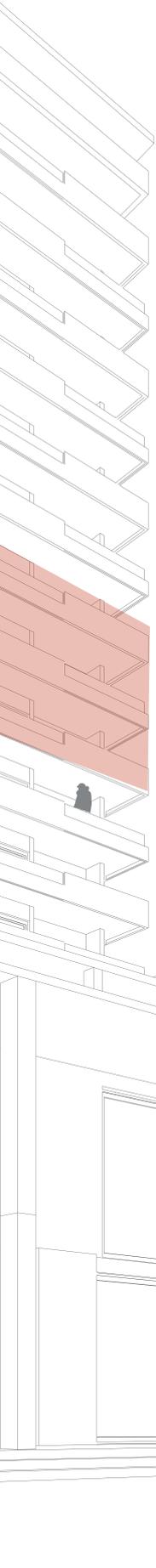


# **BUILDING SAFETY BILL**

Essential guide



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## Introduction

The Building Safety Bill is the latest iteration of the Government's legislative response to the Grenfell Tower fire and Dame Judith Hackitt's 2018 review of the building industry, Building a Safer Future. It represents a wholesale reform of the regulatory system for building control and safety in England, and is designed to improve building and fire safety, with the primary aim of ensuring that residents will feel and be safer in their homes.

The Housing Secretary Robert Jenrick MP presented the Bill to Parliament on 29 June 2021, stating that it will "ensure high standards of safety for people's homes, and in particular for high rise buildings, with a new regulator providing essential oversight at every stage of a building's lifecycle, from design, construction, completion to occupation."

The Bill was published on 5 July 2021, along with Explanatory Notes and an Impact Assessment providing further details about key obligations. A second reading of the Bill was held in Parliament on 21 July 2021.

Also published with the Bill are two draft pieces of secondary legislation, the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations, which clarify the definition of higher-risk buildings, and the Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations, which set out competency and other requirements for building and design works.

The Government expects the Bill to achieve Royal Assent within 9-12 months of its publication (i.e. by April – July 2022). Implementation of the bulk of the new regime is anticipated within 12-18 months from the date of Royal Assent (i.e. by October 2022 – April 2023) with some obligations coming into force before then. This is an ambitious timetable that will require significant upskilling within the building industry and commitment from all involved.

Trowers & Hamlins is committed to helping our clients navigate the new building safety regime. We have been involved with government working groups on the competency regime and have participated in the consultation of the legislative proposals and the implementation of the Bill. We are already working alongside clients across the public and private sectors, helping to deliver meaningful change and results in accordance with the proposals.

As part of this work, we have produced this Essential Guide to the Bill, which provides an overview of the key elements of the proposed law changes. We hope that this will help all those committed to delivering safer buildings get to grips with the Bill and help the building industry prepare for the coming changes.



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# Overview of the draft Bill

## The Building Safety Regulator

Part 2 of the Bill establishes a new national Building Safety Regulator, which will sit in the Health and Safety Executive and report to the Secretary of State for Housing. 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 Bill) 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, appoint 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 Bill, together with the draft Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations, 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 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 consists exclusively of machinery or plant rooms. When determining the number of storeys a building has, any storey below ground level will be ignored, meaning that any part of the finished surface of the ceiling of the storey is below the ground immediately adjacent to that part of the building. Any mezzanine floor is 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 Bill. 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, and 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, published in draft with the Bill, imposes 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 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 competency 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 Bill 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 Bill 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 Bill 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 will be set out in secondary legislation and guidance to be issued by the Regulator.

### **In-occupation obligations**

Part 4 of the Bill 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 (formerly referred to as “the golden thread”), register higher-risk buildings and apply for a Building Assessment Certificate before the 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.

Accountable Persons must also appoint a Building Safety Manager, who will assist with the day to day management of fire and structural safety in the building. Accountable Persons and Building Safety Managers must proactively engage with residents, provide them with key building information and develop a Resident Engagement Strategy.

### **Changes to landlord and tenant law**

Part 4 of the Bill amends the Landlord and Tenant Act 1985, importing a new regime for charging tenants a Building Safety Charge for costs incurred in relation to the ongoing building safety regime set out in the Bill (e.g. day-to-day costs incurred by the appointment of the Building Safety Manager, resident liaison, signage etc). Works required by the Regulator, or as a result of the Accountable Person’s negligence or breach of contract, will not be able to be recharged.

The Bill imposes implied terms into tenancy agreements covered by the Landlord and Tenant Act, requiring residents and owners in higher-risk buildings to comply with landlords who are Accountable Persons in 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 will also be required not to act in a way that creates a significant building safety risk materialising, 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.

Landlords will be deemed to be granted entry to dwellings for relevant building safety purposes, provided this is at reasonable times and with 48 hours prior notice. A warrant from the County Court will be needed for private dwellings or where force is required to gain entry.

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

### **Claims and building industry reforms**

Part 5 of the Bill provides that landlords will be able to recharge for costs of building safety remediation works, provided that they first pursue grant funding, insurance, guarantees and/or claims against third parties.

The Bill will amend the Defective Premises Act 1972 allowing parties to sue for breaches of the Act with extended limitation periods of up to 15 years, both prospectively and retrospectively. Parties will also be able to sue under the Building Act for compensation for physical damage caused by a breach of building regulations for a period of up to 15 years, but only for prospective claims. Section 125 of the Bill also creates a new duty on those who do any work on a building which contains a dwelling to ensure that the work does not render the dwelling unfit for habitation (by inserting a new clause 2A into the Defective Premises Act 1972).

The Bill 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 issue guidance about the adequacy of insurance schemes

for higher-risk buildings and building safety works. 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 Product Standards.

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

## Amendments to Fire Safety Order

The Bill 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 Bill, 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.

## Structure of the Bill

There are 147 sections in the Bill divided into 6 Parts (each sub-divided into different "Chapters") and 9 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, the Principal Accountable Person and the Building Safety Manager, and sets out details of offences, Special Measures Orders and appeals; also sets out amendments to the Landlord and Tenant Act 1985 to import the Building Safety Charge regime, and obligations on landlords and tenants in respect of building safety;
- Part 5 – Provisions to amend the building industry, including recovery of service charges for remediation works; the establishment of a New Homes Ombudsman Scheme; 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 for 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 Bill.

## Commencement and timings

The Government has indicated in the Explanatory Notes to the Bill that it expects the Bill to achieve Royal Assent within 9-12 months (i.e. April – July 2022).

Section 146 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 27);
- The classification of higher-risk buildings as defined (sections 58-67); and
- The right for the Secretary of State to authorise the Regulator to make regulations pursuant to the Act.

Two months after the Act is passed into law, the following provisions will come into force:

- Amendments to the Limitation Act 1980 to extend limitation periods for claims under the Defective Premises Act 1972 (section 126);
- Rules about the regulation of construction products (section 133 and Schedule 9); and
- Amendments to the Architects Act 1997 (sections 135-136).

The Government's Transition Plan anticipates that the bulk of the new obligations will be implemented within 12-18 months from the date of Royal Assent (i.e. by April – July 2023). The Secretary of State is authorised to make transitional or saving provisions in respect of any provision of the Act (section 146).



# Buildings covered by the Bill

There are two categories of buildings recognised by the Bill and secondary legislation:

## “Higher-risk buildings”

Higher-risk buildings are defined by section 30 of the Bill 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 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 consists exclusively of machinery or plant rooms.

The Higher-Risk Building Regulations provide that higher-risk buildings will also include the following buildings (provided that they also meet the height requirements 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).

The Higher-Risk Building Regulations provide that the following buildings are not higher-risk buildings 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 of: military barracks; or a building occupied solely for the purposes of the armed forces; or a 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 30 of the Building Safety Bill 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 Bill, 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 Bill, 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 Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations, explained below.

### “Buildings”

Clause 29 of the Bill 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 Bill. However, certain provisions of the Bill will apply to all buildings, including:

- The Regulator will have 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 31-32);
- Dutyholder obligations in respect of prescribed works (section 33);
- Obligations in respect of competency (section 34);
- Requirements to comply with any compliance notice or stop notice issued by the Regulator (section 37);
- 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 38 and 39);
- Any requirements specified by the New Homes Ombudsman (who will be established pursuant to section 127);
- Requirements to comply with regulations on construction products set out by the new regulator (who will be established pursuant to section 133); and
- Requirements to comply with amendments to the Regulatory Reform (Fire Safety) Order 2005, where relevant to that building (section 134).

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



# The Building Safety Regulator

Part 2 of the Bill establishes the role of the Building Safety Regulator, which will sit within the Health & Safety Executive and report to the Secretary of State for Housing. The Regulator already exists in shadow form, with Peter Baker appointed as the Chief Inspector of Buildings, and will be 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. The Regulator will also establish and implement the new regulatory system for 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, commissioning advice on risks in, and the standards of buildings.

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

This 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 expanding and strengthening the existing scheme for Confidential Reporting on Structural Safety (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.

### 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); and
- 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).

### 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 (clause 21).

It will be a criminal offence to obstruct an authorised officer of the Regulator or to impersonate an authorised officer (section 22), 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 (clause 23),

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 at 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 24-25). 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 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 Food Standards Agency.

### Cooperation and information sharing

Section 26 and Schedule 3 of the Bill 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 27 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 Bill. 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 will be required to implement this section via new statutory regulations.

# Amendments to the Building Act 1984

Part 3 of the Bill 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 Bill 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 30).

## Building control authority for higher-risk buildings

Section 31 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 high-risk buildings, and for any work that leads to a building becoming a higher-risk building.

Section 32 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 35 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 33 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 Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations have set out some requirements, as described below.

## Competence

Section 34 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 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, Principal Contractor for the design and construction phase, and the role of Building Safety Manager for the in-occupation phase.

## Compliance Notices and Stop Notices

Section 37 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 Magistrate's Court or Crown Court. If tried in the Magistrate's 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 2 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 38 provides that any breach of the Building Regulations will be a criminal offence, triable in the Magistrate's Court or Crown Court. If tried in the Magistrate's 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 2 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. The requirement to correct non-compliant work will be extended from 1 year to 10 years.

Section 39 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.

### Building Control Approvals and Building Inspectors

Section 41 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).

### Procedures for higher-risk building works

Sections 45 – 50 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. The Regulator is empowered to approve insurance schemes in respect of higher-risk building works, and can specify requirements for information gathering.

Section 52 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 55 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 Magistrate's Court; and rights of appeal against decisions of local authorities.

### Fees, charges and building industry levy

Section 56 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 57 allows the Secretary of State to issue regulations imposing a levy on applicants for building control approval in respect of higher-risk buildings and other prescribed buildings. The levy is to be paid to the Secretary of State for the purpose of meeting any building safety expenditure. The Government will be consulting on the scope of the levy during 2021, 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 requirements for building and design work

The Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations (the Competence Regulations), published in draft with the Bill, are the first piece of secondary legislation to define relevant competence requirements for the building industry, pursuant to clause 34 of the Building Safety Bill.

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.

## “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
- cooperate 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
- cooperate 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 prior to 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 principal designers

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

- Plan, manage and monitor the design work during the design phase;
- Coordinate 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.

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

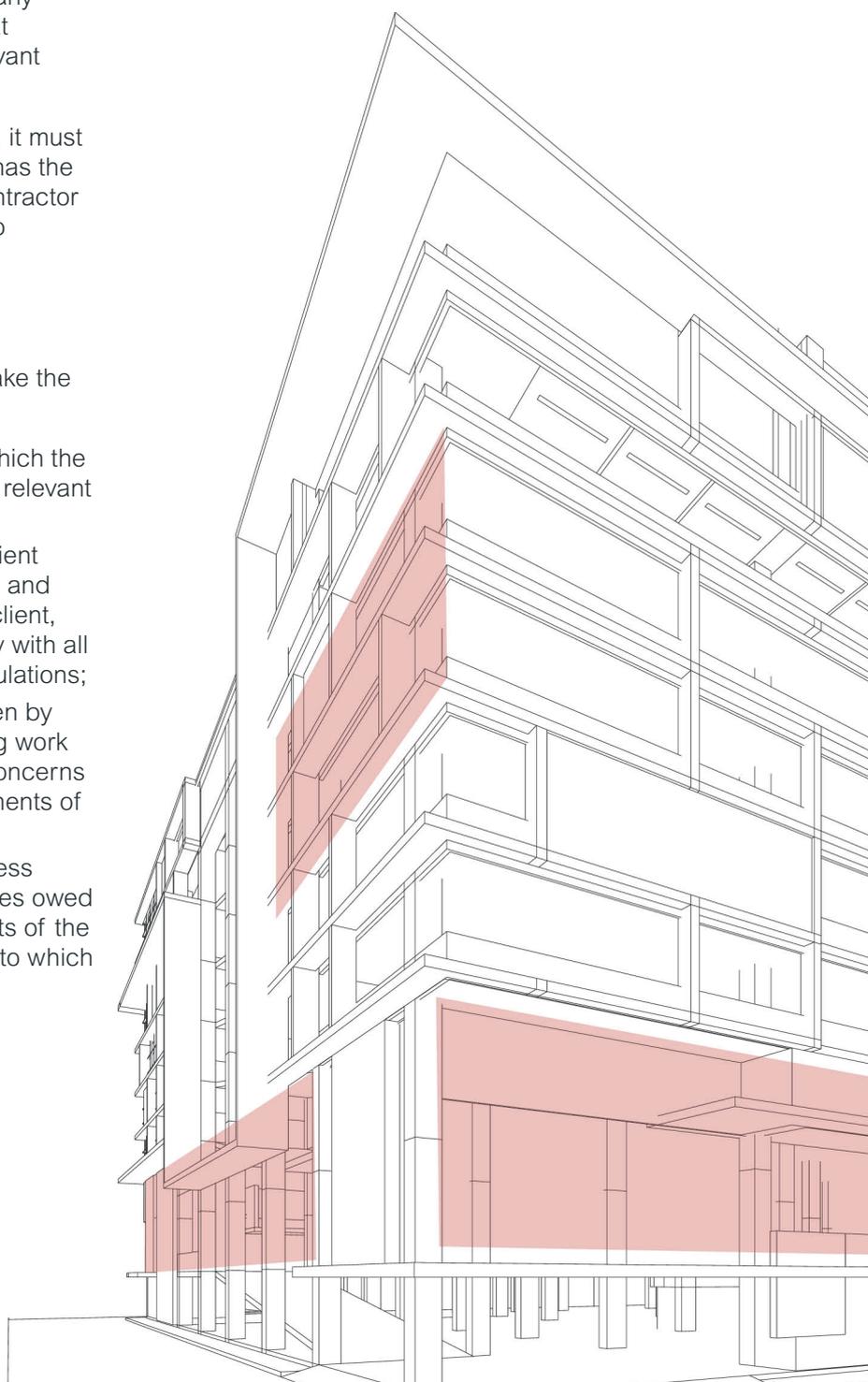
Anyone appointed as a designer must undertake the following duties:

- 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.

### 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.



# Dutyholders and Gateways regime for higher-risk buildings

## Dutyholders

The Bill 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 and Impact Assessment outline 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 & 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, mandatory occurrence reporting); and cooperate 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.

## Gateway regime

Government guidance issued with the Building Safety Bill sets out a proposed three-stage Gateway regime for the design, construction and major refurbishment of 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.



It is expected that the Gateways will apply to existing projects at the point the rules comes into force, so some projects may be required to pass one or more Gateways, depending on the progression of the works.

Guidance on Gateway 1 has already been published, and came into force for all higher-risk buildings on 1 August 2021. Further secondary legislation is expected for full details of Gateways 2 and 3. Pending the issue of this Guidance, the Explanatory Notes and Impact Assessment published with the Bill provide more detail about the anticipated processes for each Gateway. The Impact Assessment also provides estimates about the anticipated costs and timelines for each Gateway assessment stage.

### Gateway 1

Gateway 1 will form part of the existing planning application stage, and will be implemented via amendments to the Town and Country Planning Act 1990. Applicants will be required to demonstrate that its planning application incorporates thinking on fire safety, and submit a Fire Statement to the planning authority, 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 anticipates 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.

### 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 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.

Clients and dutyholders will also be required to submit “key information” to the Regulator demonstrating how they will comply with the Building Regulations and manage building safety risks. The key information is expected to include:

- Full plans and statement of approach, which must be realistic for the building in use;
- a Construction Control Plan, describing how building safety will be maintained during the construction phase and the framework for mandatory reporting of safety concerns;
- a Fire and Emergency File, setting out key building safety information, demonstrating appropriate consideration of building safety and that proposed fire strategies will work for the building in use;
- a signed declaration from the client that the principal designer and principal contractor meet competence requirements; and

- a “key dataset” and supporting information to demonstrate that the Building Regulations are complied with and that building safety risk will be managed sufficiently.

For complex buildings, clients will be able to apply for a staged approach to obtaining Gateway 2 approval, by submitting documents in tranches rather than all at once, but ultimately it will be for the Regulator to confirm that a client can go down the staged route or the full plans route.

The Impact Assessment estimates that the information submitted at Gateway 2 will take an estimated 33 days (248 hours) to prepare at a cost of around £16,000 to the developer, in addition to the time required to prepare full design plans. It is estimated that the Regulator will take an average of 5.5 days (41 hours) to review the documents submitted for each Gateway 2 application.

### **Construction phase (between Gateways 2 and 3)**

Once Gateway 2 has been approved, dutyholders will be able to proceed with construction, during which they will be required to:

- Comply with any inspections agreed with the Regulator and any additional inspections the Regulator deems necessary;
- Implement and comply with the change control procedure for managing any amendments to the designs as approved at Gateway 2. There will be two levels of regulatory oversight for change control: “Major changes”, such as a change in the number of storeys, must be approved by the Regulator before they can be implemented; and “Notifiable changes”, which include changes that may impact fire and structural safety, that must not be implemented until after a prescribed period to give the Regulator time to consider the notification and take action if required; and
- Implement and comply with the requirements for mandatory occurrence reporting.

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

The Impact Assessment estimates that, assuming 8 major changes to a building that will require approval, the site inspections process and change control process will take dutyholders an average of around 115 additional days (864 hours) at a cost of around £42,000 to the developer. It is further estimated that the site inspections and change control assessments during this period will take the Regulator an average of 40 days (297 hours), in addition to the site inspection currently carried out by local building control or registered building control approvers during construction.

### **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. The client, supported by dutyholders, will be required to submit to the Regulator information about the “as-built” building (or part of the building), including:

- Updated plans and statement of approach, indicating any variations since Gateway 2;
- Final Construction Control Plan with complete change control log;
- An updated Fire and Emergency File;
- a “key dataset” and supporting information, based on the information provided at Gateway 2 and updated accordingly; and

- a joint declaration, co-signed by the client and principal designer and principal contractor, confirming that to the best of their knowledge the building complies with the Building Regulations.

The Regulator will authorise the inspection of the building as part of its application. Once the Regulator is satisfied, it will issue a completion certificate for all or part of the 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 Impact Assessment estimates that the information submitted at Gateway 3 will take an estimated 46 days (347 hours) to prepare at a cost of around £23,000 to the developer. It is further estimated that the Regulator will take an average of 10 days (76 hours) to review the documents submitted for each Gateway 3 application.

Once the completion certificate is issued, all prescribed information and documents will then be handed over to the Accountable Person who will be required to register the building before it is occupied.

### **Formatting requirements for key information**

The Bill allows the Regulator to specify that key information forming the “golden thread” for higher-risk buildings must be presented in a certain format. Neither the Bill nor the Explanatory Notes provide any further guidance on this point.

Pending formal guidance from the Regulator, the Impact Assessment states that the Government assumes firms already comply with Building Information Modelling 1 standards, by using a Common Data Environment and complete COBie files, and therefore will not incur any additional costs in digitising information for new higher-risk buildings. The Government estimates that firms that do not currently meet these standards will face additional costs for digitising information of between £24,000 – £38,000 per affected building. A further cost is anticipated for dutyholders to fill out a COBie file during construction for handover after Gateway 3, allowing the Accountable Person to access “as built” information, estimated at £4,000 – £8,000 per building.

The Impact Assessment also notes that costs will be incurred for digitising key information required for the registration of existing higher-risk buildings (discussed further in the next section), further suggesting that the new regulatory regime will require the digitisation of key building safety information.

### **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 and expected timescales will be covered in secondary legislation.

## In-occupation obligations

Part 4 of the Bill relates to the in-occupation phase of higher-risk buildings. It introduces new roles of the Accountable Person, the Principal Accountable Person and Building Safety Manager, 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 introduce a new Building Safety 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 59 of the Bill 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 60 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 68 of the Bill 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 Bill to cover responsibility for all those living in higher-risk buildings, regardless of their tenancy status in that building.

### Accountable Person

Section 69 of the Bill 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 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.

Where there are two or more persons with legal interests in a higher-risk building, the Bill provides that the Accountable Person will be the person who holds the legal estate in possession in relation to the common parts and the lease arrangements in relation to the repair and maintenance of those common parts. The Explanatory Notes confirm that this means management bodies may become Accountable Persons for higher-risk buildings, in circumstances where lease agreements impose repair and maintenance obligations on that body.

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 70 of the Bill introduces the new role of the

Principal Accountable Person, who will be responsible for meeting the statutory obligations for occupied higher-risk buildings. The Explanatory Notes confirm that this new role has been created to recognise that building ownership in the UK is complex and to ensure that there is an identifiable dutyholder who can be held to account for building safety during the occupation stage of a higher-risk building.

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. Therefore, leaseholders who retain repairing obligations for all the other common parts will be the Principal Accountable Person.

### **Tribunal determination of Accountable Persons and Principal Accountable Persons**

Section 71 of the Bill establishes a process for the First-Tier Tribunal to determine the identity of any Accountable Person or Principal Accountable Person. The Explanatory Notes 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 a legal estate in any part of the building.

### **Requirement to register a higher-risk building**

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

Section 72 of the Bill 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 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 2 years.

The Explanatory Notes 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 73 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 113 allows decisions of the Regulator under these provisions to be appealed.

### **Building Assessment Certificates**

Section 74 requires the Principal Accountable Person to apply for a Building Assessment Certificate (previously referred to in earlier drafts of the Bill as a “building assurance 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 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 5 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 6 months increasing to 12 months as explained above) and on conviction on indictment, the maximum term for imprisonment is 2 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 75 provides that applications for Building Assessment Certificates must be accompanied by:

- prescribed information demonstrating compliance by the Principal Accountable Person with their duties under section 78 or 81(4) (appointment of a Building Safety Manager);
- 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.);
- a copy of the Residents' Engagement Strategy.

The Impact Assessment 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);
- details of the Building Safety Manager, including evidence of the assessment of their skills, knowledge, experiences and behaviours; and
- 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 76 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:

- section 78 or 81(4) (duty to appoint Building Safety Manager);
- 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.);
- section 91 (provision of Residents' Engagement Strategy).

The Impact Assessment also confirms 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 77 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 and any Building Safety Manager for the building, and any relevant Compliance Notice.

The Impact Assessment notes that Building Assessment Certificates will not have a specified duration of validity, and it will be superseded by any later compliance notice or Special Measures Order.

Building Assessment Certificates will need to be reapplied for periodically. The Impact Assessment estimates that this will be required every 5 years.

### Duty to appoint a Building Safety Manager

Section 78 obliges the Principal Accountable Person to appoint a person to be the Building Safety Manager for a higher-risk building, before that building becomes occupied. A Building Safety Manager may only be appointed where the Principal Accountable Person is satisfied that the individual has the skills, knowledge, experience and behaviours to carry out the Building Safety Manager's duties.

The starting position is that the Building Safety Manager will be an individual. However, there is scope to appoint a person other than an individual (i.e. a company) where the Principal Accountable Person is satisfied of their capability to carry out the Building Safety Manager's duties. Where a company is appointed as Building Safety Manager, they will normally be required to nominate an individual under its control who is appointed to carry out the Building Safety Manager's duties. The Building Safety Manager must ensure that their nominated individual has the skills, knowledge, experience and behaviours to manage the carrying out of those duties.

Principal Accountable Persons who fail to appoint a Building Safety Manager commit 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 6 months but increasing to 12 months as explained above) and on conviction on indictment, the

maximum term for imprisonment is 2 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.

Section 79 provides that in higher-risk buildings where there is more than one Accountable Person, the Principal Accountable Person must consult the other Accountable Persons before appointing a Building Safety Manager. All Accountable Persons will need to enter into an agreement setting out the terms for sharing the costs of appointing the Building Safety Manager.

Section 80 allows the Principal Accountable Person to remove a Building Safety Manager at any time by giving notice to them. In a change from the draft Bill, the Regulator no longer has a power of veto over the appointment of a Building Safety Manager.

Section 81 also includes an exception for the requirement to appoint a Building Safety Manager where the Principal Accountable Person is satisfied that they have the skills, knowledge, experience and behaviours to carry out the planning, managing and monitoring of the in-occupation obligations, and have notified the Regulator that this is the case before the building is occupied. Where there is more than one Accountable Person and the Principal Accountable Person intends to assume the Building Safety Manager role, it must first consult with the other Accountable Persons and provide them with a document setting out the proposed terms for sharing any relevant expenditure

If at any time a person ceases to be the Building Safety Manager for a particular building, the Principal Accountable Person can also notify the Regulator (and any other Accountable Persons) that it will assume the role of Building Safety Manager, subject to the same requirements and processes as above.

### **The Building Safety Manager's capacity and workload**

The Impact Assessment highlights that, in practice, the Building Safety Manager may not be explicitly involved in every task they are allocated, as they may delegate to others and provide oversight. In those circumstances, the Government estimates that a single Building Safety Manager would have the capability to manage between 7 and 11 higher-risk buildings.

Where the Building Safety Manager will perform all of its functions, the Impact Assessment estimates that it would require 1 full time employee per 5 higher-risk buildings (on the assumption that it will require 28 days of a Building Safety Manager's time on average per building) with estimated employment costs of £60,000 per year.



## 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 113 allows decisions of the Regulator under Section 84 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 to 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

Any reasonable steps must be undertaken promptly, and may include carrying out works to that part of the building for which the Accountable Person is responsible.

## 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 is authorised to make further provision about the content and form of Safety Case Reports. The Impact Assessment 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.

## 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, which is expected to be described in secondary legislation.

The Explanatory Notes anticipate that prescribed information will need to be kept in digital format, but neither the Bill nor the Notes anticipate the mandating of Building Information Modelling for prescribed

information. The Impact Assessment anticipates that for existing higher-risk buildings with no plans or inaccurate plans, a two-dimensional CAD plan and evaluation drawing will be carried out, and estimates a cost of between £10,000 and £19,000 per building. The Impact Assessment notes that Accountable Persons may opt for alternatives, such as 3D scans.

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, 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 Persons 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 Resident Engagement Strategy for any higher-risk building for which it is responsible, as soon as reasonably practicable after "the relevant time" (as defined above). 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 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 for a higher-risk building who appears to the Regulator to have contravened a relevant requirement, and require the 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,

punishable on summary conviction to imprisonment for a term not exceeding 6 months (extending to 12 months) or for conviction on indictment to imprisonment not exceeding 2 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 112 allows a person against whom a Compliance Notice has been given to appeal to the Tribunal.

## Special Measures Orders

Sections 102 and 103 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 under section 103, it must follow the process set out in Section 102, 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;
- any Building Safety Manager;
- 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.

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.

Section 104 provides that once the Tribunal has appointed a Special Measures Manager pursuant to Section 103, the appointment of any Building Safety Manager will cease to have effect. Section 105 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.

Section 106 empowers a Special Measures Manager to apply for an order appointing a manager pursuant to section 24 of the Landlord and Tenant Act 1987. Section 107 provides that 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.

Section 108 allows the Tribunal to give directions to the Special Measures Manager with respect to the exercise of its functions or any other matter.

Section 109 allows the Regulator to 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.

Section 110 allows the Tribunal to 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 has not monetised the costs related with a “Special Measures Manager” on the basis that the number of cases is expected to be small.

### Enforceability of Tribunal decisions

Section 116 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 117 allows the Regulator to issue, amend, withdraw and update guidance on any of the duties of the Accountable Person and/or the Building Safety Manager under Part 4 of the Bill. This guidance is expected to be issued in secondary legislation.

### Cooperation and coordination

Section 118 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, cooperate and coordinate with every other Accountable Person for the building.

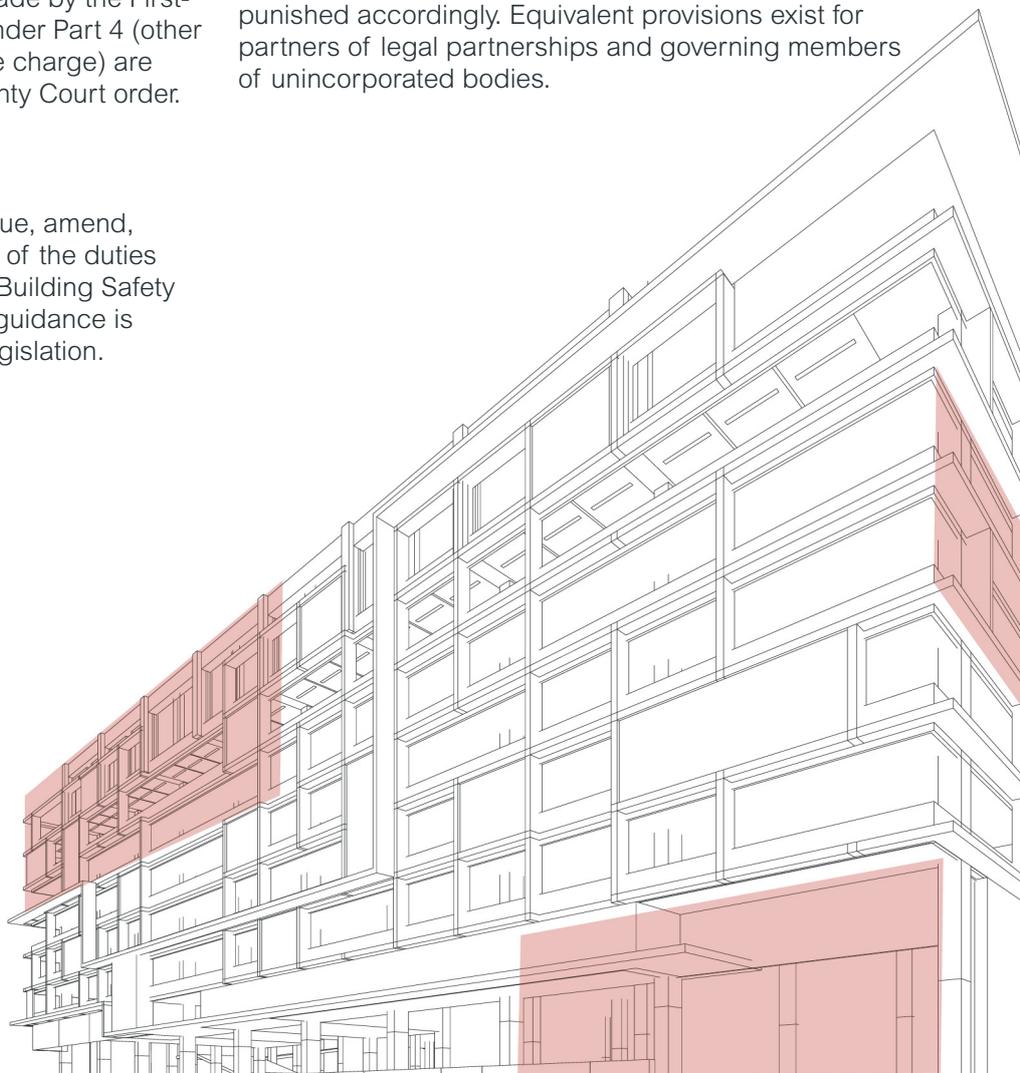
An Accountable Person must also cooperate with each “Responsible Person” under the Regulatory Reform (Fire Safety) Order 2005 in relation to the building, where this is a different person.

### Liability of bodies corporate for in-occupation obligations

Section 138 provides that where an offence under Part 4 of the Bill 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 Bill 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 (eg 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.

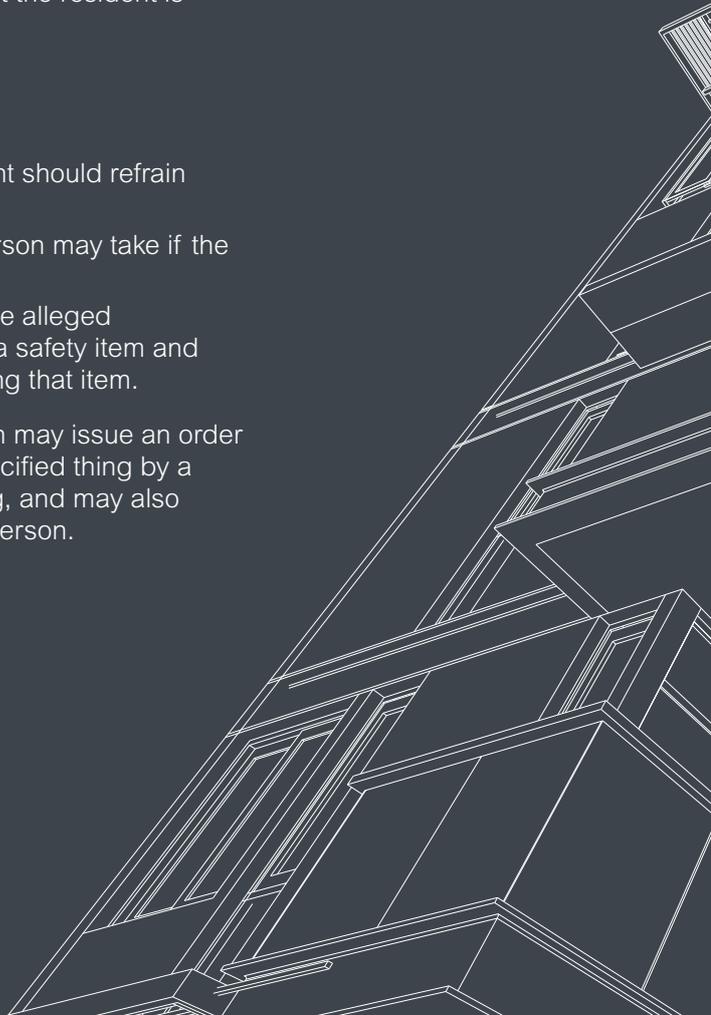
### Contravention Notices

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;
- any steps that the Accountable Person considers the resident should refrain from doing 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 repairs 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.

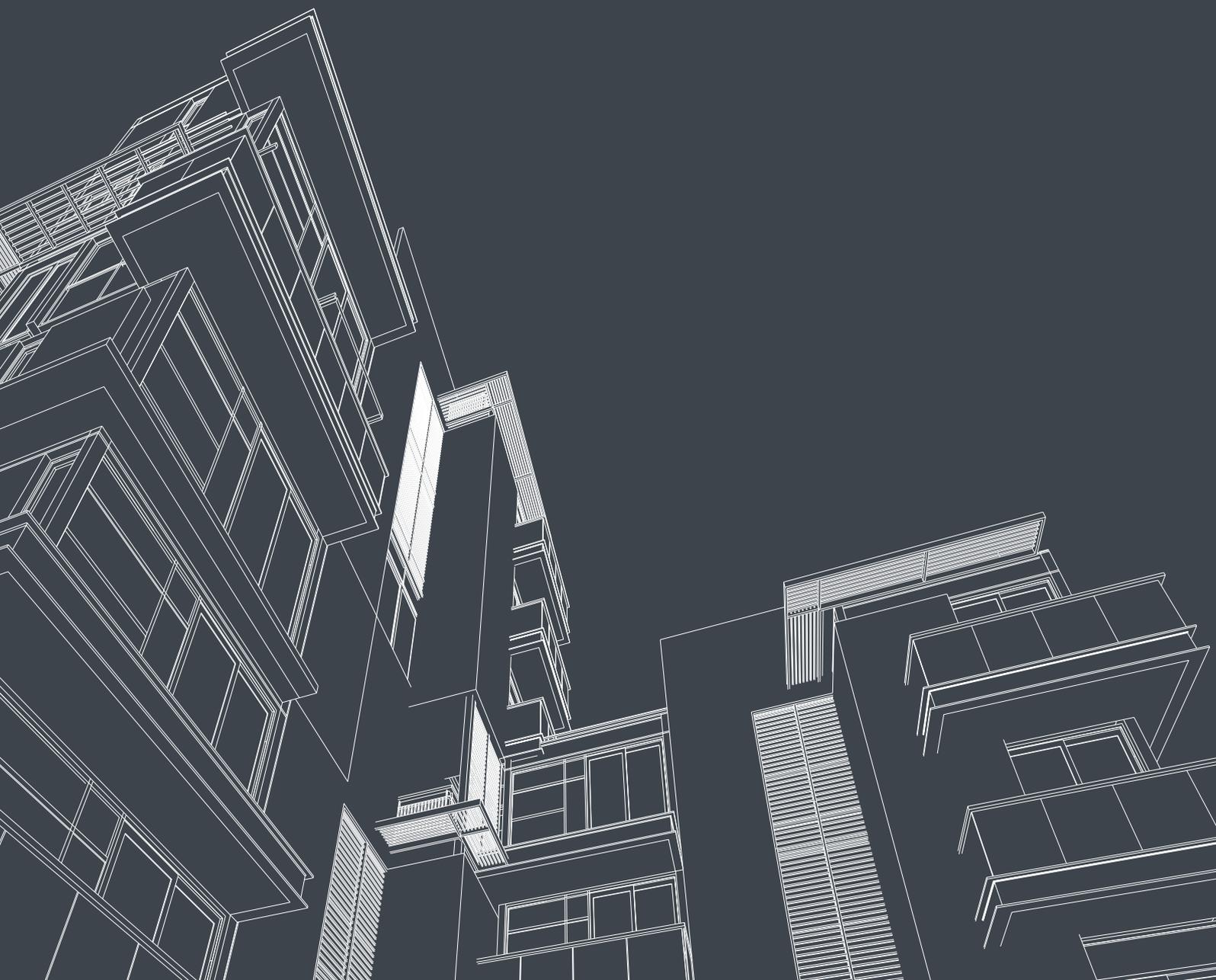


## Rights of access to residents' dwellings

Section 97 allows Accountable Persons for higher-risk buildings to make a request to a resident 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.



# Building Safety Charges and landlord and tenant obligations

Part 4 also introduces major 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 7 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).

## Implied terms

Section 120 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, building safety manager or Special Measures Manager (including by providing names and contact details of residents and tenants where reasonably required);
- comply with the terms of any Special Measures Order; and
- calculate and demand any Building Safety Charges pursuant to prescribed rules and give the tenant a summary of rights and obligations in relation to Building Safety Charges.

### Tenants are required to:

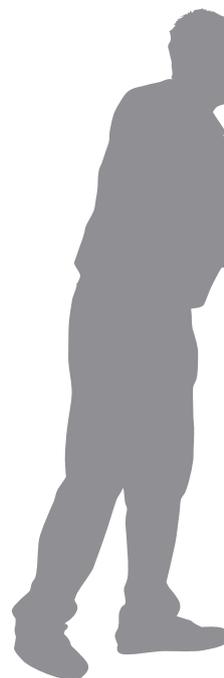
- allow the landlord, Accountable Person, Building Safety Manager or other authorised person to enter their dwelling to carry out building safety measures or to inspect/assess the property, at reasonable times and upon 48 hours’ notice in writing;
- act in accordance with the duties placed on residents and owners by section 95; and
- pay Building Safety Charges in accordance with the newly introduced Schedule 2 of the Landlord and Tenant Act 1985, as discussed further below.

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.

## Building Safety Charges

Section 120 also introduces a new Schedule 2 into the Landlord and Tenant Act 1985.

“Building Safety Charges” are introduced as a new category of service charges, meaning charges relating to costs incurred by or on behalf of the landlord, Accountable Person or Special Measures Manager for a higher-risk building in connection with building safety measures (defined as measures taken under Part 4 of the Bill, but excluding the carrying out of works to a higher-risk building).



Detailed rules are introduced relating to the apportionment of Building Safety Charges (although the terms of the lease will take precedence where such costs are provided for). Requirements relating to reasonableness and consultation are introduced, which are similar to the existing sections 19 and 20 of the Landlord and Tenant Act 1985 but include a new consultation procedure, which will be set out in secondary legislation. Dispensation from the consultation requirements is also provided for, again on a similar basis to the existing leaseholder consultation rules.

Building Safety Charge contributions are to be held on trust for the contributing tenants. Unlike the service charge trust provisions under section 42 of the Landlord and Tenant Act 1987, there does not appear to be any exception for social landlords.

The Secretary of State is empowered to require landlords to comply with conditions relating to annual accounting periods, the provision of budgets and reconciliation accounts, how any surpluses and shortfalls are to be treated, as well as the frequency with which demands may be given.

### Exemptions to paying Building Safety Charges

Tenants are entitled to withhold payment of Building Safety Charges if the landlord has not complied with the above conditions, but only if the tenant gives the landlord a notice in writing setting out the reasons for withholding the payment and complies with such conditions as may be prescribed in secondary legislation.

A new “18 month rule” is introduced, providing that tenants are not liable to pay Building Safety Charges if the cost was incurred more than 18 months before the Building Safety Charge demand was served upon the tenant.

### Remediation and redress

Section 124 (in Part 5 of the Bill) 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 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.

Further prescribed steps and requirements will be set out in secondary legislation.



## Amendments to building industry

Parts 5 and 6 of the Bill sets 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.

### Extension of limitation periods

Section 126 extends the limitation period for claims for a breach of section 1 or 2A of the Defective Premises Act 1972 to 15 years from the date on which the right of action accrued. This extension will also have retrospective effect, allowing claims to be made for claims where the right of action accrued up to 15 years prior to the Building Safety Act coming into force.

Section 126 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 127 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 128 to 132 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;
- The Secretary of State may also issue or approve a code of practice about the standards of conduct and quality of work.

Schedule 8 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 8 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 8 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 8 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.

### Regulation of construction products

Section 133 and Schedule 9 of the Bill allow the Secretary of State to regulate all construction products made available in the UK. The Schedule 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 9 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.

### Changes to Regulatory Reform (Fire Safety Order) 2005

Section 134 makes a number of changes intended to clarify and tighten up the Regulatory Reform (Fire Safety) Order 2005 (FSO); there are two potentially significant changes proposed:

- 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 be a number of additional requirements.

### **Changes to registration of architects**

Section 135 amends the Architects Act 1997 to allow the Architects Registration Board to monitor the competence of architects throughout their registration. The Bill provides broad powers for the Board to determine the criteria and process for registering as an architect in the UK.

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 architects by the Professional Conduct Committee of the Board will be listed alongside an architect’s entry in the Architects Register, to allow greater transparency.

### **Amendments to rules about complaints to Housing Ombudsman**

Section 137 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. Interestingly, the Bill removes the obligation tabled in the 2020 draft Bill for complainants to have exhausted their landlord’s own complaints process first.

### **Independent review of regulatory regime**

Section 139 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 5 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 Bill is a complex and technical piece of legislation that will require further amendments to a number of existing laws and regulations, as well as the production of substantial secondary legislation, regulations and guidance, which are likely to be developed over the next few years.

As noted above, the Government is continuing to consult with the building industry on a number of key issues, particularly around the insurability of the new duties and key roles.

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 Bill 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 and Building Safety Manager can be undertaken in compliance with the new regime.

For further information about the Building Safety Bill and how it may affect you, please contact:



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