must give a copy of the Strategy to:

- each resident of the building who is aged 16 years and over and resides in a residential unit in the part of the building for which the Accountable Person is responsible; and
- each owner of a residential unit in that part of the building.

The duty to provide a copy of the Strategy is not required where the Accountable Person is not aware of the resident and has taken all reasonable steps to make itself aware of persons who reside in residential units in the part of the building for which that Accountable Person is responsible.

Residents' requests for further information

Section 92 provides that any resident of a higher-risk building who is entitled to receive a copy of the Residents' Engagement Strategy will be able to request that an Accountable Person provides "prescribed information" or a copy of a "prescribed document", as directed by the Secretary of State.

The Explanatory Notes published with the initial version of the Bill anticipate that this further information is likely to comprise:

- full, current and historical fire risk assessments;
- planned maintenance and repairs schedules;
- the outcome of any building safety inspection checks;
- how assets in the building are managed;

- details of preventive measures;
- fire protection measures in place;
- information on the maintenance of fire safety systems;
- fire strategy for the building;
- structural assessments; and
- planned and historical changes to the building.

Complaints procedures

Section 93 requires the Principal Accountable Person to establish a complaints procedure and system to handle any "relevant complaint" made by a resident of a higher-risk building, relating to a building safety risk as regards the building, and the performance of an Accountable Person.

The Secretary of State is expected to issue further guidance about the establishment and operation of complaints systems in secondary legislation, particularly around the way in which complaints may be made, timescales within which complaints must be considered and dealt with, and the process for a Principal Accountable Person to refer a complaint to the Regulator.

Section 94 requires the Regulator to establish and operate a system for the investigation of relevant complaints referred to it by Principal Accountable Persons. Further details of the system will be set out in secondary legislation.

Compliance Notices

Section 99 allows the Regulator to give a Compliance Notice to an Accountable Person who appears to the Regulator to have contravened a relevant requirement and require that Accountable Person to take specified steps or remedy the contravention within a specified period.

Where it appears to the Regulator that the contravention has placed or will place people in or about the building in imminent danger, the Regulator may specify that the Compliance Notice is an Urgent Action Notice.

An Accountable Person commits an offence if it without reasonable excuse:

- breaches a Compliance Notice; or
- contravenes a relevant requirement that places one or more people in or about the building at significant risk of death or serious injury.

These offences are punishable on summary conviction to imprisonment for a term not exceeding six months (extending to 12 months) or for conviction on indictment to imprison not exceeding two years; or a fine or both.

Section 100 provides that where the Regulator issues a Compliance Notice to an Accountable Person, it must take reasonable steps to notify the local authority and fire and rescue authority for the area in which the building is situated, and the Regulator for Social Housing where the Accountable Person is a registered provider of social housing.

Section 103 allows a person to whom a Compliance Notice has been given, to appeal to the Tribunal.

Special Measures

Section 102 and Schedule 7 allow the Regulator to apply to the First-Tier Tribunal for a Special Measures Order in respect of an occupied higher-risk building. The Tribunal will be able to make such a Special Measures Order where it is satisfied

there has been a serious failure, or a failure on two or more occasions, by an Accountable Person to comply with a duty imposed on that Accountable Person, or by regulations made under the Building Safety Act.

The effect of a Special Measures Order will be the appointment of a person to be the "Special Measures Manager" for the building, who will be appointed to carry out the functions of the Accountable Person for the building.

Before the Regulator is able to apply for an Order, it must follow the process set out in paragraph 2 of Schedule 7, which includes issuing an initial notice, setting out that it intends to make an application for an Order, the reasons for that application, the terms of the proposed Order (including the identity of the proposed Special Measures Manager) and giving the opportunity for recipients of the notice to make representations on the proposed application. The initial notice must be sent to:

- each Accountable Person for that building;
- each resident aged 16 or over in the building;
- each owner of a residential unit in the building;
- any managing agent for all or part of the building;
- any recognised tenants' association (for all or part of the building);
- any manager appointed under section 24 of the Landlord and Tenant Act 1987;
- the fire and rescue authority for the area;
- the local housing authority for the area;
- where any Accountable Person is a registered provider of social housing, the Regulator of Social Housing; and
- where any part of the building contains premises occupied for the purposes of a business, each Responsible Person within the meaning of article 3 of the Regulatory Reform (Fire Safety) Order 2005.

Where the initial notice requires an Accountable Person to make payments to the Special Measures Manager, the Regulator must include a financial management proposal in the initial notice.

Once a decision has been made, the Regulator will issue a final notice, stating whether or not the Regulator intends to make the application and specifying the terms of the Order it intends to invite the Tribunal to make.

Under paragraph 6 of Schedule 7, where the Order requires one or more Accountable Persons to make payments to the Special Measures Manager, these will be held on trust. Paragraph 7 provides that when a Special Measures Order is in place, the Special Measures Manager will assume the rights and liabilities of any relevant contract, and may bring, continue or defend any relevant cause of action.

Paragraph 8 empowers a Special Measures Manager to apply for an Order appointing a manager pursuant to section 24 of the Landlord and Tenant Act 1987. Where both a Special Measures Manager and a 1987 Act manager have been appointed in respect of a higher-risk building, the Special Measures Manager shall take priority in relation to the function for which it was appointed.

Paragraph 10 of Schedule 7 enables the Regulator to give financial assistance to a Special Measures Manager and paragraph 11 allows the Tribunal to give directions to the Special Measures Manager with respect to the exercise of its functions or any other matter.

The Regulator may make an application to change the identity of the Special Measures Manager or vary a Special Measures Order, following a similar process to the initial application.

The Tribunal may vary or discharge a Special Measures Order following an application by the Regulator, an Accountable Person, or the Special Measures Manager. In considering whether to vary or discharge the order, the Tribunal will need to have regard to the likelihood of the variation or discharge resulting in a recurrence of the events that led to the Order being made in the first place, and whether it is just and convenient in all the circumstances to vary or discharge the Order.

The Impact Assessment did not monetise the costs related to appointment of a "Special Measures Manager" on the basis that the number of cases is expected to be small.

Enforceability of Tribunal decisions

Section 107 provides that decisions made by the First-Tier Tribunal or Upper Tribunal made under Part 4 (other than in relation to payment of a service charge) are enforceable in the same way as a County Court order.

Guidance

Section 108 allows the Regulator to issue, amend, withdraw and update guidance on any of the duties of the Accountable Person under Part 4 of the Act. This guidance is expected to be issued in secondary legislation.

Co-operation and co-ordination

Section 109 applies where there is more than one Accountable Person in a higher-risk building, and requires that Accountable Persons, when carrying out their duties, must so far as possible, co-operate and co-ordinate with every other Accountable Person for the building.

An Accountable Person must also cooperate with each "Responsible Person" under the Regulatory Reform (Fire Safety) Order 2005 in relation to the building, where this is a different person.

Resident management companies

Section 111 of the Act empowers resident management companies to appoint building safety directors.

Liability of bodies corporate for in-occupation obligations

Section 161 provides that where an offence under Part 4 of the Act is committed by a corporate entity:

- with the consent or connivance of any director, manager, secretary or other similar officer of the corporate entity, or by any person purporting to act in any such capacity; or
- is attributable to any neglect on the part of any such person,

then the person as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly. Equivalent provisions exist for partners of legal partnerships and governing members of unincorporated bodies.

Duties on residents and owners in higher-risk buildings

Part 4 of the Act places express duties on residents of occupied higher-risk buildings, and allows Accountable Persons a system of redress for dealing with any contraventions of these duties.

General duty on residents and owners

Section 95 requires residents of residential units in occupied higher-risk buildings who are aged 16 years or over, and owners of residential units in those buildings, to observe the following duties:

- not to act in a way that creates a significant risk of a building safety risk materialising;
- not to interfere with a "relevant safety item", meaning anything in or forming part of the common parts of the building that is intended to improve the safety of people in or about the building in relation to a fire safety risk (e.g. fire safety equipment or fire doors); and
- to comply with a request made by the appropriate Accountable Person for information reasonably required for the Accountable Person's duties to identify and manage building safety risks.

Contravention Notices

Section 96 allows Accountable Persons to issue a Contravention Notice to any resident subject to the duties in Section 95, where it appears that the resident is contravening or has contravened its statutory duties.

Contravention Notices must specify:

- the alleged contravention;
- to avoid further contraventions of the duty;
- contain an explanation of the steps that the Accountable Person may take if the Contravention Notice is not complied with; and
- any sum payable to the Accountable Person as a result of the alleged contravention, where this is necessary to repair or replace a safety item and does not exceed the reasonable cost of repairing or replacing that item.

Contravention Notices may be enforced in a County Court, which may issue an order to require a resident to provide specified information or do a specified thing by a specified time, or prohibit a resident from doing a specified thing, and may also require the resident to pay a specified sum to the Accountable Person.

Rights of access to residents' dwellings

Section 97 allows Accountable Persons for higher-risk buildings to make a request to a resident aged over 16 to enter their premises to assess building safety risks or determine whether a resident's duty has been contravened. All requests must:

- be in writing;
- set out the purpose for which they are made;
- contain an explanation of why it is necessary to enter the premises for that purpose;
- request access to the premises at a reasonable time; and
- be made at least 48 hours before the time of requested access.

Accountable Persons may apply to the County Court for an order requiring the resident to allow the Accountable Person or its authorised representative to enter the premises for the purpose mentioned in the request.

Landlord and tenant obligations

Part 4 also introduces reforms to service charge legislation by introducing implied terms relating to building safety into long leases and making substantial amendments to the service charge provisions as set out in the Landlord and Tenant Act 1985.

These changes only apply to relevant leases, which are defined as a lease for a term of seven years or more, under which the tenant is liable to pay a variable service charge (within the meaning of section 18 of the Landlord and Tenant Act 1985) but excluding a "relevant social housing tenancy" (which means that flexible or assured tenancies that are not long leases or shared ownership leases are excluded).

In addition to the reforms under Part 4 of the Act, further amendments to service charge legislation have been made under Part 5 of the Act in relation to the remediation of certain defects, which are set out in the next section.

Implied terms

Section 112 imports a number of implied terms into relevant leases, including the following obligations:

Landlords are required to:

- comply with their building safety duties;
- co-operate with an Accountable Person or Special Measures Manager (including by providing names and contact details of residents and tenants where reasonably required); and
- comply with the terms of any Special Measures Order.

Tenants are required to:

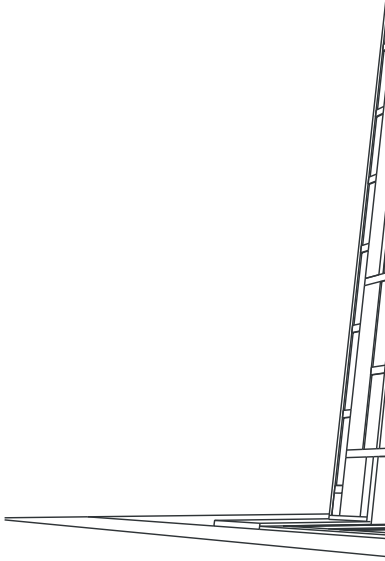
- allow the landlord, Accountable Person or other authorised person to enter their dwelling to carry out building safety measures or to inspect/assess the property, at reasonable times and upon 48 hours' notice in writing; and
- act in accordance with the duties placed on residents and owners by section 95.

Landlords and tenants are prevented from contracting out of these obligations and may not exercise any forfeiture or penalty in respect of either landlord or tenant enforcing their rights under these provisions.

Amendments to service charge provisions

The Act does not introduce the building safety charge regime that was originally proposed during the passage of the Bill through Parliament. Instead, section 112 of the Act amends the Landlord and Tenant Act 1985 to allow landlords to recover costs for a specified list of "building safety measures" and defines "excluded costs" for higher-risk buildings that may not be recharged to tenants.

Building safety measures comprise costs incurred by an Accountable Person or relevant person applying to register a higher-risk building or for a building assessment certificate; assessing and taking reasonable steps to manage building safety risks; preparing and revising safety case reports; establishing and operating mandatory occurrence reporting systems; keeping and circulating information and documents in accordance with the Act; complying with duties under a residents' engagement strategy; establishing and operating a complaints system under the



Act; and issuing contravention notices to, and taking legal action against, residents in respect of breaches to tenants' building safety obligations. Building safety measures are also deemed to include fees payable to the Regulator, management costs and legal and other professional fees related to building safety measures.

Excluded costs for higher-risk buildings comprise costs relating to a fine imposed by the Regulator; legal costs incurred in connection with a Special Measures Order; costs incurred by reason of any negligence, breach of contract or unlawful act by the landlord or their appointee; or costs prescribed by regulations to be incurred in connection with taking building safety measures.

Section 113 requires landlords to serve a prescribed form of building safety information alongside any service charge demand, confirming the identity of the Principal Accountable Person and any Special Measures Manager for the building. The tenant is not liable to pay the service charge demanded until such time as this information is provided.

Remediation of certain defects in "relevant buildings"

In line with Michael Gove's announcement in January 2022, Part 5 of the Act introduces a number of remedies to require landlords and associated persons to undertake and pay for remediation works for defects in "relevant buildings".

"Relevant Buildings" are defined in section 117 as self-contained buildings (or self-contained parts of the building) containing at least two dwellings being at least 11 metres high or having at least five storeys.

Section 119 defines **"qualifying lease"** as a long lease of a single dwelling in a relevant building granted before 14 February 2022 for which the tenant is liable to pay a service charge, and where the dwelling was the tenant's only or principal home, the tenant did not own any other dwelling in the UK, or they owned no more than two dwellings in the UK apart from their interest under that lease.

"Relevant Defects" are defined in section 120 to include anything giving rise to a risk to the safety of people in or about the building arising from the spread of fire or the collapse of the building or any part of it and will also include anything done or not done during the 30-year period preceding the commencement of this section of the Act.

Restrictions on service charges for remediation costs

Section 122 and Schedule 8 of the Act set out a number of financial caps and exclusions on service charge payments for defects in Relevant Buildings.

Under paragraphs 8 and 9 of Schedule 8, no service charges will be payable in respect of cladding remediation works, or for the legal or other professional fees relating to the liability or potential liability of any person incurred as a result of a Relevant Defect.

Under paragraph 2 of Schedule 8, no service charge will be payable under a qualifying lease in respect of a relevant measure relating to a Relevant Defect where the landlord is responsible for the defect or is "associated" with a person who is "responsible" for the defect. A person is responsible when they undertook or commissioned works relating to the defect or was in a joint venture with a developer who undertook or commissioned works relating to the defect. Section 121 of the Act defines how a partnership or body corporate is "associated" with another person.

Under paragraph 3 of Schedule 8, no service charge will be payable under a qualifying lease in respect of a relevant measure relating to a Relevant Defect where the landlord meets a defined "contribution condition", based on a calculation of the landlord group's net worth. Note that this paragraph does not apply to local authorities or private registered providers of social housing.

Under paragraph 4 of Schedule 8, no service charge will be payable under a qualifying lease in respect of a relevant measure relating to a Relevant Defect if the value of the qualifying lease on 14 February 2022 was less that £325,000 (if the lease is in Greater London) or £175,000 in any other case.

Where none of the above applies and service charges are payable, Schedule 8 specifies permitted maximum sums that may be recovered from tenants in respect of defects, taking into account service charge payments made in the preceding five years, and also sets annual limits on service charge payments for defects. For leases with a value of less than £1 million, the permitted maximums over the five-year

period are set at £15,000 (for leases in Greater London) and £10,000 elsewhere. For leases between £1 million and £2 million, the permitted maximum is £50,000 and £100,000 where the value exceeds £2 million. Paragraph 6(5) sets out specific requirements in relation to shared ownership leases. The annual limits are set at one tenth of the above caps.

The Secretary of State has the power to make further regulations on a number of areas under Schedule 8.

The Secretary of State is empowered to allow recovery from landlords of any unrecoverable sum under a lease as a result of these provisions, and to allow applications to the First-Tier Tribunal to determine whether landlords have failed to comply with these provisions.

Remediation Orders

Section 123 of the Act gives the First-Tier Tribunal powers to issue Remediation Orders if it considers it just and equitable to do so. A Remediation Order is an order made by the First-Tier Tribunal on the application of an interested person (which includes a person with a legal or equitable interest in the "Relevant Building" as well as the Regulator, relevant fire service, local authority or any other person prescribed by regulations), which requires a "relevant landlord" to remedy specified Relevant Defects in a Relevant Building within a specified time.

Remediation Contribution Orders

Section 124 of the Act gives the First-Tier Tribunal powers to issue Remediation Contribution Orders. A Remediation Contribution Order is an order made by the First-Tier Tribunal, requiring: (a) landlords under a lease of Relevant Buildings; (b) a person who was such a landlord at the "qualifying time"; (c) a developer in relation to a Relevant Building; or (d) or any person 'associated' with any of paragraphs (a) – (c) to make payments to a specified person, for the purpose of meeting costs incurred or to be incurred in remedying Relevant Defects relating to the Relevant Building. Such order may require the making of payments of a specified amount(s) or payments of a reasonable amount(s) in respect of remediation of Relevant Defects (or things done or to be done for the purpose of remedying Relevant Defects) and/or require any such payment to be made by a specified time / on demand following the occurrence of a specified event.

Remediation costs of insolvent landlords

Section 125 of the Act deals with remediation costs of insolvent landlords. Where, in the course of the winding up of a company (which is a landlord under a lease of a Relevant Building) it appears that there are Relevant Defects relating to the building and that the company is under an obligation to remedy any of the Relevant Defects or is liable to make a payment relating to the costs incurred / to be incurred in remedying those Relevant Defects, a court may on the application of a person acting as an insolvency practitioner require a body corporate / partnership "associated" with the company to:

- make such contributions to the company's assets at the court considers just and equitable; or
- to make such payments to a specified person as the court considers just and equitable for the purpose of meeting costs incurred / to be incurred in remedying the Relevant Defects.

Building industry schemes

Sections 126 and 127 of the Act provide more detail about the Secretary of State's powers to establish building industry schemes, which can now include securing that persons in the building industry remedy defects in buildings or contribute to costs associated with remedying defects in buildings.

The Secretary of State can prescribe conditions for "eligible persons" who can join a scheme and different categories of membership of a scheme. Membership of a scheme may include conditions for an eligible person to remedy defects in buildings with which they have a connection of a prescribed kind; making financial contributions towards the costs of remedying defects (including buildings with which an eligible person has no connection); the use of construction products; the provision of information to the Secretary of State or others; and the competence or conduct of any individual connected with an eligible person or with whom an eligible person contracts, including conduct occurring before this provision comes into force; and whether persons with whom an eligible person contracts are members of the scheme.

The Secretary of State will keep and publish a list of members of the scheme and may publish a list of persons who are eligible persons but not members of the scheme. The Secretary of State may also make regulations in relation to a number of aspects of the scheme.

Prohibition on development and building control

Section 128 allows the Secretary of State to prohibit "prescribed persons" from carrying out development of land in England, which may apply despite planning permission already having been granted. Section 129 also allows the Secretary of State to impose building control prohibitions as regards buildings or proposed buildings, which would prevent a prescribed person from (amongst other things set out in section 129(4)) applying for building control approval or the granting of a final certificate in relation to works carried out by that person.

Under these provisions, prescribed persons may include persons who are eligible to be members of a building industry scheme and those who are not members of a scheme.

These prohibitions may be imposed for any purpose connected with securing the safety of people in or about buildings in relation to risks arising from buildings, improving the standard of buildings, including securing that safety or improving that standard, by securing that persons in the building industry remedy defects or contribute to costs associated with remedying defects.

Building Liability Orders

Section 130 of the Act gives the High Court powers to issue Building Liability Orders if it considers it just and equitable to do so. A Building Liability Order is an order providing that any "Relevant Liability" of a body corporate (known as the "original body") relating to a specified building is also: (a) a liability of a specified body corporate associated with the original body; or (b) a joint and several liability of two or more specified body corporates associated with the original body (in the period between the beginning of the carrying out of works relating to the Relevant Liability and the giving of an Order). A Building Liability Order can be made in respect of a liability of a body corporate (i.e. the original body) that has been dissolved (including where dissolution occurred before the commencement of this section) and continues to have effect even if the original body is dissolved after the making of the Order.

The relevant liability that the High Court can pass on in these circumstances is a liability (whether arising before or after commencement of this section) of the original body under: (a) the Defective Premises Act 1972 or section 38 of the Building Act 1984; or (b) as a result of a building safety risk (very widely defined as a risk to the safety of people in or about the building arising from the spread of fire or structural failure).

Section 132 also makes provision for persons to apply for "Information Orders" requiring a specified body corporate to give information or documents relating to persons who are or have at any time in a specified period been associates of the body corporate.

Remediation and redress

Section 133 introduces a new section 20D into the Landlord and Tenant Act 1985, providing that where a landlord undertakes remediation works it must take reasonable steps to obtain grant funding if available, to ascertain whether monies may be obtained from a third party (under an insurance policy, guarantee or indemnity, or pursuant to a claim made against a developer or person involved in the design of the building or the building works) and, if so, to obtain those monies. Where such funding is obtained, the amount of funding is to be deducted from the remediation costs (and the amount of service charge is to be reduced accordingly).

Where a landlord fails to take these steps, the tenant can apply for an order disallowing any service charges relating to remediation costs incurred by the landlord.

Amendments to the building industry

Parts 5 and 6 of the Act set out a number of miscellaneous amendments to the building industry, including extension of limitation periods for breaches of statutory requirements relating to building works, the introduction of new government agencies to provide assistance and redress to residents, and amendments to the regulation of construction products and the role of architects.

Section 2A of the Defective Premises Act 1972

The Act introduces a new section 2A of the Defective Premises Act 1972 which imposes a duty on those who take on any work on a building that contains a dwelling to ensure that the work does not render the dwelling unfit for habitation. The limitation period for these claims (prospectively) from the date of commencement is 15 years.

Extension of limitation periods

Section 135 of the Act extends the limitation period from six years to 15 years prospectively for claims under section 1 and section 2A of the Defective Premises Act 1972 (i.e. for claims that accrue after the Act takes effect / work completed in the future) and from six to 30 years retrospectively for claims under section 1 of the Defective Premises Act only (for claims that accrued before the Act takes effect / works completed in the past).

Section 135 also extends the limitation period for claims for a breach of section 38 of the Building Act 1984, when it comes into force, which relates to civil claims for damage caused by breaches of duties imposed by the Building Regulations.

New Homes Ombudsman

Section 136 requires the Secretary of State to establish a scheme for all owners and occupiers of "new build" homes in England to allow complaints to be made to a New Homes Ombudsman.

Sections 137 to 142 provide that:

- membership of the New Homes Ombudsman scheme will be open to all developers;
- the person who maintains the New Homes Ombudsman Scheme must keep a register of persons who are members of the scheme;
- the Secretary of State will have a power to issue further regulations (via secondary legislation) requiring developers to become members of the scheme, and to notify certain people (such as purchasers of 'new build' homes) that the New Homes Ombudsman scheme exists;
- persons may be required to become members of the scheme for a specified period, even where they are no longer developers;
- the Secretary of State may include sanctions within those regulations for failing to become or remain a member; and
- the Secretary of State may also issue or approve a code of practice about the standards of conduct and quality of work.

Schedule 9 includes more details concerning the proposed procedures for becoming and remaining a member of the scheme, which may include requirements for developers to pay membership fees, provide information to the Ombudsman and put in place internal complaints handling procedures. Where the scheme requires developers to have internal complaints handling procedures, it must also require developers to publish those procedures.

Schedule 9 also requires the scheme to include provisions setting out what type of complaint may be made under the scheme, and the procedure for making such a complaint. Of note, Schedule 9 prohibits the New Homes Ombudsman from charging complainants a fee to bring a claim; the operating costs of the scheme seem likely to be covered wholly by the fees payable by members of the scheme.

Schedule 9 provides that the scheme must set out details concerning the investigation and determination of complaints, including a requirement for the New Homes Ombudsman to have regard to any codes of practice issued or approved by the Secretary of State. Provisions around complaints handling must require members to provide complainants whose complaints are well founded with one or more of the following forms of redress:

- compensation;
- an apology;
- an explanation;
- such other action in the interests of the complainant as the New Homes Ombudsman may specify.

Schedule 10 makes some consequential amendments to the Local Government Act 1974 in relation to the New Homes Ombudsman.

‘New build’ home warranties

Section 144 of the Act, when it comes into force, introduces a requirement for developers, at the time of or before granting or disposing of a relevant interest in a new home to: (a) provide to the purchaser a ‘new build’ home warranty for the ‘new build’ home; and (b) provide to a prescribed person a ‘new build’ home warranty for any common parts.

A ‘new build’ home warranty is an arrangement in which: (a) the developer agrees, in specified circumstances, to remedy any specified defects occurring within a specified time; and (b) a prescribed person obtains the benefit of a policy of insurance relating to specified defects.

The Act notes that regulations will further set out the requirements about ‘new build’ home warranties (i.e. as to the type of defects developers must remedy, the policy of insurance, and how the warranty may be transferred etc), but that these regulations must require that the period of cover under the policy of insurance must be at least 15 years from the day on which the relevant interest is granted or disposed of.

Section 145 of the Act imposes financial penalties for persons who fail to comply with Section 144 (not to exceed the greater of 10% of the value of the relevant interest and £10,000).

Regulation of construction products

Sections 146 to 151 and Schedule 11 of the Act allow the Secretary of State to regulate all construction products made available in the UK.

Following the publication of the draft Construction Products Regulations in 2021, sections 146 to 151 of the Act contain detailed provisions about liability for failure to comply with those Regulations, and specific liability relating to cladding products.

Under the Regulations, a construction products regulator will have powers to remove any dangerous construction products from the market.

Between 12 – 18 months after enactment (April 2023 – October 2023) there will be specific requirements for construction products included on the safety-critical list and the requirement for construction products to be safe, with strengthened oversight and enforcement powers to be used by the National Regulator for Construction Products to operate effectively. The Act creates a power for the Secretary of State to issue further regulations enabling it to issue Cost Contribution Notices where an offence has been committed under the new Construction Product Regulations.

Section 148 creates a liability on the part of a person to pay damages to a person with a relevant interest for personal injury, damage to property or economic loss suffered by that person as a result of a building(s) becoming "unfit for habitation" where certain conditions are met:

- Condition A: The party has after the date the Section comes into force: (a) failed to comply with a requirement in relation to a construction product under the prescribed Construction Product Regulations; (b) marketed or supplied a construction product and makes a misleading statement in relation to it; and (c) manufactures a construction product that is inherently defective;
- Condition B: The construction product is installed in, applied to, or attached to a building (consisting of a dwelling or one or more dwellings);
- Condition C: In the course of those works, or any time after their completion, the building or dwelling becomes unfit for habitation – there is no definition of what constitutes 'unfit for habitation' although it is noted that it may mirror part of the test under the Defective Premises Act 1972; and
- Condition D: the installation, application etc. of the construction product within the dwelling is the cause or one of the causes of the dwelling becoming unfit for habitation.

Section 149 creates a liability for past defaults relating to cladding products on the part of a person with a relevant interest for personal injury, damage to property or economic loss suffered by that person as a result of a building(s) becoming 'unfit for habitation' where certain conditions are met:

- The party has before the coming into force of this section: (a) failed to comply with a cladding product requirement in relation to a cladding product under prescribed existing construction product regulations; (b) marketed or supplies a cladding product and makes a misleading statement in relation to it; or (c) manufactured a cladding product that is inherently defective;
- Where conditions B – D above are also satisfied (save that this section relates to 'cladding products' rather than construction products').

Actions under section 148 will have a 15-year limitation period, whereas actions under section 149 will have a limitation period of 30 years (if the right of action accrued prior to commencement of section 149) or 15 years (if the right of action accrues after the commencement of section 149).

Schedule 11 gives the Secretary of State a power to make further "construction product regulations" which may:

- prohibit the marketing or supply of construction products which are not safe products;
- impose other requirements to ensure that construction products which are not safe products are not marketed or supplied; and
- impose requirements in relation to the marketing and supply of construction products which are safe.

Schedule 11 also sets out that a construction product will be a "safe product" if, under normal or reasonably foreseeable conditions of use (including circumstances where the product might come under stress, for example, a fire):

- the product does not present any risk to the health or safety of persons; or
- if it does, the risk is as low as it can be compatibly with using the product.

The regulatory regime may set designated standards or technical assessments for construction products and, where there are such standards or technical assessments, may impose requirements on people carrying out activities in relation to those construction products (including, for example, declarations of performance, the marking or packaging of such products, and the monitoring, assessment and verification of the products' performance).

The Secretary of State will have ongoing powers to amend the legislation relating to designated products and technical assessments and to update the statutory list as required.

The draft Construction Products Regulations 2022 have now been published but have not yet come into force. They address the following areas in relation to construction products:

Safe products and the general safety requirement

The draft Regulations define a "safe product" and place a general safety requirement on "economic operators" (manufacturers, importers and distributors) not to place a construction product on the market unless it is a safe product. They also require all economic operators to be established in the UK so as to be able to ensure conformity with the rules and any enforcement decisions. There is also a positive obligation on that economic operator to notify the Secretary of State where they have reason to believe the product does not comply with the general safety requirement.

There are express obligations on manufacturers, importers and distributors of construction products to undertake risk assessments and provide safety information about construction products and withdraw or recall products that are not in compliance.

Safety critical products

The Secretary of State may request that the British Standards Institution draws up a "safety-critical standard" for a "safety critical product" (products that may risk death or serious injury to any person), establish an AVCP (assessment and verification of constancy of performance) system for safety critical products, and place enhanced obligations on manufacturers, importers and distributors in relation to safety critical products, including Declarations of Performance.

False or misleading claims about construction products

The draft Regulations introduce a new requirement that economic operators must not make false or misleading claims about construction products they put on the market.

Enforcement powers

Enforcement authorities are granted a wide range of powers to test and inspect products, require information from economic operators, enter premises for the purposes of testing and inspecting, seize or detain goods, and order the withdrawal or prohibition of unsafe products.

The draft Regulations establish a number of offences for breaches of the regulatory regime and the obstruction of any enforcement activity. Where an offence is due to the acts of a third person, that person may also be guilty of the offence. Individuals within bodies corporate may also be prosecuted.

Costs Contribution Orders

Sections 152 to 155 of the Act introduce Costs Contribution Orders. Section 153 enables the Secretary of State to make regulations enabling courts to make Costs Contribution Orders in respect of breaches of the construction products provisions set out above, requiring defaulting parties to pay such prescribed costs to affected persons as a court considers to be just and equitable.

Under Section 153, the regulations may only make provision for the making of Costs Contribution Orders in cases where:

- Conditions A to D (set out below) are met; and
- any prescribed conditions are met.

Condition A is that a person ("the defaulter") is convicted of an offence consisting of a failure to comply with a construction product requirement in relation to a construction product.

Condition B is that, after the failure to comply referred to in Condition A, the construction product is installed in, or applied or attached to, a relevant building (meaning a building which consists of a dwelling or contains two or more dwellings) in the course of works carried out in the construction of, or otherwise in relation to, the building.

Condition C is that when those works are completed:

- in a case where the relevant building consists of a dwelling, the building is unfit for habitation; or
- in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is unfit for habitation.

Condition D is that the failure to comply referred to in Condition A was the cause, or one of the causes, of the building or dwelling being unfit for habitation.

Section 154 enables the Secretary of State to make further regulations enabling it to make Costs Contribution Orders directly. The same conditions A-D apply to any such regulations.

Section 155 enables, for the purposes of Sections 153 and 154, the Secretary of State to make regulations for it to appoint persons to assess:

- whether the conditions for the imposition of a Costs Contribution Order are met;
- the works required to make a building or dwelling fit for habitation;
- what interest a person has in a building or dwelling;
- the costs that a person has reasonably incurred or is likely to incur reasonably in respect of works required to make a building or dwelling fit for habitation; and
- the amount that a person should be required to pay under a Costs Contribution Order.

The regulations made under section 155 may:

- confer power on an assessor to require that persons provide such information as the assessor may reasonably require for the purposes of an assessment; and
- include provision for criminal offences in relation to a failure to provide such information.

Changes to Regulatory Reform (Fire Safety) Order 2005

Section 156 makes a number of changes intended to clarify and tighten up the Regulatory Reform (Fire Safety) Order 2005 (FSO); there are two significant changes:

- the requirement to have a written record of a building's Fire Risk Assessment (FRA) will now apply to all Responsible Persons, including those employers with less than five employees; and
- there will be a statutory requirement for Responsible Persons to provide residents of domestic premises with "comprehensible and relevant information" pertaining to fire safety matters – although how frequently and in what form will be the subject of secondary legislation.

Essentially FRAs are to be a written record in all cases and are no longer limited to the "significant" findings of an assessment – all findings should be documented. Those carrying out FRAs are required to be competent, which is defined by reference to "sufficient training, experience or knowledge" rather than specified qualifications. Fire Risk Assessors will be required to cooperate with each other.

In addition to the requirement to share relevant fire safety information with residents, Responsible Persons will be under an express duty to cooperate with each other and with the Accountable Person. There will also be a need to make specific enquiries to ascertain whether there are any other Responsible Persons for the relevant building, and if there are, to cooperate with them and share written information relating to their respective areas of responsibility. There will also be specified arrangements for handovers between outgoing and incoming Responsible Persons.

Most of these proposed changes will not be significant for many, and indeed most were already implied into the FSO by existing legislation such as the Management of Health and Safety At Work Regulations 1999, but for small organisations occupying multi-tenanted buildings, there will a number of additional requirements.

Changes to registration of architects

Sections 158 to 159 amend the Architects Act 1997 to allow the Architects Registration Board to monitor the competence of architects throughout their registration. The Act provides broad powers for the Board to determine the criteria and process for registering as an architect in the UK. The Act also provides for an appeals process through a newly-established Appeals Committee.

Where an architect does not meet the requirements set out by the Board, the individual may be removed from the Architects Register. Any disciplinary orders made by the Professional Conduct Committee of the Board will be listed alongside an architect's entry in the Architects Register, to allow greater transparency.

The draft Architects (Fees for Services) Regulations [2022] allow the Architects Registration Board to charge fees for the registration of UK and overseas architects.

Amendments to rules about complaints to Housing Ombudsman

Section 160 removes the so-called "democratic filter" and enables social housing complainants to escalate a complaint directly to the Housing Ombudsman without having to make their complaint via a "designated person" (e.g. an MP, Councillor or recognised tenant panel). This removal seeks to improve and expedite access to the Housing Ombudsman service for social housing complainants.

Independent review of regulatory regime

Section 162 provides that the Secretary of State will periodically appoint an independent reviewer to review the effectiveness of the building safety regime and make recommendations for improvement where necessary. This is to ensure the whole system is effective, including the effectiveness of the Regulator.

In the first instance, the Secretary of State must appoint an independent reviewer within five years of the Act receiving Royal Assent, and ensure that the reviewer is independent from the Secretary of State, the Regulator, the building control profession, the built environment industry, the construction products industry and local authorities.

Concluding remarks

The Act is a complex and technical piece of legislation. Whilst providing the underlying framework for the new regime, we expect the production of substantial secondary legislation, regulations and guidance to flesh out the new regime so that it can be implemented over the coming months. Much of the detail is still to come and the industry will need to get to grips with the new requirements ahead of implementation (noting that some of the Act is already in force).

Of chief interest to many will be the roll-out of the Gateway regime for higher-risk buildings with key decisions around the timing of applications and inspections, and the extent and format of building safety information required for Gateway applications, still to be finalised. Landlords and Accountable Persons for existing higher-risk buildings will also be mindful of the raft of new regulatory requirements due to land when the Regulator starts the registration process for these buildings.

Implementation of the Act will require considerable resources to establish the building control inspectorate, develop competency in the industry to ensure dutyholder roles are understood, and new roles such as the Accountable Person can be undertaken in compliance with the new regime.

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